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Dear Readers,

In this 96thedition, we bring you detailed articles on certain tax issues, which seemed to be settled but really unsettling the accepted ideology. The article analysing the judgment of Supreme Court in the matter of Northern Operating Systems raises certain important questions which may have a direct impact on the judgment handed over to us by the Supreme Court. The next article is part of the series of various facets of taxability of management support services. In this part, we have analysed the impact of taxability of said services vis-à-vis other income.

The next article is on the judgment of Gujarat High Court in the matter of Munjaal Manishbhai Bhatt, wherein the High Court read down Para 2 of Notification No 11/2017 – CT (R). We have made certain comments which may have an impact on the judgment in the succeeding forums.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

ANALYSIS ON SUPREME COURT JUDGMENT IN NORTHERN OPERATING SYSTEMS – UPHOLDING RCM ON MANPOWER SUPPLY FOR SECONDMENT EMPLOYEE

Contributed by CA Sri Harsha

[This article was first published in taxmann.com and available at [2022] 139 taxmann.com 291 (Article)]

Introduction:

On 19th May 2022, the Supreme Court delivered two judgments that shaken the foundations of indirect taxation. One in the matter of Mohit Minerals Private Limited [1], which struck down the levy of reverse charge on the importer for ocean freight services (for more on this, please read our article here[2]). Two, in the matter of Northern Operating Systems Private Limited[3] , which upheld the revere charge on secondment of employees. Results of both the verdicts are opposite to the most popular public view, thus changing the way we look at the future of indirect taxation.

In this article, we wish to analyse the judgment of Supreme Court in the matter of Northern Operating Systems Private Limited (supra) and conclude with our remarks as to how the said judgment will impact the position under GST laws.

Issue in Brief:

The facts were that Northern Operating Systems Private Limited (for brevity respondent/NOS) was registered with service tax authorities under the categories of 'manpower recruitment agency service' and other services. An audit was conducted by revenue which resulted in the proceedings against NOS alleging non-payment of service tax concerning agreements entered into by it with its group companies located in USA, UK, Dublin, Singapore etc to provide general back office and operational support to such group companies.

The nature and contents of the agreements which are subject matter of current discussion reveal that when required NOS requests the group companies for managerial and technical personnel to assist in its business and accordingly the employees (seconded employees) are selected by group company and they would be transferred to NOS. During the term of secondment, the seconded employees act in accordance with the instructions and directions of NOS and the seconded employees would devote their entire time and work to NOS. The seconded employees would continue to be on the payroll of the group company (foreign entity)for purpose of continuation of social security/retirement benefits, but for all practical purposes, NOS is the employer. The seconded employees would receive the salary, bonus, social benefits, out of pocket expenses and other expenses from group company and the group company raises a debit note on NOS to recover the said expenses without any mark-up. NOS would be issuing prescribed forms under the provisions of Income Tax Act, 1961 for the seconded employees. The seconded employees file their returns in India and contribute to the provident fund.

[1][2022] 138 taxmann.com 331 (SC)
[2]2022] 138 taxmann.com 360 (Article)
[3][2022] 138 taxmann.com 359 (SC)

The tax authorities alleged that NOS has failed to pay service tax under reverse charge for the services of manpower supply received from the group entities which are located outside India. The tax authorities contention was that the seconded employee would revert to the group entity once the requirement with NOS is met. Hence, the seconded employee cannot be called as employee of NOS. Since there is no exclusion under the service tax law for a situation like which the NOS is in, there cannot be any relief from payment of tax under reverse charge. On the other hand, NOS argued that the group entities cannot be called as entities falling under the manpower recruitment or supply agency and after introduction of negative list, the definition of 'service' has excluded the services provided by employee to his employer from its ambit and since seconded employee is employee and NOS is the employer, their cannot be any tax either under pre or post negative list.

The CESTAT after hearing to both the parties, held that on reading of contracts and agreements, the group entities cannot be said to be engaged in supply of manpower. The seconded employees were receiving salaries from the group companies only for disbursement purposes and the employer – employee relationship existed and the activity, therefore, could not be termed as 'manpower recruitment and supply agency'. The CESTAT further held that in the above circumstances, the overseas group companies which had contracted with NOS were not in the business of supply of manpower and NOS was not a service recipient and accordingly rejected the stand taken by the tax authorities. The Revenue appealed the CESTAT's order before the Supreme Court.

Analysis by Supreme Court:

The Supreme Court after hearing to both the parties has framed the issue as to whether the overseas group companies with whom NOS has entered into agreement, provide manpower services, for discharge of its functions through seconded employees? In simple words, the Supreme Court has to decide, as to, who is the employer of the seconded employee? If the Indian entity is treated as employer, then what is paid to the group entity is only a reimbursement and accordingly there is nothing to be taxed. On the contrary, if the foreign entity is treated as employer of the seconded employee, then the services provided by the foreign entity would be treated as service and becomes taxable. Hence, the crux is, who is the employer of the seconded employee?

The Supreme Court after referring to its previous judgments, wherein it was held that 'control' alone cannot be a factor to decide as to who is the employer has stated that there is no one single determinative factor, which the courts give primacy to, while deciding, whether an arrangement is a contract of service (as NOS pleads) or a contract for service (as the revenue pleads). The Supreme Court stated that one test has been consistently applied by them, which is 'substance over form', requiring a close look at the terms of the agreement.

The Court then stated that a ***vital fact*** which needs to be considered in the NOS case, is that the nature of overseas group companies business appears to be to secure contracts, which can be performed by its highly trained and skilled personnel. This business is providing certain specialised services and taking advantage of the globalised economy, and having regard to the locational advantages, the overseas group company enters into agreements with its affiliates or local companies, such as NOS and the role of NOS is to optimise the economic edge to perform the specific tasks given to it, by the overseas company. As part of this, the secondment contract is entered into, whereby the overseas company's employees, possessing

the specific required skill, are deployed for duration the task is estimated to be completed in. The Court stated it is in this context, it has to be decided, whether the secondment, for purpose of completion of the Indian entity's job, amounts to supply of manpower?

The Supreme Court stated that for all appearances, the seconded employees, for the duration of secondment, is under the control of NOS and works under its direction. The fact remains that they are on the payrolls of their overseas employer and what is left unsaid and perhaps crucial, is that this is a legal requirement, since they are entitled to social security benefits in the country of their origin. The Court stated that it is doubtful whether without the comfort of this assurance, they would agree to the secondment. The Court further stated that, the reality is that the secondment is part of the global policy of the overseas employer loaning their services, on temporary basis and on cessation of secondment period, they have to be repatriated in accordance with the global repatriation policy. The Court further stated that the agreement between NOS and seconded employee nowhere states that latter would be treated as former's employees after the seconded period and on contrary, they revert to their overseas employer.

