

**ISSUES AND CASE STUDIES
RELATING TO FOREIGN REMITTANCE
CERTIFICATION**

SNCO – Chartered Accountant

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ROADMAP

- Applicability provision - Act and DTAA
- Flowchart – guiding process to examine tax implication
 - As per Income tax Act (“the Act”)
 - As per Double Tax Avoidance Agreement (“DTAA”)
- Case Studies
- Questions

APPLICABLE PROVISION INCOME TAX ACT

PROVISION AS PER ACT

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Section	Provision
Sec 195(1)	Charing section of withholding tax
Sec 5	Scope of total income
Sec 9	Income Deemed to accrue or arise In India
Sec 115A	Taxes on Dividend, Royalty and FTS

Section 195 (1) – Charging Sections

- **Any person** responsible for paying to a non-resident, **not being a company**, or to a foreign company, any interest [*(not being interest referred to in section 194LB or section 194LC)*] or any other **sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon **at the rates in force** :
 - Provision applicable to all person including nonresident (Explanation 2 to sec 195(1))
 - Excludes payment of interest govern by specific provision
 - Sum Chargeable to tax under Act
 - Rate in-force (Part II of First Schedule)

PROVISION AS PER ACT

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Scope of Total Income

INCOME	ROR	RNOR	NR
Received /Accrued in India	Yes	Yes	Yes
Deemed to accrue or arise In India	Yes	Yes	Yes
Accrued/received/deemed to accrue or arise outside India	Yes	Yes only if derived from business controlled or profession set up in India	No

DEEMED TO ACCRUE OR ARISE IN INDIA

Nature of foreign remittance

Nature of Income	Act	Treaty
Business & Profession	S. 9(1)(i)	Art. 5,7 & 14
Salary Income	S. 9(1)(ii)	Art. 15
Dividend Income	S. 9(1)(iv) , S.115A	Art. 10
Interest Income	S. 9(1)(v) , S.115A	Art. 11
Royalties	S. 9(1)(vi) , S.115A	Art. 12
FTS	S. 9(1)(vii), S.115A	Art. 12
Capital Gain	S. 9(1)(i), S.45	Art. 13

Payment not deemed to accrue or arises in India

Condition	Royalty	FTS	Interest
Payment by Resident	B&P outside India IFOS outside India	B&P outside India IFOS outside India	B&P outside India IFOS outside India
Payment by Non Resident	B&P outside India IFOS outside India	B&P outside India IFOS outside India	B&P outside India IFOS in or outside India
Payment by Govt.	Always deemed to accrue or arise in India		

■ Section – 9(1)(i)

- All income accruing or arising, through
 - any business connection in India,
 - any property in India,
 - any asset or source of income in India
 - transfer of a capital asset situate in India.
-
- Business connection" shall include any business activity carried out through a person acting on behalf of the non-resident,—
 - (a) has and habitually exercises in India, an **authority to conclude contracts** unless his activities are limited to the purchase of goods
 - (b) habitually secures orders in India and other non-residents controlling, controlled by, or subject to the same common control
 - business connection shall not include any business activity carried out by an agent having an independent status

DEFINITION OF ROYALTY

As per Act

- Royalty means consideration including any **lump sum consideration** but excluding any consideration chargeable under the head "**Capital gains**"
- Transfer of all or any rights (**including the granting of a license**) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- **Imparting of any information concerning the working of**, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;
- Use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;
- Imparting of any information concerning **technical, industrial, commercial or scientific knowledge, experience or skill**
- Use of any industrial, commercial or scientific equipment
- Introduction of explanation by Finance Act 2012 includes consideration for software rights by any medium as royalty

FEES FOR TECHNICAL SERVICES

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As per Act

- any consideration (including any lump sum consideration) for the rendering of any **managerial, technical or consultancy services** but does not include consideration for any **construction, assembly, mining or like project** undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"

APPLICABLE ARTICLES DTAA

ARTICLES AS PER DTAA

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Section	Provision
Article 5	Permanent Establishment
Article 7	Business Profit
Article 12	Royalty and FTS
Article 14	Professional service

PERMANENT ESTABLISHMENT

The term “permanent establishment” includes especially :

