**Digest of Decisions of Authority for Advance Rulings**

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1. **Offshore supply of equipment under the offshore supply contract – Ishikawajima – not liable to tax in India**

The applicant is a company incorporated under laws of China engaged in the business of supply of equipment for electric power project. The applicant entered into a contract with Jhajjar Power Ltd.,an Indian company for supply of equipments for the power project. On perusal of bill of lading, bill of entry and transit insurance, the Authority held that the activity relating to offshore supplies is an offshore sale in the light of the decision of the Supreme Court in Ishikawajima-Harima Heavy Industries Ltd. and the Income Tax Authorities under the Act, have no jurisdiction to tax the payments made outside for the supplies taking place outside India.

*SEPCO III Electric Power Construction Corporation, 342 ITR 313 (AAR No. 1008 dt. 31.01.12)*

1. **Contract for procurement of offshore supplies for project – right, title, payments, etc, passed to P outside India - no income arises in India - not liable to tax in India (S. 9(1) expl. 1(a))**

Applicant is a HongKong based company, engaged in the business of engineering, procurement and construction of petroleum, petro-chemical and power plant. With a view to execute project awarded by Petronet (P), an Indian company, it entered into a consortium with an Indian Company to develop a terminal for receipt and storage of liquefied natural gas at Kochi. On question as to whether income received/ receivable by the applicant for offshore-supplies from P was liable to tax in India, it was held that though applicant had a business connection in India, but it had not carried any part of business relating to offshore supplies in India. Thus u/s 9(1) read with Explanation 1(a), no income of the applicant in respect of offshore supplies is deemed to accrue or arise in India as the right, title, payments, etc, in the supplies have passed on to P outside India.

*CTCI Overseas Corporation Ltd., 342 ITR 217 (AAR No. 854 dt. 01.02.12)*

1. **Filing of a return of income - considered as matter pending before Income Tax authority - debars the taxpayer from approaching the AAR**

The taxpayer, a Norwegian company, had earned income in India under a sub contract from another foreign company. Based on this sub contract, the taxpayer entered into an agreement with a third foreign company to hire a vessel. The taxpayer withheld taxes on the payments for hiring the vessel under Section 195 and filed its return of income. Subsequently, it filed an application with the AAR on various issues. The AAR dismissed the taxpayer’s application on the grounds that since the taxpayer had filed its return of income, the questions arising in the application are already pending before the Revenue, and therefore, the application was barred under clause (i) of the proviso to Section 245R(2). The AAR was of the opinion that when a taxpayer files a return of income, multiple questions arise out of the return of income such as computation of total income, exclusions and exemptions, acceptance or non acceptance of any revenue expenditure, computation of income chargeable to tax and tax due thereon. The arising of the question from a return of income filed cannot depend upon the volition, vagaries, diligence, care or lack of care on the part of the AO. If a return of income is accepted with or without being subjected to an audit, it would only mean that the contention of the taxpayer has been accepted and not that the question has not arisen before the AO.

*GTB Invest ASA (AAR No 932, 933 dt. 03.02.12)*

1. **Payment received on sale or licensing of a software product is liable to tax as royalty**

The taxpayer, an Australian company, is a provider of software services. It entered into a non-exclusive distribution agreement with an Indian company. Under the agreement, the hardware products were delivered to the end user through the distributor while the software had to be downloaded directly by the end user from the taxpayer’s server. The distributor was responsible for realizing the price of both the hardware and software products from the end user and for facilitating the execution of version updates and secure portal access between the taxpayer and the end user. The AAR ruled that when a person sells or licenses software, he is also selling or licensing the copyright embedded in the software. It is not possible to separate the software from the intellectual property right of the creator of the software. Accordingly, the payment made by the distributor to the taxpayer was held to be in the nature of royalty and liable to tax in India.