The Court thus stated that the overall effect of the four agreements entered into by NOS with group companies, clearly points to the fact that the overseas company has a pool of highly skilled employees, who are entitled to a certain salary structure- as well as social security benefits. These employees, having regard to their expertise and specialization, are seconded to the concerned Indian entity for the use of their skills and upon cessation of terms of secondment, they return to their overseas employer, or are deployed on some other secondment.

The Court stated that while control (over performance of seconded employee's work) and the right to ask them to return, if their functioning is not as is desired, is with NOS, the fact remains that their overseas employer in relation to its business, deploys them to NOS, on secondment. The Court further stated that overseas employer for whatever reason, pays them their salaries and their terms of employment even during the secondment are in accord with policy of overseas company, who is their employer and upon the end of period of secondment, they return to their original places, to await deployment or extension of secondment. Accordingly, the Court concluded that the overseas entity will continue to be the employer of the seconded employee and not the Indian entity.

The Court also rejected the argument put forward by NOS by stating that there was no consideration paid to the overseas entity (assuming that there is a service provided by overseas entity)and therefore no tax liability should accrue by stating that the mere payment in the form of remittances or amounts, either duration of the secondment, or per employee is just one of the way to reckon the consideration and the other way of looking at the arrangement is the economic benefit derived by NOS, which also secures specific job or assignments, from the overseas entities, which results in revenue and the quid pro quo for the secondment arrangement, where the NOS has benefits of the experts for limited period, is implicit in the overall things.

[4]A situation where the tax if paid was available as input tax credit or refund and hence making non-payment of such tax should be considered as revenue neutral.

[5]2014 (34) STR 135

The Court also rejected the argument of revenue neutrality[4] by stating that the judgments relied upon by NOS of the same court are unreasoned and merely affirming the CESTAT Orders. Hence, those judgments relied upon by NOS does not have precedential value and accordingly NOS cannot escape tax based on the ground of revenue neutrality. The Court also rejected the reliance of NOS on earlier judgments of Supreme Court in the matter of Volkswagen India Private Limited[5] wherein it was held that the similar services provided by overseas entity is not a manpower recruitment and supply agency service by stating that such judgments are just confirmation of orders of CESTAT without any independent analysis and hence they do not have any precedential value.

Our Analysis:

As stated in the introduction of this article, this judgment is opposite to the most popular public view. There are series of judgments where in the tribunals have held that there cannot be any tax on similar transaction for the reason that the overseas entity cannot be called as manpower supplier and the employer shall be the Indian entity [6]. However, the Supreme Court overturned all such rulings by single stroke. The predominant reason that appears for the Supreme Court to arrive at above conclusion is the reliance on the judgment of Morgan Stanley & Co (MSCo) [7].

The Supreme Court in Morgan Stanley & Co (supra) was dealing with inter alia, a situation where an employee of MSCo when deputed to Indian entity Morgan Stanley Advantages Services Private Limited (MSAS) would constitute a service permanent establishment (PE) for MSCo in India? It was in this context the Supreme Court held that a deputationist has a lien on his employment with MSCo and as long as the lien remains with MSCo the said company retains control over the deputationist's terms and employment. The Court further stated that it is important to note that where the activities of multinational enterprise entails it being responsible for the work of deputationist and the employees continue to be on payroll of multi-national enterprises or they continue to have their lien on their jobs with multi-national enterprises, a service PE can emerge. By applying such rationale to the facts of MSCo, the Supreme Court held that there exists a service PE and accordingly concluded the income attributable to such service PE is taxable in India.

The point to ponder is whether the judgment of Supreme Court in the context of service PE can be used to determine, whether the employer would be the foreign entity or Indian entity for the purposes of service tax law. The existence of PE of a foreign entity in India is a factual exercise and changes from case to case. Even in the case of Morgan Stanley (supra), the court held that provision of stewards does not trigger service PE but provision of deputationist triggers. Hence, how far the adoption of such a judgment which deals with service PE can be applied to context of service tax law is not known. In addition to the above, when there exists a service PE, it can be said at the best, there was a provision of technical services by employees of MSCo to MSAS. However, in the instant case, the service tax was not charged under the category of technical services but under the category of manpower supplier.

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[6]For reference, see recent ones in Komatsu India (P) Limited [2021] 131 taxmann.com 276 (Chennai – CESTAT), and Target Corporation India (P) Limited [2021] 123 taxmann.com 444 (Bangalore – CESTAT).

[7][2007] 162 Taxman 165 (SC)

[8]Organization for Economic Co-operation and Development

[9]OECD Commentary on Article 15

Further, even under the direct taxation law, the seconded employees were treated as employees of the Indian entity. Though the overseas entity continues to be a legal employer, the Indian entity becomes an economic employer. OECD[8] in its commentary on model convention on Article 15[9], while dealing with who is to be treated as employer in international hiring-out of labour' stated that the term 'employer' was not defined in the convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks. The commentary further stated apart from the above test, the contracting states have to refer to number of circumstances enabling them to establish that the real employer is the user of labour, like:

- The hirer does not bear the responsibility or risk for the results produced by employee's work
- The authority to instruct the worker lies with the user
- The work is performed at a place which is under the control and responsibility of user
- The number and qualifications of employees are not solely determined by hirer

On applying the above factors, it would be evident that the Indian entity is to be treated as employer and accordingly the services provided should have been out of service tax ambit. Further, there are numerous judgment under the direct taxation law, where it has been consistently held that Indian entity is the employer qua the seconded employees. Only in thin number of cases, where the consideration is paid to the foreign entity without any evidence that the same is again paid to seconded employees (Centrica India Offshore Private Limited[10] by Delhi High Court) or where there is an additional amount paid to foreign entity apart from the salary cost (AT&S India Private Limited[11]), the courts have held that the said amounts are for provision of technical or other services and not the reimbursement of cost of seconded employees.

The Supreme Court though stated that there cannot one test for determination as to who the employer is, but ruled out that the Indian entity cannot be employer for the only reason that he exercises the control on the seconded employee. Though the agreement between NOS and its group entities clearly states that the seconded employee would be on the payrolls for the overseas entities only for purposes of salary disbursement and nothing else was set aside by stating that they have adopted the substance over form approach. The Court nowhere stated why the agreements should be discarded and a substance over form approach is to be adopted. The Court has completely ignored the fact that the seconded employees have been issued tax forms in India which shows the intent of NOS to treat them as employees of NOS and concluded that the overseas entity will continue to be the employer of the seconded employee only for the reason that there exists a lien on such employment and seconded employee continues to be on payroll of the overseas entity. This pick and choose approach of Supreme Court with due respects requires a re-consideration.