Fix Base PE - a place of management ;a branch ;an office ;a factory ;a workshop ; a warehouse, in relation to a person providing storage facilities for others ;

Installation PE- a building site or construction, installation or assembly project or supervisory activities continue for a period of more than 120 days in any twelve-month period ;

Service PE - the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), if:

(i) activities continue for more than stipulated days within any twelve-month period or

(ii) the services are performed within that State for a related enterprise

Dependent Agency PE – the person habitually exercise on behalf of principal and is authorized to conclude contract

DEFINITION OF ROYALTY

As per DTAA

Royalties as used in this Article means :

- payment for the use of, or the right to use, any copyright of a literary, artistic, or scientific work including cinematograph films, etc.
- any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific **experience**,
- **Gains derived from the alienation** of any such right or property
- DTAA with Australia includes the supply of scientific, technical, **industrial or commercial knowledge or information**

FEES FOR TECHNICAL SERVICES

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As per DTAA

- **Normal**

consideration for the rendering of any managerial, technical or consultancy services excluding independent Personal service

- **Make Available**

“fees for included services” means consideration for rendering of any **technical or consultancy services** if such service **make available** technical knowledge, experience, skill, know-how

- Exclusion

- for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property
- for teaching in or by educational institutions
- for services for the personal use of the individual

INDEPENDENT PERSONAL SERVICES

- Applicable only to defined professional service – generally includes scientific, physicians, surgeons, lawyers, engineers, architects, dentists and accountants

- Shall be taxable in source country if
 - person has a fixed base regularly available to him
 - the person's stay exceeds specified number of days

- Chargeability of profit attributable to activity carried out through fixed base

- Article 14 will override the provision of Article 12
 - Dieter Eberhand Gustav Van Mark – 235 ITR 698 (AAR)
 - ADIT vs Intellectual Property Bureau 7 SOT 38 (Mum)

 - Graphite India Ltd – 86 ITD 384 (Kol)

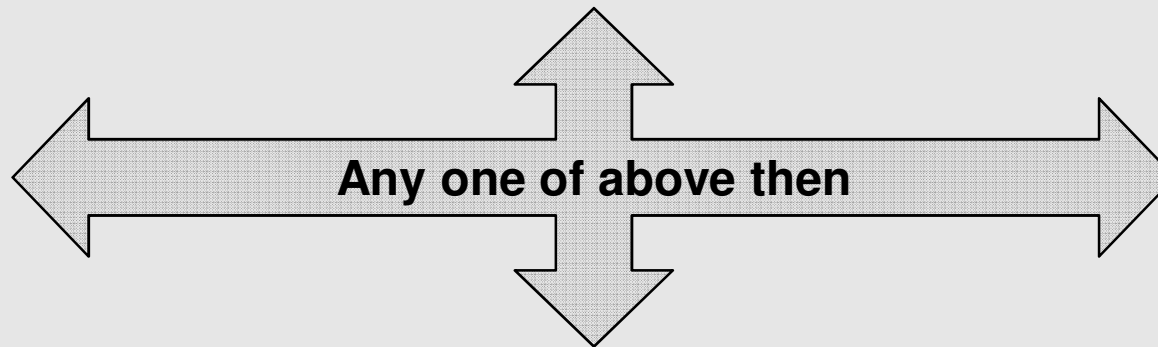
GUIDELINES – DETERMINATION OF WITHHOLDING TAX

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Business Connection –
Section 9 (1)(i)