*Citrix Systems Asia Pacific Pty Ltd 18 Taxmann.com 172 (AAR No 822 dt. 06.02.12)*

1. **Time spent on preparatory services are to included while determining the service period - Existence of performance guarantee and inclusion of preparatory activities - constitute a PE - liable to tax in India**

The taxpayer, a Singapore company, was given a sub-contract by Larsen and Toubro for installation of a bridge, pipelines, cable installations, etc for which the taxpayer mobilized vessels to India. The taxpayer claimed that since the vessels had been in India for less than 183 days, it would not constitute a PE in India under Article 5(5) of the India-Singapore tax treaty. On perusal of the sub-contract agreement, it was seen that the taxpayer was also responsible for rendering pre-installation services both in and outside India. Additionally, the taxpayer had given a 12 month warranty for the materials and workmanship. The parent company of the taxpayer was also required to give a performance guarantee till the end of the warranty period. The Authority for Advance Rulings (‘AAR’) ruled that when a performance guarantee has been taken to ensure the performance of the obligations of a party under a contract, the obligations under the contract continued to exist even after the vessels through which the services were rendered left the shores of India. This performance guarantee would commence on the conclusion of the contract and remain in force in lieu of the post-installation services guaranteed. Further, preparatory activities cannot be excluded while determining the period for which services have been rendered in India. The existence of the performance guarantee and the inclusion of the preparatory activities would constitute a PE in India for the taxpayer and its income would be liable to tax under Section 44BB.

*Global Industries Asia Pacific Pte Ltd 18 Taxmann.com 243 (AAR No 936 dt. 15.02.12)*

1. **Commission - Service rendered from abroad - Since the order was executed in India, right of agent to receive commission arose in India – taxable u/s 5(2)(b) r.w. s. 9(1)(i) - the provision of withholding tax will apply**

The applicant is an Indian company engaged in the manufacturing and supply of Rice Par Boiling and Dryer Plants as per requirement of customers. It had received orders from two agents situated in Pakistan. The plant was shipped and commission was payable to agents on completion of export orders. The question was raised whether the income of non –resident agent can be considered as deemed to accrue or arise in India and whether tax deduction would be mandatory under section 195 on export commission paid to non-resident agent; if so, at what rate. The Authority for Advance Ruling held that the fact that the agents have rendered services abroad in the form of soliciting the orders and the commission is to be remitted to them abroad are wholly irrelevant for the purpose of determining the situs of their income. The right to receive commission arises in India when the order is executed in India. Following the ruling in Rajive Malhotra (2006) 284 ITR 564 (AAR), it is to be held that commission is deemed to accrue and arise in India and is taxable under the Act in view of section 5(2)(b) read with section 9(1)(i). The provision of section 195 would apply and the rate of tax will be as provided under the Finance Act for the relevant year.

*SKF Boilers and Driers (P) Ltd 206 Taxman 19 / 248 CTR 121(AAR No. 983, 984 dt. 22.02.12)*

1. **Payment received from the sale of software products to the end users/customers through its independent reseller in India is royalty - tax is deductible. (Art. 7,12, S. 195 )**

The applicant, a Japanese scientific informatics software and services company for life sciences, chemical and material research and development was a subsidiary of a company incorporated in the U.S.A.. It had a liaison office in India which acted as a co‐ordinator. No sales were carried through the liaison office. The applicant sought an advance ruling on the questions whether payment received by the applicant from sale of software products to end users / customers through an independent resellers in India were taxable as business profits under Article 7 of the DTAA between India And Japan, or whether it will constitute “royalties and fees for technical services” as defined in article 12 of the DTAA and whether any tax needed to be deducted by the customers while making remittances to the applicant as consideration. The Authority referring the rulings of Dassault (AAR No. 821) and Citrix Systems (AAR No. 822) ruled that:

(i) the amount received by the applicant for sale of software products and for updates and maintenance is royalty as defined in article 12 of the DTAA and not business income covered by article 7 of the India-Japan DTAA; and

(ii) tax needs to be deducted by the customers while making the remittances to the applicant as consideration for the software supplied to them.