The Court instead of rejecting the reliance on Volkswagen India Private Limited (supra) and others should have gone into detail as to what the high courts or CESTATs have held on similar issue and then should have concluded regarding the taxability. To this extent, the conclusion of the Supreme Court in the matter of NOS may require a re-consideration.

[10][2014] 364 ITR 336 (Delhi)
[11]287 ITR 421

Further, another point that requires consideration is, whether the judgment of Supreme Court in NOS (supra) is universally applicable for all secondment cases or the Supreme Court did draw a distinction? Para 52 of the judgment states that a vital fact that needs to be considered in the NOS case is that the overseas entities are engaged in securing contracts which are then outsourced to NOS and later performed by deputed/seconded employees. In this context, the Court framed a question that whether the secondment, for the purpose of completion of NOS's job, amounts to manpower supply? The Court also stressed on the role of NOS to be optimising the economic edge to perform the specific task given to it, by overseas companies.

Taking clue from the above, can we state that the employer will be the overseas entity, only in cases where the Indian entity places request for seconded employees for completion of specific tasks which are outsourced by overseas entity to Indian entity? In simple words, where seconded employees are not engaged in any specific activity or involved in day to day management, can they stand exclude by the judgment in NOS (supra). This question assumes significance especially, when seen in the context of facts of Morgan Stanley (supra). In the said case, MSCo sent two sets of employees to MSAS. One, the stewards and two, the deputationists. The AAR[12] in MSCo case held that MSCo sending both the sets of employees to MSAS triggers service PE for the former. However, the Supreme Court after analysing the activities of stewards, stated that the activities of steward are in the nature of merely protecting MSCo's interest in the competitive world by ensuring, the quality and confidentiality of MSAS services. Hence, the Court held that there cannot be said that by providing stewards MSCo has actually provided a service to MSAS. Then, the Court moved on to the analysis of provision of deputationists and as discussed earlier, held that the provision of such employees would trigger service PE for MSCo.

Hence, on a close reading of the judgment of NOS (supra) and Morgan Stanley (supra), it appears that only in cases where the secondment employees are taken for completion of specific task which earns a direct revenue to the Indian entity, such cases will alone be falling for the payment of tax under reverse charge. However, whether this is the interpretation of the Supreme Court or not has to be waited and seen in the times to come.

Position under GST Laws:

Though the above judgment was delivered in the context of service tax law, it is important to examine the impact that it will have under the GST laws. Similar to the exclusion from the definition of 'service', the services provided by employee to employer in the course of or in relation to his employment was specified as Entry 1 in Schedule III to Section 7 of CT Actto be an activity or transaction which shall be treated neither as supply of goods or services or both. Hence, the services provided by employee to his employer are also not subjected to tax under GST laws. However, the prime question that who is to be treated as employer, the foreign entity or Indian entity remains unanswered.

Taking clue from the judgment of Supreme Court in NOS (supra), the overseas entity would be the employer, there by the service provider. In terms of Section 13(1) and 13(2) of IT Act [13]read with Entry 1 of Notification No 10/2017 – CT (R), the tax is required to be paid by the service recipient under reverse charge. Further, the argument that there is no separate fee or consideration charged by the overseas

[12]Authority for Advance Ruling

[13]Integrated Goods and Services Tax Act, 2017

entity and hence there cannot be any tax (argument taken by NOS before Supreme Court) will fail under the GST laws in light of Entry 2 of Schedule I to Section 7 of CT Act. The said entry states that the activity of supply of services when made in course or furtherance of business between related person shall be treated as supply even when there is no consideration. Assuming that the overseas entity and Indian entity falls under the definition of 'related person' as laid down vide Explanation (a) to Section 15, then the activity shall be treated as supply dehors the fact there is no consideration. The value of supply has to be determined by the rules which deal with valuation. On the other hand, if the employer is treated as Indian entity being the economic employer, then the services provided by seconded employee would not be subjected to tax.

Therefore, in all instances where the activity of the seconded employee is not in achieving a specific task or job of the Indian entity, then there will be a high chance that the taxpayer need not pay tax under reverse charge by placing reliance on NOS (supra). In instances where the activity of seconded employee is directly related to achieving a specific task or job, then there is a high chance for the tax authorities to demand tax under reverse charge from the Indian entity. If the Indian entity is in a situation that it is eligible for credit, it is advisable on a conservative basis to remit the tax and avail as credit. In cases, where Indian entity is not in a situation to avail the tax paid as credit, then it has to prepare to face the litigation.

From the above analysis it is evident that, if a review petition is filed before the Supreme Court, the chances of change in the outcome of the judgment are high. Assuming that the review petition fails, then there will be a second round of litigation, where the concept of economic employers and other connected matters will be tested. Till then, this twist in the story continues to effect the Indian entities.

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GST

THE HIT AND MISS OF GUJARAT HC IN MUNJAAL MANISHBHAI BHATT

Contributed by CA Sri Harsha

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Introduction:

Gujarat High Court strikes again, this time holding that providing an adhoc and standard method to value of undivided share of land involved in provision of construction services as invalid and has Para 2 of Notification No 1/2017 – CT (R) to be read down.

Before going into the detailed study of ruling for understanding the hit and miss of the Court in Munjaal Manishbhai Bhatt [1], it is necessary to understand the issue involved, the major arguments by petitioner and revenue and the analysis of High Court. Let us proceed to examine the same. Our analysis on the judgment and way forward is given at the conclusion of this article.

Issue Involved:

The petitioner has entered an agreement with Navratna Organisers & Developers Private Limited (4threspondent) for the purchase of plot of land admeasuring 1021 square meters. The said agreement also encompassed construction of bungalow on the said plot of land by 4th respondent. Separate and distinct considerations were agreed upon between the parties to the agreement for sale of land and construction of bungalow on the land. The agreement stated that the petitioner is liable to pay all taxes including GST and the petitioner believed that GST is required to be paid only on the construction services qua bungalow, because that would only constitute supply under GST laws.

However, the 4th respondent relying upon the Entry 3(if) of Notification No 11/2017 – CT (R) read with Para 2 informed the petitioner that he would be liable to pay tax at the rate of 18% on the entire consideration payable for land as well as construction of bungalow after deducting 1/3rd of value towards land as stipulated in Para 2 and accordingly raised invoice on the petitioner. The petitioner challenged the above Entry 3(if) read with Para 2 of Notification No 11/2017 – CT (R) [for brevity 'NN 11/2017')], since the same does not provide for complete exclusion of consideration towards land and provides only for 1/3rd deduction, instead.