Royalty

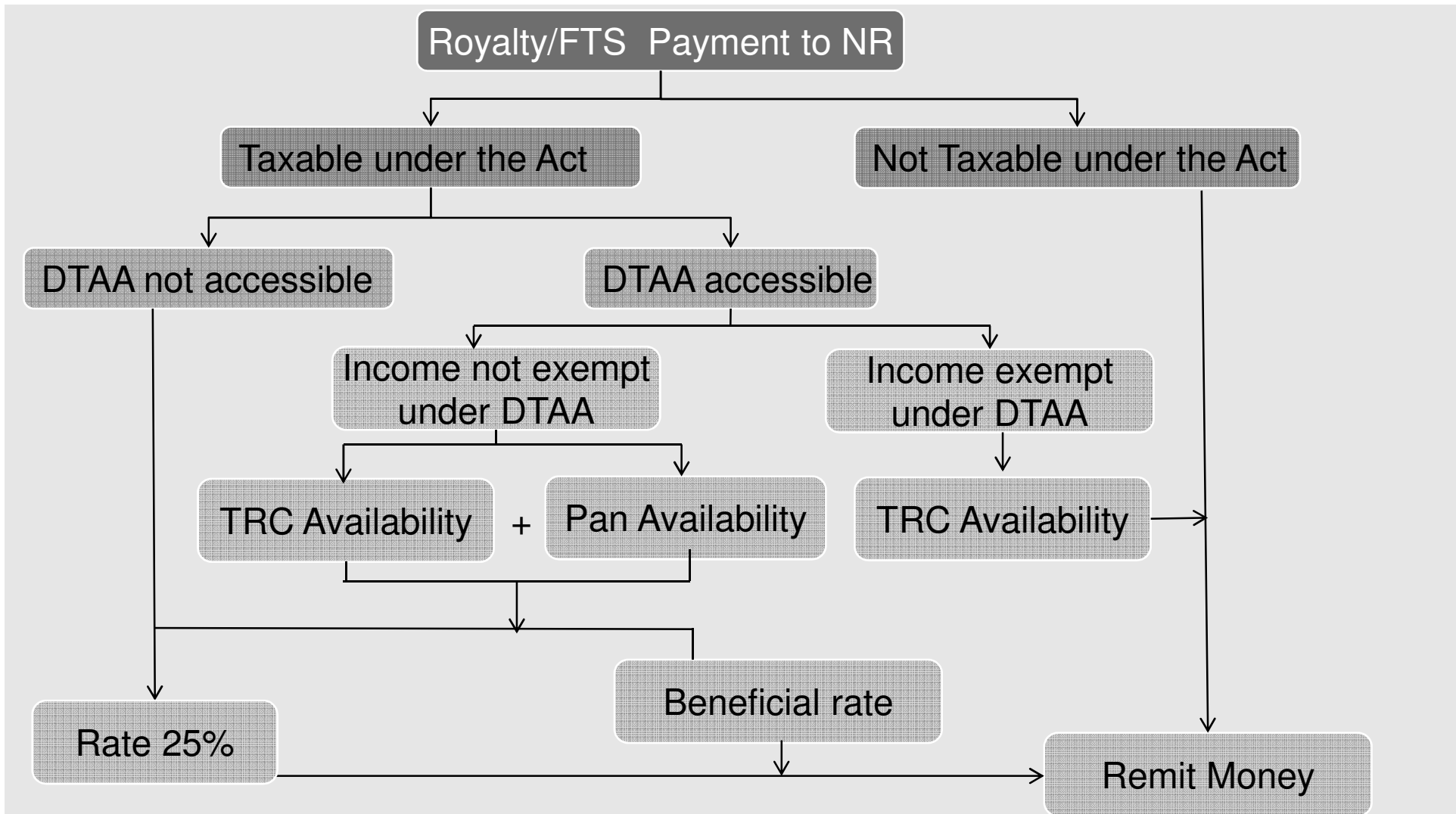
FTS



Go To DTAA

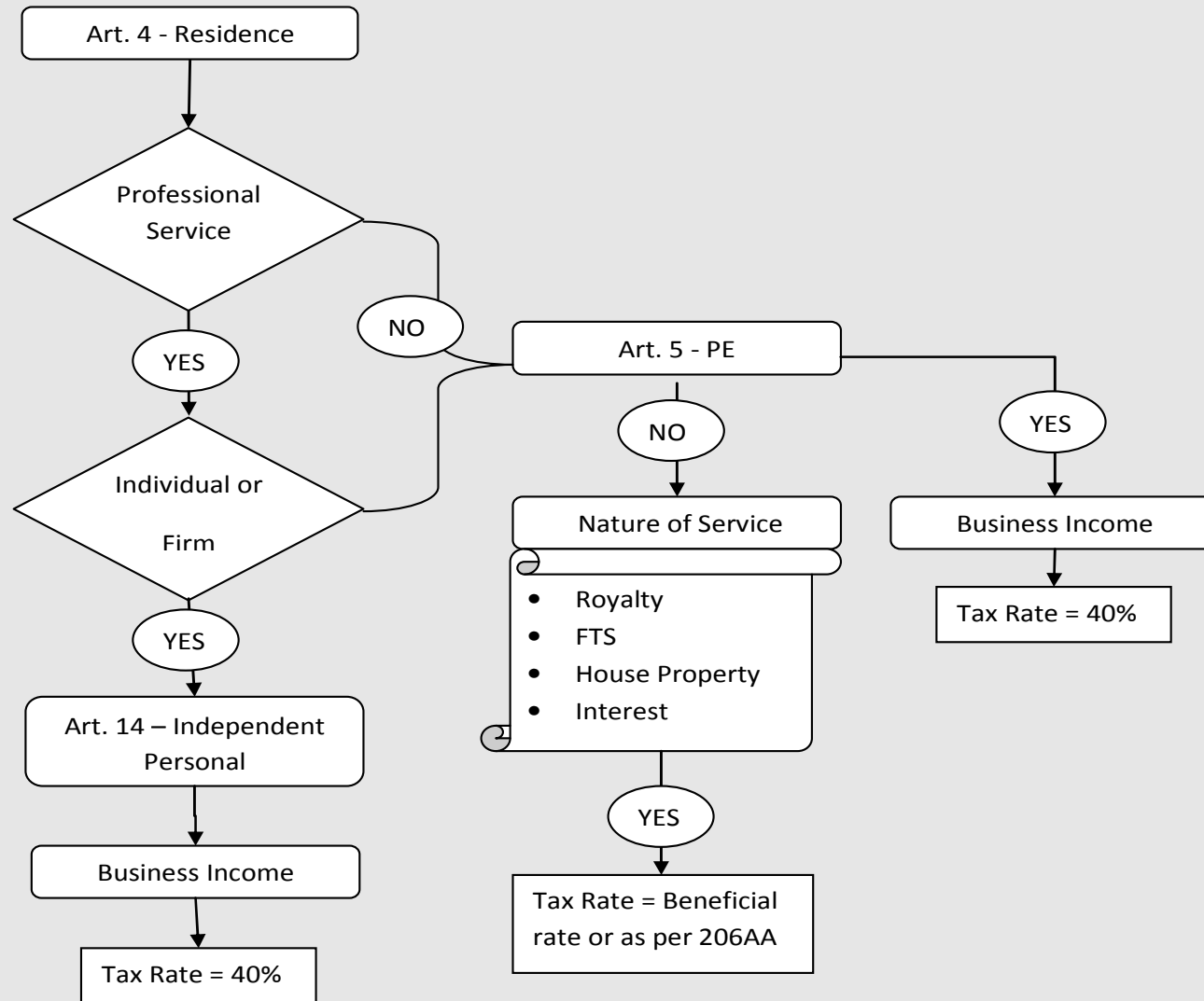
Or else it is not taxable

GUIDELINES – DETERMINATION OF WITHHOLDING TAX



*PN: If tax is to be borne by ICO, Tax rate = Invoice Amount*ROT/ (100-ROT)

TAXABILITY AS PER DTAA



WITHHODING TAX PROVISIONS

Section 195 (2) – Application for determination of income & tax thereon

- Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.
 - The Application to be made by Payer
 - No Specified format for application
 - Assessing officer may determine income chargeable to tax
 - The order is appealable u/s 248 of the Act

Section 197

- where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the rates in force under sections 195, the AO is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax , as the case may be, the AO shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.
 - The Application is made by the payee
 - The application is under Form 13
 - It is a non-appealable order

Whether payers can assess income?

- Syed Aslam Hashmi Vs ITO (26 Taxmann.com 6)

Tax to be deducted on sales consideration instead of capital gain in absence of application for 195(2) of the Act

- ITO Vs Intel Tech India 32 SOT 227 (Ban)

Deductor cannot assess the income of the deductee. In absence of application u/s 195(2) assessee is a defaulter for short deduction and default continues till the return is filed by deductee

- Hindustan Coca Cola Beverages P Ltd (293 ITR 226) (SC)

When the payee has paid the tax on the payment received from payer, tax could not be recovered from the deductor once again. Supported by Circular no 275/201/95 dt. 29.1.1997

- Eli Lilly & Co India P Ltd (312 ITR 225)(SC) - Default of deductor is only to the extent of shortfall in recovery of tax

CASE STUDIES

QUESTIONS



B&P or IFOS outside India

CIT v. Havells India Ltd 208 Taxman 114 (Delhi)

- ICO hired service of certification from FCO to enable it to sell its products in the European markets
- The assessee manufactured goods in India and concluded the export contracts in India.
- The source of income is created the moment the export contracts are concluded in India.
- The customer located outside India is not the source of the income
- In order to fall u/s 9(1)(vii)(b), the source of the income, and not the receipt, should be situated outside India.