*Acclerys kk 343 ITR 304 (AAR No. 989 dt. 27.02.12)*

1. **Interest payment on loan guaranteed by EKN – Most favoured nation clause in Protocol to India-Sweden DTAA – not taxable in India – no obligation to with hold the tax. (India-Sweden DTAA, India-Ireland DTAA, AAR No. 953 of 2010)**

The applicant, Idea Cellular Limited is engaged in the business of providing telecommunication services across different circles in India. To facilitate the financing the procurement of equipments, the applicant availed the loan facility from ABN Amro Bank and NORDEA Bank (thereafter rights transferred to SEK, Sweden). Loans taken from Swedish Banks were guaranteed by Swedish Export Credits Guarantee Board (EKN). The questions for consideration by the Authority are whether payment of interest is exempt from tax in India in view of Article 11(3) of India-Sweden DTAA and in light of the fact that SEK does not have any PE in India, whether it would be taxable under Article 7 of DTAA and related TDS u/s 195. Ref Poonawalla Aviation Private Limited (AAR NO.953 of 2010), the Authority ruled that guaranteeing a loan is not same as extending a loan or endorsing a loan. Thus, on the basis of article 11(3) of the DTAA between India and Sweden, the applicant could not claim that the interest paid or payable could not be taxed in India. However as upheld in that case, in view of most favoured nation clause in Protocol covering article 11, even a loan or credit guaranteed by EKN would come within the purview of the exemption contained in article 11(3) of the DTAA. Therefore, the payment of interest by the applicant to SEK through NORDEA Bank AB is not taxable in India.

Since it was claimed that SEK had no permanent establishment in India, there would be no obligation on the applicant to withhold taxes u/s 195 of the Income‐tax Act, 1961, on the interest payable on the transaction.

*Idea Cellular Limited 343 ITR 381 (AAR No. 967 dt. 28.02.12)*

1. **Payment for IVTC services utilized by resident in its business carried out in India is chargeable as fees for technical services. (S. 9(1)(vii), 139, 195)**

Section 9(1)(vii)(b) shows that, when a resident of India is engaged in a business carried on outside India or earns any income from any source outside India, makes a payment by way of a fee falling under the definition of FTS, then such payment despite being in the nature of FTS is out of charge to tax in India. In the instant case, the payment received in connection with Inspection, Verification, Testing and Certification (IVTC) services utilized by a resident of India in its business carried on by it in India, irrespective of the place where the services are rendered, the amount of fee would be deemed to accrue and arise in India are taxable as FTS u/s 9(1)(vii) and exceptions u/s 9(1)(vii)(b) are not available, as the applicant has tax presence in India. Indian Customers are required to with hold taxes under section 195 at the rate in force mentioned in the Finance Act for the relevant year on the payment made / proposed to be made to the applicant. The applicant has taxable income in India it is required to file to tax return under the provisions of Section 139.

*XYZ Ltd., 206 Taxman 416 (AAR No.928 dt. 13.03.12)*

1. **Payment to overseas affiliate entities for services of seconded employees, managerial services, does not constitute fees for technical services under the India-Canada and India-UK DTAAs - services beyond threshold - constitution of a service PE - liable to tax and withholding in India**

The applicant is a wholly owned Indian subsidiary of a UK company which is engaged in the business of supplying gas and electricity. The overseas affiliate entities of the applicant in UK and Canada have outsourced their back office support functions to third party vendors in India and the applicant was incorporated as a locally based interface. The overseas affiliate entities assigned individuals to perform the duties at the location of the applicant. The applicant had the right to specify the scope and nature of the secondee’s work, supervise and control their functions and bear their remuneration. In order to ensure that the salaries are received uninterruptedly and in time by the secondees, the overseas entities directly paid their salaries in their overseas bank account and thereafter, claimed as a reimbursement from the applicant on a cost basis. The question before the Authority for Advance Rulings (‘AAR’) was whether the amount paid by the applicant to the overseas entities, equivalent to salary and other benefits paid to the secondees initially by the overseas entities, is taxable in India and subject to withholding tax. The AAR observed that employees continue to be the employees of the overseas entity and the right of the seconded employees to seek their salaries and other emoluments is against the overseas entity. Also, the right of dismissal of the employees vested in the overseas entity. The obligation to pay salary to an employee is different from an obligation undertaken to compensate their employer by tendering an equal amount and hence, the event of paying the salary has already taken place. However, under the India-Canada and India-UK DTAA, fees for included services (‘FIS’) / FTS means payment in consideration of technical or consultancy services and hence, it does not include managerial services. It was however held that rendering of such managerial services for periods exceeding the threshold specified under the DTAA would lead to the constitution of a service PE in India and hence, the income accruing to the overseas entity would be liable to tax and subject to withholding in India.