In another set of petitions, the petitioner were developers who have sold/intending to sell developed parcels of land The advance ruling applications were filed seeking a ruling on the question whether there was any tax liability under the GST Act on supply of developed land. The advance ruling authority held that the deduction of land was admissible only to the extent of 1/3rdof total consideration on basis of NN 11/2017. The said ruling was also affirmed by Appellate Authority for Advance Ruling. Hence, the petitioner has challenged the validity of the impugned notification.

[1][2022] 138 taxmann.com 117 (Gujarat)

Major Arguments by Petitioners:

The petitioner states that there were two separate agreements for transfer of land and for construction of bungalow and pointed out that the booking agreement was entered after the land was fully developer and that no further activity was required to be done by the land owner/developer in respect of the land after entering of the booking agreement with petitioner. Since there were two separate agreements which are clearly severable and the sale of land being made for a separate consideration, the entire amount of consideration relating to land is outside the scope and purview of GST Act and not 1/3rd which is provided by the NN 11/2017.The petitioner relied upon the minutes of 14th GST Council meeting to demonstrate that the before of issuance of said notification, it was deliberated that the same should be confined only in respect of sale of flats/apartments and not in respect of transactions where land was separately sold and separate value of land was specifically so available. However, the notification was issued in wide terms so as to even include the sale of plots of land along with construction of bungalows which is argued to be arbitrary and contrary to the object sought to be achieved by deeming fiction.

The petitioner further argued that it was post decision of Supreme Court in 1st Larsen and Toubro[2] that sale in course of execution of works contract would commence only from the stage when the contract is entered into during the course of construction and observed that sale of fully constructed property would also not attract levy of tax and accordingly it was the reason that the sale of land and fully constructed building has been excluded from the purview of GST Act. Since, what is taxable under the GST Act is supply of goods or services, they argued that it is only when the recipient enters into a contract with supplier, the supply can commence and since in the instant case, the land has already been developed by the developer and thereafter if the contract for construction of bungalow is entered with prospective buyer, then the supply of goods or services is only to the extent of construction undertaken pursuant to contract with such a prospective buyer. For something done by the developer prior to execution of contract with prospective buyer, such activity is not a supply at all as defined under Section 7 and thus there should not be no charge of tax on such activity.

The petitioner further argued that the Supreme Court held in 2nd Gannon Dunkerley's case[3] , that tax is imposed on the actual taxable value of works contract and the Government could prescribe fixed percentage only for cases where the actual value was not ascertainable and in cases where fixed percentage is prescribed the same should not appreciably differ from the actual value. The petitioner argued that the impugned notification prescribing fixed percentage deduction of 1/3rd without giving option for deducting the actual value of land as well as without taking into consideration the different variants of contracts as also the size of the land vis-à-vis the consideration is contrary to the rationale delivered by the Supreme Court in 2nd Gannon Dunkerley's case (supra).

The petitioner argued that the Delhi High Court in Suresh Kumar Bansal[4] clearly held that there need to be a specific statutory provision excluding the value of land from the taxable value of the works contract and mere abatement by way of notification is not sufficient and post that judgment, the Government by way of retrospective amendment to Service Tax (Determination of Value) Rules provided for specific deduction for consideration charged for land and provided that only in event of such actual value not

[2]2014 (1) SCC 708
[3](1993) 1 SCC 364
[4][2016] taxmann.com 55 (Delhi)

being available that the alternative methods of fixed percentage deduction were to be adopted. However, the petitioner argued that impugned notification providing only a specific method for deducting the value of land is to be held ultra-vires.

The petitioner urged that the deeming fiction is ex-facie discriminatory in as much as person like the petitioner who are getting the bungalow constructed on 10-20% of the land get the same deduction as a buyer of a flat unit in a multi-storeyed building who merely gets an undivided share in the land and major portion of the agreement value is towards cost of construction. Further, the petitioner argued that, as a result of impugned entry, there is a high taxability in cases such as that of the petitioner, where construction is to be done by the same person who is seller of land vis-à-vis cases where the sale of land and construction is by separate individuals and it was pointed out that in **the present case the seller and developer are different person.**

In another set of petitions, where the developed land was sold and the appellate authority for advance ruling held that, even in such cases, the deduction of 1/3rd of total amount would be applicable, the petitioners argued that once a particular consideration was agreed for sale of land between two parties, it was not open for the tax authorities to rewrite the terms of agreement. Further, they have stated that if the impugned notification is not to be struck down as ultra-vires, the same is required to be read down as inapplicable where separate value of land was ascertainable.

Major Arguments by Revenue:

The revenue argued that in case of transaction that involves construction of building, civil structure or part thereof, including a complex or building intended for sale to a buyer, wholly or partly, wherein the completion certificate with respect to such constructions has not been received, such transactions shall be treated as services under Para 5(b) of Schedule II and in the facts, the petitioner has entered into a booking agreement with the developer (4th respondent) whereby the petitioner agreed to purchase the residential plot together with a bungalow/apartment thereon in the scheme called as the 'Kalhaar Blues and Greens' subject to various terms and conditions, which indicate that none of these components of transaction can be separated and are integral part of the transaction. The Revenue argued that the petitioner has no right to construct the plot, no right to change the plan/layout of all the plans provided by the developer, no right to get the construction done by any other person other than the developer, no right to divide the plot area from the scheme, no right to deal with the plot are and other such conditions, limitations, prohibitions and restrictions, except without the consent of the developer and the concerned local authority and all these indicate that the sale of land and construction of bungalow forms part of single transaction and cannot be treated as separate transactions dehors the fact that separate contracts have been entered, for the reason they may not reflect true value of land.

The Revenue placed reliance on the Supreme Court judgment in the case of Narne Construction Private Limited[5] , which was in the context of Consumer Protection Act to drive that the sale of developed plot is not sale of land only, it is a different transaction that mere sale of land and accordingly argued that sale of developed land in the instant case is different from the mere sale of land as envisaged in Schedule III. The Revenue argued that the component of land as provided in the booking apartment is not only land, it is a developed land as being part of the plotting scheme and developer shall have to get the plans approved

[5][2013] 30 taxmann.com 42 (SC)

by concerned local development authority and develop the common facilities like roads, water lines, drainage, greens and various other amenities and thus land component is not only land but also consist of such development being part of the plotting scheme and value of such development cannot be ascertained as the same are to be enjoyed with all the occupants of the scheme.