DEEMED TO ACCRUE OR ARISE IN INDIA

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ITO Vs Bajaj Hindustan Ltd (ITA NO.63/MUM/09)

- ICO hired service of KPMG to study the possibility of expansion of assessee's in Brazil
- First exception u/s 9(1)(vii)(b) is where the fees are payable in respect of services utilized in a **business or profession carried on outside India** and second exception is for the purposes of earning any income from **any source outside India**
- The Court has given finding that as ICO carries on business in India and has utilized the services of KPMG in connection with such business. Therefore the case of the Assessee **would not fall within the first exception**
- Court has held that as service is utilized for setting up a subsidiary company in Brazil it is covered under second exception and therefore not covered under FTS

DEEMED TO ACCRUE OR ARISE IN INDIA

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Aqua Omega Services – 31 Taxmann.com 179

- Assessee was in business of providing underwater diving services in Saudi Arabia - paid fees to non-resident divers - since services of non-residents for technical fee was paid by assessee, were utilized for business carried on outside India for earning income from a source outside India, no TDS liability would arise

Hofincons Infotech & Industrial Services - 52 taxmann.com 232

- Fees paid for support services rendered by non resident towards Nigerian project of taxpayer is excluded from FTS clause

- Reimbursement of allocated cost /sharing of common expense
 - A P Moller – reimbursement of cost of software used by shipping agents is not royalty or FTS as taxpayer is not rendering any technical service
 - M&M Ltd 16 taxmann.com 386 (Mum) - Reimbursement of share of market research expenses is not taxable
 - ABB Ltd – 322 ITR 564 , 230 CTR 327- Payment for Cost Contribution in respect of shared R&D activities are not taxable
 - International Hotel Licensing Co – 288 ITR 534 – reimbursement of expenses towards sales promotion service as % of gross sales is taxable
 - Tecumseh Products Ltd vs DCIT- 13 SOT 489 - Payment for providing support to assessee in the areas of accounts, finance, human resources development etc was liable to tax under sec 9(1)(vii)

Case Study

Whether reimbursement of expenses are taxable in following situation?

- Reimbursement of actual expenses to third party or Group Company
- Payment for cost sharing arrangement
 - Sharing of license
 - Sharing of survey report
- Reimbursement of Travelling expenses in relation to FTS

Whether managerial service liable under India France DTAA?

- MFN clause in Belgium, Israel, Spain, Sweden, France
- Switzerland and Philippines has MFN clause but not automatic

Whether license for use of software is Royalty

- Wipro reported in 16 Taxmann.com 141
 - Literary work is a Copyright and, wherefore, a literary work is entitled to be registered as copyright
 - Literary includes computer programme, tables, compilations including computer database
 - Under sec 2(o) of the Copyright Act 1957, computer software has been recognised as copyright work
 - Therefore use of computer software is Royalty being use of copyright

Cummins Inc vs DIT – User right of oracle software granted to subsidiary is royalty

DEFINITION OF ROYALTY

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Whether license for use of software is Royalty

Payment for purchase of software is not royalty – Infotech Entp Ltd 41 Tamann.com 364

Payment for use of software is a copyrighted article and not use of copyright therefore not royalty as per DTAA

- Infrasoft Ltd 220 Taxmann 273 (Del) – amendment in Act does not overall benefit provided by DTA
- Ericsson case 16 Taxmann.com 371
- Bharati Axa General Insurance 326 ITR 477

Principles of interpretation of DTL may not be adopted for DTAA

- B4U International Holdings Ltd 372 (Mum) [2012]
- Sanofi Pasteur Holding SA 222 (Andhra Pradesh) [2013]