*Centrica India Offshore Pvt Ltd 19 Taxmann.com 214 (AAR No 856 of 2010 dt. 14.03.12)*

1. **Fees received for IVTC services are chargeable to tax as fees for technical services under section 9(1)(vii) – no “make available” – not Royalty or FTS under respective DTAAs or MFN clause – No TDS but file ROI (S. 90, 139, 195)**

On the same facts and analysis in above case the payments received or receivable by the applicants in connection with IVTC services rendered to Indian customers are chargeable to tax as fees for technical services under section 9(1) (vii) but not under the provisions of the article on “Royalties and fees for technical services” under respective DTAAs or when the said article is read with the most favoured nation clause; since technical services do not “make available” technical knowledge, experience, skill knowledge or process while preparing reports. Since the applicants do not have a tax presence in India , Indian customers are not required to with hold taxes under section 195, however the applicants are bound to file returns in India under section 139.

*XYZ 249 DTR 241/ 206 Taxman 494 (AAR No.* *886 to 911,913 to 924,927,929,930 dt. 19.03.12)*

1. **2(22): Definitions‐Dividend‐Buy back shares‐Capital gains‐ DTAA‐ India‐Mauritius‐ Scheme for buy back shares to avoid tax in India ‐ Profits arising to be treated as deemed dividend and taxable in India ‐ Hence liable to deduct tax at source [S. 46A, 1150, 195, 245R (2) DTAA‐article 10(2) (4) 13(4)]**

The applicant is an Indian company, whose 98.24 % shares were held by group companies in U.S.A, Mauritius and Singapore and 1.76 percent by the general public. The company offered a scheme of buy back on 15.06.10, which was accepted by Mauritian company. Ruling was sought on the question whether the gains as a result of the buy-back would be capital gains u/s 46A in the hands of the Mauritius company and exempt under Article 13 of the India-Mauritius DTAA.

On the facts of the case the Authority held that the applicant had not paid dividend to any of the share holders after April 1, 2003, on which date section 115‐0 of the Act was introduced, when the company was regularly making profits and when dividends were being distributed before the introduction of section 115‐O of the Act. Other major shareholders did not accept the offer of buy‐ back for obvious reasons that it would have been taxable in India as capital gains. Therefore, the proposal of buy‐back was a colourable devise for avoiding tax on distributed profits. The arrangement could only be treated as distribution of profits satisfying the definition of dividend to its share holders. The payments in question would also satisfy the definition of dividend in the article 10(4) of the DTAA between India and Mauritius. Thus the proposed payment would be taxable in India in terms of article 10(2) of the DTAA between India and Mauritius hence the applicant is required to withhold tax on the remittance to the Mauritius company.

*A Mauritius 343 ITR 455 (AAR No. P dt. 22.03.12)*

1. **DTAA India-France - Article 7 &13 - Payment made for advisory services is fees for technical services - tax there on not to exceed 10 percent of the gross amount of fees (S. 9(1)(vii), S.90, 195)**

The applicant, an Indian Company is in the business of manufacturing electrical components. Under the service agreement, Mersen, a French company, has undertaken to provide the applicant with services in the nature of assistance, professional and administrative consultation and training. The issue raised for consideration was whether the payment by the applicant is towards fees for technical services as per art 13(4) of the India‐French DTAA read with the protocol to the said DTAA. If yes what is the rate of tax to be deducted under section 195(1). The Authority for Advance ruling held that advisory services rendered by a French company to the applicant, in the field of management, international relationship, financial control and accounting, purchase and sales, environment and safety and human resources issues are in the nature of consultancy services which are made available to the applicant and therefore, payment made by the applicant to the French company towards such advisory services is fees for technical services in terms of art 13 of India – France DTAA read with Protocol thereto . As regards managerial services rendered under the agreement, as there is specific Article 13 to deal with it, it cannot be said to be covered under Article 7 in terms of the Protocol. The Authority also held that in terms of para 2 of Art 13, tax thereon is not to exceed 10% of the gross amount of fees and consequently TDS under section 195(1) has to be on that basis.