Analysis by High Court:

The High Court after listening to both the parties have framed a question for consideration as to whether the impugned notification providing for 1/3rd deduction with respect to land or undivided share of land in cases of construction contracts involving element of land is ultra-vires the provisions of GST laws and/or violative Article 14 of Constitution of India?

After tracing the history of taxation of building construction contracts through various judgments of Supreme Court stated that the very base of the levy was not changed under GST law. While earlier VAT and service tax were imposed on tripartite agreements, such taxes were sought to be consolidated under GST laws with a specific exclusion of land element. The High Court stated that 'supply' under Section 7 of CT Act includes supply of goods or services or both made or agreed for a consideration and thus the factum of supply should be initiated only once the agreement is entered between the supplier and recipient and such agreement is for consideration and this is in consonance with the observation of Supreme Court in case of 1st Larsen and Toubro (supra) that there cannot be a sale in respect of construction undertaken prior to the agreement with the buyer. The Court stated that thus the legislative intent is to impose tax on construction activity by a supplier at the behest of or pursuant to contract with recipient and there is no intention to impose tax on supply of land in any form and it is for this reason that it is provided in Schedule III that supply of land will be neither supply of goods nor supply of services.

The Court stated that if looked from this perspective, the arguments of Revenue that there is difference between sale of land and sale of developed land should be set aside. The expression used in Schedule III is, sale of land and then it can be in any form, developed or undeveloped.

The Court stated the Revenue's stand that exclusion of sale of land will not be available since the land is a developed piece of land is difficult to accept such argument, as at the point of time when the buyer entered into the picture, the land was already developed and thus, even without going to Schedule III, the only service which is supplied by supplier to the recipient is the construction undertaken for buyer and it is such supply alone can be taxed and the fact the land is not a plain parcel of land but a developed land cannot be a ground for imposing tax on sale of such land. Further, the Court held that the Revenue's argument is not supported by the notification, since the subject notification does not state that if the land is developed, the service provider cannot take the benefit of Para 2. Since Para 2 provides for deduction for transfer of land, it would also cover the developed land. The next and only question that is left to be determined is whether such artificial deeming fiction of 1/3rd deduction is ultra-vires of provisions of GST laws and Constitution.

The Court stated that in the facts of the case the booking agreement showed specific consideration was agreed for sale of land and for construction of bungalow. **The Court stated that there is no averment in the affidavit filed by Revenue that such bifurcation is not acceptable.** In such a case, the Court stated that if there is a specific value for land and Revenue does not have any objection for such bi-furcation, can the notification provide for fixed deduction as against the actual value of land available in the agreement?

The Court stated it should be answered in negative because, when the valuation provisions provide for valuation with actual price paid or payable for the service and where such actual price is available, then tax has to be imposed on such actual value. Deeming fiction can be applied only where actual value is not ascertainable and accordingly held that mandatory application of deeming fiction of 1/3rd of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and ultra-vires the statutory provisions.

The Court further held that one of the most glaring feature of the impugned deeming fiction is its arbitrariness in as much as the same is uniformly applied irrespective of the size of plot of land and construction therein and there is no distinction which is made even between a flat and bungalow and while a flat would have number of floors and the transfer would only be undivided share in land, the same deduction which is available on supply of flats is made available on supply of bungalows without any regard to the vast different factual aspects. The Court also rejected the Revenue's argument that there is a possibility to include the value of construction contract into the value of land and to avoid the GST on the construction contract by stating that there are various ways in the valuation mechanism through which Revenue can reject valuation in such cases and that cannot be the sole reason for adopting the fixed deduction. The Court also stated that when there was a methodology prevalent under the service tax law ([as a consequence to the judgment of Delhi High Court in Suresh Kumar Bansal] to provide for deduction of land, ignoring the same and providing a standard deduction in GST laws is not right in law. The Court also ruled out that the present controversy is not pertaining to Para 5(b) of Schedule II because the issue is with the valuation and not with chargeability.

The Court further held that reliance placed by Revenue on Narne Construction Private Limited (supra) is misplaced, since the judgment was in the context of Consumer Protection Act and the same is inapplicable while interpreting a statute. **The Court stated that in a given case there may be tax liability if the development of land is undertaken pursuant to contract with buyer and however, if the land is already developed and thereafter agreement is entered with the buyer for sale of such developed land, then it would not involve any service.**

The Court concluded by stating that while maintaining the mandatory deduction of 1/3rd value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with aid of valuation rules, such deduction can be permitted at the option of taxable person particularly in cases where the value of land or undivided share of land is not ascertainable. Accordingly, the Court held that the Para 2 has to be read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature and it will only be available at the option of taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

Our Analysis:

Whether the judgment missed out a crucial fact that Revenue argued that the contract is an integrated one and cannot be split?

The Revenue in their arguments has stated that the contract is integrated one and cannot be split dehors the fact that the consideration is separately agreed, for the reason that the petitioner (buyer) does not have any right to get the bungalow constructed by anyone except from the developer. Hence, the

Revenue stated that such a split as argued by the Petitioner is not possible. However, when the Court was analysing, it has stated that the Revenue in its affidavit has no-where stated that bifurcation is not acceptable. Despite the Revenue has made its arguments in such a direction, the Court appears not to consider such arguments since they do not form part of the affidavit. The Revenue's submissions that the components of transaction cannot be separated and are integral part of the transaction are evident from Para 46 of the judgment. If this would have been considered, whether the High Court would have come to the same conclusion as it has reached is doubtful.

Whether the facts in the current judgment were understood by the High Court in a different manner than the actual transaction?

The High Court in Para 4.1 when narrating the facts stated that the land is being sold by the developer and construction of bungalow is also being done by the same developer. However, in Para 22, the Court stated that in the present case, the seller and developer are different persons. Whether the judgment rendered keeping in view that the seller and developer as one and same or different was not clear. It is important to note that the taxation would be completely different, if the developer and seller are different than in a case, where the seller and developer is same.

In a situation, where the seller of land is different from the developer, then there is no requirement for the developer to include the value of land in his consideration to claim a deduction of 1/3rd or actual value of land. If the seller of the land and developer are same, then only the question of deduction of 1/3rd or actual value would come into play. If the entire judgment is taken holistically, it appears that the facts narrated in Para 4.1 appears to be more resembling with the actual transaction rather than what was mentioned in Para 22.

Whether there is any mandate or deeming fiction under the GST law that though the contract for sale of land and construction agreement are entered separately, should they be seen as a single contract?