Whether license for use of database is Royalty

- Wipro Ltd (203 Taxman 621)(Kar)

Mere fact that the issue does not pertain to shrink wrapped software or off-the-shelf software and access to database maintained by FCO is granted online, would not make any difference to hold that such right to access would amount to transfer of right to use the copyright

- CIT Vs Infosys Technologies Ltd (17 Taxmann.com 115)(Kar)

Deputation & Secondment of Employees

- Whether ICO is a real or economic employer of employee seconded
 - Direct control, supervision, direction
 - Responsibility of loss or damage of secondee's work
 - Right to termination of secondee's agreement
 - Continuation of Economic interest of Secondee's
 - Taxability in hands of secondee's

- Whether payment is pure reimbursement of expense
- Whether secondment forms service PE – Morgan Stanley 292 ITR 416(SC)
- Whether payment is towards FTS
 - Payment is towards rendering of service or only secondment of employee

Reimbursement of salary of seconded employee is taxable as FTS

1. Centrica Indai Offshore (P.)Ltd vs CIT, [2014]
2. JC Bamford Investments Rochester vs DDIT-[2014]
3. Tekniskil (Sdendirian) Berchad vs CIT-(1996)

Reimbursement of salary of seconded employee is not taxable as FTS

1. Temasek Holdings vs DCIT, (2013)
2. ITO vs AON Specialist Services Private Limited (2014)
3. Abbey Business Services India Pvt Ltd vs DCIT (2012)
4. ACIT vs CMS (India) Operations and Maintenance Co. Pvt Ltd (2012)
5. ITO vs Ariba Technologies (India) Pvt Ltd (2012)
6. Centrica India Offshore Pvt.Ltd (2012)

Whether certification charges is covered under Royalty

- Essar Oil Ltd Vs JCIT (102 TTJ 270)(Mum)

Payment for supply of commercial knowledge or information (like credit rating) which affects public at large is Royalty as per DTAA with Australia

- ICICI Bank Ltd (20 SOT 453)(Mum)

Expertise skills of credit rating agency was used in preparing commercial information but the said service did not made such skills available to assesse and therefore not FTS – USA DTAA

- Diamond services International Pvt Ltd (216 CTR 120) (BOM)

There is no parting or rendering of technical services either of technical or consultancy nature or industrial or commercial experience – therefore not taxable as royalty or FTS – USA DTA

- Hindalco Industries Ltd (96 TTJ 1009)(Mum)

Credit rating is a specialized professional service and therefore not taxable in India in absence of PE

Case Study

Whether supervision of erection and commissioning excluded from FTS?

- Sms Schloemann Siemag 57 ITD 254

Supervisory services undertaken by assessee would not tantamount to undertaking of construction or assembly of plant neither term as "like project"

- Aditya Birla Nuvo Ltd. 44 SOT 601

Supervision charges cannot be said to be a payment for assembly of machines to fall within the exclusion clause

Case Study

Whether Freight and logistic service in respect of export consignment is FTS?

- UPS SCS (Asia) Ltd 18 taxmann.com 302

Payment for Freight and logistic service in respect of export consignment is not FTS

Whether referral fees is FTS ?

- CUSHMAN & WAKEFIELD (S) PTE. LTD (AAR) 305 ITR 208
- Real Resourcing Ltd (AAR) 322 ITR 558

Case Study

Whether Commission paid to foreign agent is taxable in India?

- As the service is rendered outside India and amount received in foreign bank account, further not being technical service is not taxable in India
 - Armayesh Global Vs ACIT 12 Taxmann.com 130 (Mum)
 - CIT Vs Angelique International Ltd. 38 Taxmann.com 425 (Delhi HC)
 - Eon Technology (P) Ltd Vs DCIT 11 Taxmann.com 53 (Delhi)
 - Series of other decision

Case Study

Fee for Technical Services Routine repairs are not 'FTS'?

- BHEL-GE-Gas Turbine Servicing (P.) Ltd 24 taxmann.com 25
- Lufthansa Cargo India (P.) Ltd 91 ITD 133

carrying out routine maintenance of components and use of material being incidental to execution of work and non-resident company carried out repair work in normal course of its business

Whether fees for conducting Analysis and Impact testing is Taxable?