*Mersen India (P) Ltd. 70 DTR 121 / 249 CTR 345 (AAR No. 1074 dt. 16.04.12)*

1. **Information through internet - DTAA India-Singapore - Subscription received by Indian subscriber would be royalty - Income deemed to accrue or arise in India. (S. 9(1)(vi), S. 195, Art 12 )**

The applicant is a Singaporean company engaged in providing social media monitoring services for a company, brand or product. It is a platform for users to hear and engage with their customers’ brand ambassadors etc across the internet. The applicant offered services on charging a subscription. The clients who subscribed can log into its website to search on what is being spoken about various brands and so on. The applicant raised the two questions before the Authority;

(a) Whether the amount received by offering subscription bases services is taxable in India?

(b) Whether tax is required to be deducted from such amount by the subscribers who are resident in India?

The Authority for Advance Rulings held that the applicant being engaged in providing social media monitoring service by generating reports with analytics on the basis of the inputs given by the clients which amounts to business of gathering, collating and making available or imparting information concerning industrial and commercial knowledge , experience and skill and therefore , the subscription received by it form the Indian subscribers would be royalty in terms of clause (iv) of Explanation 2 to section 9(1) (vi) as well as para 12 of the India –Singapore DTAA , consequently tax is required to be deducted in terms of section 195 from the payment made to it by the subscribers who are resident in India.

*Thoughtbuzz (P) Ltd. 250 CTR 1 / 71 DTR 105 (AAR No. 1036 dt. 07.05.12)*

1. **Services for supply, installation and commissioning of gauges – deemed to accrue or arise in India - Providing services or facilities in connection with prospecting for or extraction of mineral oil section 44BB is attracted. [S.9 (1)(i), 44BB]**

The applicant approached the Authority for advance Ruling with the plea that it had entered in to a contract with ONGC for supply of manometer gauges, the title to the goods passed outside India, the payment there for was received outside India and that the transaction of sale was not taxable in India. After examining the contract the Authority held that the contract has to be read as a whole. On the facts the applicant, a foreign company, having entered in to a contract with ONGC for “services for supply, installation and commissioning of 36 manometer gauges” for the purpose of installation of the gauges at certain sites, was to enable ONGC to carry on its operations. It is a composite indivisible contract for supply and erection of manometer gauges at sites within territory of India and, therefore, all payments received by the applicant under the composite contract have arisen to the applicant in India and income is chargeable to tax in India. The applicant is providing services or facilities in connection with prospecting for or extraction of mineral oil hence section 44BB is attracted.

*Roxar Maximum Reservoir Performance WLL 250 CTR 4 / 71 DTR 108 (AAR No. 977 dt. 07.05.12)*

1. **Overhauling separate from original contract - inspection and boroscoping - no make available - furnishing drawings and data of replaced parts - make available technical information - FTS - Taxable (Article 12 India-US DTAA)**

The applicant, a company in USA is a manufacturer of industrial gas turbines. It had supplied turbines to ONGC, installed at Mumbai and also entered into contract for carrying out trouble shooting repair and maintenance, another for repair and overhaul services of the solar turbines. The question was raised taxability in India of the amount received for repair and overhaul services under contract. Under the contract the applicant has the obligation to overhaul the equipment at work site in USA. The inspection and Boroscoping is carried out at site in Mumbai. The applicant has the obligation to furnish detailed drawings and data of replaced parts or upgradation to ONGC.