The facts of the case in one set of petitions is that the sale of land and construction agreement were entered separately and consideration is fixed separately. Since there are separate agreements, the petitioner stated that they cannot be asked to pay tax on the total agreement value after taking a deduction of 1/3rd towards land, when the entire value of land can be excluded from the levy. They have argued that there can be tax only on the construction contract and not on the value of land.

The question that arises is, whether there is an obligation for the developer under the GST laws to club the agreements for land and agreements for construction as a single agreement? The Court appears not to have done this discussion, based only on the reasoning that Revenue did not object that such a bifurcation is not possible. However, we feel that the Court should have analysed this aspect also before reaching the current conclusion.

The agreement between the petitioner and developer is for purchase of land and for construction of bungalow. Para 4.1 of the judgment clearly specifies this, that developer has sold and also entered an agreement for construction of bungalow. Hence, when it comes to construction of bungalow, the nature of work would be the works contract as defined under Section 2(119), because this is a contract for building or construction of an immovable property, wherein a transfer of property in goods (whether as

goods or in some other form) is involved in the execution of such contract. Hence, the contract between the petitioner and developer would be undoubtedly a works contract. Para 6(a) of Schedule II calls out a works contract, which is a composite supply as supply of services.

Hence, by the deeming fiction prescribed under Para 6(a) of Schedule II, the works contract is deemed to be supply of services. This is done precisely to remove, whether a contract involving goods and services, should be called as a contract of supply of goods or supply of services and by deeming that such a composite supply as supply of services, the disputes pertaining to classification as goods or services is put at rest. In other words, after introduction of GST laws, when the contract is relating to construction and other similar items pertaining to immovable property, the supplier cannot take an argument that he has entered two different agreements, one for supply of goods and two, for supply of services and cannot pay tax on the rate of tax applicable for supply of goods and rate of tax applicable for supply of services. The entire contract (despite of the fact that there are numerous contracts with separate consideration) would be treated as supply of services and the rate of tax that would be applicable for such services should be applied.

Accordingly, in the instant case, though the petitioner has entered two agreements, one for supply of land and the other for supply of services, since the same is for construction of an immovable property, the same will be classified as works contract services and no matter how many agreements were entered, the taxation cannot be applied qua single contract. It has to be applied for the entire contract.

Further, if we go to the history of applicability of service tax on the construction of flats, there was an explanation inserted to Section 65(105)(zzzh) (which is similar to the current Para 5(b) of Schedule II) to deem that there exists any service if consideration is received from customer prior to completion certificate. The said explanation was inserted to come over the practices adopted by developers of certain states, where they have practice of entering two agreements, one for sale of semi-finished flat (on which stamp duty was paid) and the other for construction agreement.

The current judgment tries to revive the said position (which existed prior to insertion of above explanation) to allow the developer to enter two agreements and exclude the value of land based on the such agreements. This is in a way ignoring the whole concept of composite supply of works contract being called as supply of services. Had the High Court analysed this aspect, the outcome would be different.

Whether the High Court struck down the methodology of 1/3rd deduction towards land for all the situations or did it limit to certain instances?

The High Court stated that where it is not possible to determine the actual value of land, then the 1/3rd deduction can be made applied. In all other cases, where the actual value of land is discernible, the deduction of 1/3rd is mandatory. Now, the question that arises is, who decides, whether the actual value of land is available or not. Further, what would be the actual value of land? In other words, would this judgment applicable only to such developers who enter two separate agreements, one for land and the other for construction and if yes (assuming that such a methodology is permissible under GST laws),

whether the amount mentioned in the agreement for transfer of land, can be claimed as deduction taking it to be a true value. These are all the questions which need to be evaluated before placing reliance on the judgment. Hence, the judgment in a way tried to read down the Para 2 instead of striking it as ultra-vires.

What changes did the Suresh Kumar Bansal's judgement of Delhi High Court brought in the service tax law which the Gujarat High Court suggested that it should be under the GST laws?

The Delhi High Court in Suresh Kumar Bansal's judgment held that, since the act or rules do not provide machinery provision for arriving the service component in a composite contract, the notification prescribing abatement of 75% cannot in any way substitute the machinery provisions which should have been by way of act or rules. Accordingly, held that notification prescribing abatement in absence of any statutory machinery is invalid.

In order to overcome the above, the Rule 2A of Service Tax (Determination of Value) Rules, 2006 has been amended to include a method for deriving the actual value of service in a composite contract (which includes goods and undivided share of land) and only in cases where the valuation cannot be done in above manner, then the valuation to be done based on the standard deduction.

The Gujarat High Court stated that though the above mechanism is in place during service tax law, the Government providing a standard deduction of 1/3rd for transfer of land, without giving an option for deduction of actual value of land under GST laws, has to be read down.

An observation from Supreme Court's judgment in case of Mohit Minerals Private Limited[6] is worth referring here:

94 The respondents have urged that the determination of the value of supply has to be specified only through rules, and not by notification. However, this would be an unduly restrictive interpretation. Parliament has provided the basic framework and delegated legislation provides necessary supplements to create a workable mechanism. Rule 31 of the CGST Rules 2017 specifically provides for a residual power to determine valuation in specific cases, using reasonable means that are consistent with the principles of Section 15 of the CGST Act. This is where the value of the supply of goods cannot be determined in accordance with Rules 27 to 30 of the CGST Rules 2017. Thus, the impugned notification 8/2017 cannot be struck down for excessive delegation when it prescribes 10 per cent of the CIF value as the mechanism for imposing tax on a reverse charge basis.

Had similar analogy being applied by Gujarat High Court, the outcome in the current judgment would have been different.

What would be the impact of the above judgment on AARs and AAARs relying on Supreme Court's judgment in Narne Construction Private Limited (supra) for holding that plot sales are subjected to GST?

The High Court stated that the judgment of Supreme Court in Narne Construction Private Limited (supra) delivered in the context of the Consumer Protection Act cannot be applied for interpretation of taxing

[6][2022] 138 taxmann.com 331 (SC)

statute. Hence, in a way the High Court stated that the said judgment would not be applicable for interpreting the GST statutes. Majority of the AARs and AAARs rely on the judgment of Supreme Court in Narne Construction Private Limited (supra) to hold that there is a supply of service in case of sale of plots attracting tax under the GST laws. Since, the subject judgment has stated that the judgment of Supreme Court is not applicable, this is a kind of respite.

What would be the impact of the above judgment for sale of plots?