- Maruti Udyog Ltd vs ADIT – 34 SOT 480

Payment made for testing of asset (car) and giving report thereon is not taxable as it does not make available to the assessee.

- DCIT vs Reddy's Laboratories Ltd – 35 Taxmann.com 339

No tax liability arise where payment is made for conducting bio-equivalence studies and submission of reports as there was neither transfer of any technical plan nor it make available any technical knowledge.

In absence of FTS clause what should be the tax implication?

Business income cannot be taxed under Article 21(3), if it is not taxable under Article 7.

- Essar Oil Ltd – 102 TTJ 614 (Mum)
- Mediterranean Shipping Co 27 Taxmann.com 77 (Mum)
- Gear Bulk AG 318 ITR 66 (AAR)
- Viceroy Hotels Ltd – 11 Taxmann.com 216 (Hyd)

It could not be interpreted that since DTAA does not provide for FTS clause, income will automatically become business income, rather in such situation provision of Act would have to be considered and applied.

- DCIT Vs TVS Electronics Ltd (52 SOT 287)(Chennai)
- XYZ – 348 ITR 31 (2012)

Case Study

Whether IPS clause is applicable to person other than individual

- Christiani & Nielsen case – 39 ITD 355

The word he and his refers to only to a individual and not artificial person

- AEG Telefunken – 233 ITR 129

Personal service denotes service rendered by individual and not by a company

Article 14 - IPS applies to person other than company

- MSEB V DCIT 83 TTJ 325 (Mum)
- DCIT Vs paper Products Ltd 257 ITR 1 (Del)

MISCELLANEOUS QUESTIONS

Whether section 206AA applicable while grossing up

- Section 195A provides for gross up at rate in force.
- As per 2(37A) the rate in force is specified in finance Act or DTAA
- There is no reference u/s 195A for grossing up at rate as per 206AA

Particulars	Normal rate	Rate as per 206AA
Amount of invoice	100,000	100,000
Rate in force (2(37A))	10%	20%
Gross up u/s 195A	111,111	125,000
TDS u/s 195 read with sec 206AA @ 20%	22,222	25,000

FORM 15CA AND 15CB

APPLICABILITY OF RULE 37BB

- Applicable to specified foreign remittance. specific relief for remittance mentioned in notification
- Foreign remittance has to be intimated electronically to tax house – vide FORM 15CA
- Form 15CA to be digitally verify by person authorized u/s 140A – in absence of his availability in such practical situation other person can be authorized by board resolution
- Form 15CA is not to be filed in case
 - The payment is not chargeable to tax
 - Specified transactions
 - Where order u/s 195(2) or 197 is obtain
- Some banks permit remittance not chargeable to tax base on self declaration

Specific Exclusion

Cases where Form 15CA and Form 15CB are not required	
1	Indian investment abroad -in equity capital (shares), debt securities, branches and wholly owned subsidiaries, subsidiaries and associates & real estate
2	Loans extended to Non-Residents
3	Payment for operating expenses of Indian shipping & Airlines companies operating abroad.
4	Booking of passages abroad - Airlines companies
5	Travel under basic travel quota (BTQ)
6	Travel for pilgrimage, medical treatment, education (including fees, hostel expenses etc.),business
7	Freight insurance - relating to import and export of goods
8	Payments for maintenance of offices
9	Remittance by non-residents towards family maintenance and savings

Appendix A” Specified List

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10	Construction of projects abroad by Indian companies including import of goods at project site
11	Remittance towards personal gifts and donations to religious and certain charitable institutions
12	Remittance towards payment or refund of taxes.
13	Refunds or rebates or reduction in invoice value on account of exports
14	Payments by residents for international bidding".

DOCUMENT CHECKLIST

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Particulars	TRC	PE Dec.	PAN	Form 10F	Rate Applicable
DTAA Benefit	✓	✓	✓	✓	Beneficial rate
PE exists	✓	x	✓	✓	30%(Individual) 40%(Others)
TRC Not Available	x	✓	✓	x	As per ITA
Taxable as per DTAA	✓	✓	x	✓	Taxable 20% - 206AA or 25% rate in-force
Not Taxable as per DTAA	✓	✓	x	✓	Nil

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