Consideration for mere inspection and boroscoping of machinery in India, not taxable as 'fees for included services' (FIS) under Indo-US DTAA, as no knowledge 'made available, unless the applicant has PE in India. Consideration for granting non-exclusive, royalty-free license for use of technical information in respect of overhauled machinery, taxable as FIS; Grant of such license enabled comprehension of working of replaced parts / new technologies introduced while overhauling; Part of the consideration taxable in India under Article 12 of Indo-US DTAA

*Solar Turbines International Company 21 Taxmann.com 548 (AAR No. 931 dt. 30.05.12)*

1. **A subsidiary created for Indian business is a PE of the foreign parent**

The applicant, a Singapore company, entered into an agreement with an Indian group subsidiary company for the performance of shipment transport services within & outside India. The agreement was on a principal to principal basis. The question arose as to whether applicant has a PE in India. The Authority held that a “permanent establishment” is something, either independent entity or a subsidiary, which enables a non-resident to carry on a part of its whole business in a particular country. The Aramex group could not have done business in India without a presence in India. As the subsidiary has a fixed place of business in India and the business of the applicant is carried on through it, the definition in Article 5(1) of India-Singapore DTAA is satisfied. The subsidiary is also a PE under Article 5(8) because it habitually secures orders in India wholly for the Aramex group and concludes contracts for the group. The exception in Article 5(10) does not apply because it is not a case of the subsidiary carrying on “its business” in India but it is a case of the entire group carrying on business in India through the subsidiary. Also, the fact that the agreement refers to the subsidiary as “independent” and “non-exclusive” is not relevant because it is a mere camouflage to screen the fact that the subsidiary is really a PE of the applicant’s group in India.

*Aramex International Logistics Private Limited 22 Taxmann.com 74 (AAR No. 1061 dt. 07.06.12)*

1. **Composite contract cannot be split to exempt profits from offshore supply of goods - A joint contract constitutes an AOP despite separate responsibility of parties (Ishikawajima, Hyundai, Vodafone)**

The Applicant, a foreign company, entered into a consortium agreement with three other companies for the submission of a joint bid in response to the Bangalore Metro Rail Corporation Ltd’s (BMRC) tender for “design, manufacture, supply, installation, testing & commissioning of signaling/ train control and communication systems”. The consortium parties agreed to be jointly and severally liable to BMRC for the performance of all obligations under the contract. However, the respective obligations of the parties was split up & each was separately responsible for its own profit/loss. The applicant filed an application for advance ruling and claimed, relying on Ishikawajima–Harima 288 ITR 408 (SC), Hyundai Heavy Industries 291 ITR 482 (SC) & Hyosung Corp 341 ITR 18 (AAR), that the income derived by it from offshore supply of plant and materials was not taxable in India as the title to the goods had passed, and payment was received, outside India. It was also claimed that as each consortium member had separate responsibility and was accountable for its own profit/ loss, the fact that the contract with BMRC was joint, did not make the consortium an “AOP”. The Authority held that though in cases of Ishikawajima, Hyundai & Hyosung, it was held that that a composite contract was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India, this is no longer good law in view of the larger bench decision in Vodafone International Holdings where it was held that the transaction has to be looked at as a whole and not by adopting a dissecting approach.

On facts, the contract entered into with BMRC was a composite one for which a lump sum consideration was paid. Such a contract cannot be split up into separate parts as consisting of independent supply or sale of goods and for installation at the work site, leading to the commissioning and so on (Linde AG AAR 962/2010 & [Roxar Maximum](http://itatonline.org/archives/index.php/in-re-roxar-maximum-reservoir-performance-wll-aar-a-composite-contract-for-installation-commissioning-cannot-be-split-so-as-to-exempt-the-profits-from-offshore-supply-of-goods/) AAR 977/2012 followed).

Further, as the applicant and the others came together for jointly executing the project, they constituted an AOP & were liable to be taxed as such. The fact that between themselves, the members of the Consortium divide the performance of the obligation does not affect the nature and content of the obligation undertaken by them jointly. Thus claim of applicant was rejected and it was held that the income from it has to be taxed as a whole and the income received by the Consortium Members in terms of the contract, is taxable in India under Income Tax Act and under India-France DTAA.

*Alstom Transport SA (AAR No. 958 dt. 07.06.12)*