In another set of petitions, the petitioner was engaged in development and sale of developed lands. The High Court further stated that there is no difference qua taxation in case of developed land and undeveloped land as far as Para 5 of Schedule III is concerned. The Revenue's argument that developed land would involve a kind of service element when compared to the mere sale of land is brushed away. The High Court stated that land in any form can be interpreted as covered under Entry 5 of Schedule III.

If the High Court's interpretation has to be taken to logical conclusion, then all sale of plots (developed parcel of lands) should be neither a supply of goods nor supply of services, since the subject sale of developed lands also fall under the ambit of Entry 5 of Schedule III. If such a conclusion is taken, then the High Court should have held that there is no requirement to pay tax on petitioners who are engaged in supply of developed lands. However, the Court in concluding remarks ordered the tax authorities to take the actual value of land in cases of sale of developed lands and arrive at the balance value of construction and charge tax only on such construction value as stipulated in agreement.

From the above conclusion, it may be the fact in the portioner's situation that even for the sale of developed lands, there were two agreements entered, one for supply of land and the other for development activities. If that is the fact, then the High Court concluding remarks will be meaningful. However, if the facts are that, where the petitioner has paid stamp duty on the entire amounts collected from customers for sale of developed parcels of land, then the judgment would require a re-consideration, since it would be contradictory to the conclusion arrived by the High Court in the earlier part.

Hence, in case of developers who are paying stamp duty on entire consideration received for sale of plots, then they are still untouched by the concluding remarks and the main portion of the judgment which deals with developed land also finds place in Para 5 of Schedule III would be helpful. For developers who pay stamp duty only on certain portion of consideration received for sale of plots, then the judgment would be applicable for claiming the deduction of actual value of land and balance would be subjected to tax, if there are separate agreements (assuming that such an arrangement is possible under GST laws).

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INTERNATIONAL TAX

MANAGEMENT SUPPORT SERVICES VIS-À-VIS OTHER INCOME – AN ANALYSIS ON POSITION UNDER TREATIES – PART II

Contributed by CA Sri Harsha & CA Narendra

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Introduction:

In our previous article[1], the concept of taxability of management support services (for brevity 'MSS") under fee for technical services (for brevity 'FTS' or 'FIS') clause has been analyzed in detail.

We have concluded that MSS is not taxable under Article 12, since the term 'managerial' is not included in the definition of FTS/FIS. However, we cannot conclude the non-taxability of such income only on examining Article 12. The examining of taxation of such income will not be completed without analyzing the taxability of such services under Articles which deals with 'Other Income'.

Let us proceed to continue with the same

ABC Inc a company incorporated in USA has entered into license agreement with ABC India Private Limited for manufacturing of goods in India. Subsequent to such license agreement, ABC Inc has entered into another agreement for providing various MSS.

Now, let us proceed, to understand taxability of such MSS in India in the context of treaty between India – USA.

example considered in the previous Article.

When the above services are not taxable under FTS/FIS clause, whether management support services would be taxable under Articles which deals with 'Other Income'?

India -USA:

1. *Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Convention shall be taxable only in that Contracting State.*

2. *The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6 [Income from Immovable Property (Real Property)], if the beneficial owner of the income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the income is attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.*

3. *Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State.*

From the above, it is evident that, Para 1 of Article 21 gives exclusive rights to Country of Residence ('CoR') to tax 'other income. Further, the term 'wherever arising' hassignificant importance to include incomes arising in third state and not only restricting the scope to incomes arising in either of contracting states (CS).

[1]Management Support Services vis-à-vis Ancillary and Subsidiary Clause–An Analysis on position under Treaties - Taxmann

Further, the Para 2 gives the Country of Source (CoS), right to tax such income, when such income is effectively connected with permanent establishment (PE).

Further, Para 3 gives the taxing rights to CoS as well provided such income arises in the CoS.

In simple words, Para 1 of Article 23 has given exclusive rights to CoR to tax 'other income' however, as Para 3 of Article 23 has non-obstante clause, other income may also be taxed in CoS if such income has arisen in the CoS.

Considering the scope of Article 21, the question that arises is, whether MSS, though not taxable under Article 12, will be subjected to tax under the residuary clause, that is Article 21 or similar article?

Further, majority of treaties entered into by India with other countries are based on UN MC, such treaties have different treatment in respect of 'other income'. Hence, it is required to analyse the Article which deals with 'other income'.

Treaty with[2]	**Article**	**Para 1**	**Para 2**	**Para 3**
Canada	Article 21	CoR	C of PE	CoS
Finland [3]	Article 21	CoR	C of PE/FB	Cos
France[3]	Article 23	CoR	C of PE/FB	Cos
Netherlands[3]	No specific Article for 'other income'			
Philippines[3]	Article 23	CoR	-	-
Portugal	Article 22	COR	C of PE/FB	Cos[4]
Spain	Article 23	CoR	C of PE/FB	Cos
Switzerland[3]	Article 23	CoR	C of PE/FB	Cos
UK	Article 23	CoR	C of PE/FB	Cos
USA	Article 23	CoR	C of PE/FB	Cos

[2]Treaties which do not have the term 'managerial' in FTS/FIS scope are only considered.

[3]By virtue of MFN Clause, scope of FTS/FIS must be restricted(akin to India-US/UK). For detailed analysis of MFN clause click here

[4]limited scope - akin to section 115BB

From the above Table, treaties entered into by India can broadly be categorized into three categories.

- Treaty which gives taxing rights to CoS in respect of 'other income'.
- Treaty which restricts the scope of 'other income' in CoS.
- Treaty which does not have 'other income' Article.

As this article is limited to 'managerial' services, analysis has been restricted taxation of 'managerial' services under 'other income'.

Treaty which gives taxing rights to CoS in respect of 'other income':

Treaties with Canada, Finland, France, Portugal, Spain, Switzerland, UK or US provides taxing rights to CoS in respect of 'other income'. Hence, it is required to analyse whether managerial services are taxable under these treaties as 'other income'.

Article 21 states that items of income of a resident of a CS ***not dealt with in the foregoing articles*** of this Convention and arising in the other Contracting State may also be taxed in that other State.

The Hon'ble Mumbai Tribunal in the case of Mediterranean Shipping Co., S.A.[5] has analysed the term 'not dealt with in the foregoing article' in the context of taxability of shipping income under India- Swiss DTAA. The Tribunal has held that in order to say that a particular item of income has been dealtwith, it is necessary that the relevant article must state whetherSwitzerland or India or both have a right to tax such item ofincome.Vesting of such jurisdiction must positively and explicitly stated and it cannot be inferred by implication. The expression "dealt with" contemplates a positive action and such positive action in the present context would be when there is an article categorically stating the source of country or the country of residence or both have a right to tax that item of income. ***The fact that the expression used in Article 22(1) of the Indo-Swiss treaty is "dealt with" viz-a-viz the expression "mentioned" used in some other treaties clearly demonstrates that the expression "dealt with" is something more than a mere mention of such income in the article and as rightly contended by the learned counsel for the assessee, the international shipping profits can at the most be said to have mentioned in Article 7 but the same cannot be said to have been dealt with in the said article.***

However, the Chennai Tribunal in the case of TVS Electronics Ltd.[6] has opines that when treaty is silent about particular income, provisions of domestic laws shall apply.

The Madras High Court in the case of BangkokGlassIndustryCo. Ltd.[7] , has held that since the consultancy income does not fall as miscellaneous income, the same cannot be brought under Article 22. Tribunal has held in the absence of any material to show that the same is not related to the business of the assessee, it cannot be argued that income does not fall under Article 7. *Even assuming for a moment that the assessee is an Indian company, given the nature of business of the assessee, if the income earned would qualify for consideration on the normal computation as business income, we do not find that the said character would undergo a change merely on the score that the assessee is not an Indian company.*

The Bangalore Tribunal in the case of ABB FZ-LLC[8] has held that the absence of the provision in the DTAA is not an omission **but is a deliberate mutual agreement between the contracting States not to recognize/classify any income as Fees for Technical Services for taxation and such income**

[5][2012] 27 taxmann.com 77 (Mum.)

[6][2012] 22 taxmann.com 215 (Chennai)

[7][2013] 34 taxmann.com 77 (Madras)

[8][2016] 75 taxmann.com 83 (Bangalore - Trib.)

cannot be taxed under the provisions of domestic law. Accordingly, the Tribunal opined that in the absence of the provision in the DTAA to tax Fees for Technical Services the same would be taxed as per the article 7 of the DTAA applicable for business profit and in the absence of PE in India, the said income is not chargeable to tax in India.

The Bangalore Tribunal in the case of IBM India (P.) Ltd.[9] has held that even though the India-Philippines DTAA does not have an Article dealing with 'FTS', ***its taxation would be governed by Articles 7 or Article 23 as the case may be, depending on the facts and circumstances of each case and not under domestic laws.***

The Tribunal further held that it is not the fact of taxability under article 6-22 which leads to taxability under article 23, ***but the fact of income of that nature being covered by article 6-22 which can lead to taxability under article 23.Article 23 does not apply to items of income*** *which can be classified under sections 6-22 whether or not taxable under these articles.*

Following the decision of Bangalore Tribunal, the Visakhapatnam Tribunal in the case of Paramina Earth Technologies Inc[10] has held that there is no dispute that the payment made was in the nature of FTS and there is no article in DTAA for taxing the FTS separately. Therefore, the payment made to the non-resident required to be taxed under article 7 under the head 'business profits'.

Further, Kolkata Tribunal in the case of Andaman Sea Food (P.)[11] Ltd. has held that when a tax treaty does not assign taxability rights of a particular kind of income to the source state under the treaty provision dealing with that particular kind of income, such taxability cannot be invoked under the residuary provisions of article 23 either.

However, Bangalore Tribunal in the case of Electrical Material Center Co. Ltd.[12] has held that are some exceptions provided in Article 22(2) where Article 22(1) is not applicable but those exceptions do not include FTS. Accordingly, Tribunal has held that service income would fall under 'other income'.

The AAR in the case of Lanka Hydraulic Institute Ltd., In re [2011] 11 taxmann.com 97 (AAR) has held that in the absence of FTS clause, such income would cover under Article 22 (other income) and not under Article 7 (Business profits).

The Chennai Tribunal in the case of Ford India Ltd.[13] has explained this concept in detail. The Tribunal after quoting Madras High Court has held that

- Business income is not taxable in India in the absence of PE. However, as such income is not taxable under Article 7, revenue shall not tax such income under 'other income'. Similar case with the independent personal services.

- Article 22 does not apply to items of income which can be taxed in any situations under article 6-21 whether or not such an income is actually taxable under these Articles.

- Profits earned by rendering fees for technical services are only a species of business profits just as the profits any other economic activity.

- Fee for technical services is dealt with separately in some treaties for the reason because, under those treaties the related contracting states proceed on the basis that even in the absence of the permanent establishment or fixed base requirements, the receipts of this nature can be taxed, on gross basis, at the agreed tax rate, and, to that

[9][2018] 100 taxmann.com 230 (Bangalore - Trib.)
[10][2020] 116 taxmann.com 347 (Visakhapatnam - Trib.)
[11][2012] 22 taxmann.com 400 (Kol.)

[12][2017] 86 taxmann.com 222 (Bangalore - Trib.)
[13][2017] 78 taxmann.com 5 (Chennai - Trib.)

extent, such receipts does not fall in line with the scheme of taxation of business profits under art. 7 and professional income under 14.

- When there is an FTS clause, the FTS gets taxed even in the absence of the PE or the fixed base, but the character of FTS receipt is the same, i.e., business income or professional (independent personal) income, in the hands of the same.

As sees from the above precedents, there are diversified views on taxability of an income which is not expressly mentioned in Article 12. In such a case it is ideal to consider Article 7 of the treaty as rightly pointed out by Madras High Court in the case of Bangkok Glass Industry Co. Ltd. (supra) and Chennai Tribunal in the case of Ford India Ltd (supra). As managerial services fall under the limb of business income or professional income, such income may not be covered under Article 21/22 in the absence of PE in the CoS. Further, judicial precedent which are discussed in the previous Article1have held that such income is not taxable in India. However, considering the trend in the litigation, more clarification from higher judicial is required.

Treaty which restricts the scope of 'other income' in CoS:

Treaty with Portugal, Sweden, Hungary limits the scope of income taxable in the CoS (only such income as provided in section 115BB). Hence, effectively, managerial services may not be taxable in India even under 'other income' in respect of these treaties.

Treaty which does not have 'other income' Article:

Treaty with Netherland does not contain 'other income'. The question that arises is whether in the absence of 'other income', what is the treatment of such income?

Whether it is not taxable in CoS or taxable under domestic laws of such CoS?

In such a case, revenue may argue that the treaty is not negotiated in respect of 'other income', taxing rights have been left to CSs as per domestic laws.

Further, if such income is taxable in accordance with domestic laws of both CSs, the question of taking credit of taxes paid in CoS may become hurdle as tax credit is available only with respect to taxes paid under treaty. Whether the issue of managerial services ends with Article 21? No, the balance, will be discussed in the next part.

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