
Royalty & FTS – Recent Developments & Controversies

CA. Shabbir Motorwala

CTC Seminar

TDS u/s 195 on Foreign Remittances including procedural aspects

3 August 2019, Mumbai

Contents

Particulars	Slides Nos.
R-FTS – Broad Framework, meaning and ambit	1- 7
Computer software	8
Online Database / Journals	9
Web Hosting	10
Online transactions / platforms	11 -12
Bandwidth charges /other items	13
Information concerning Industrial, Commercial and Scientific experience	14
Design and Drawings	15
Make Available	16-17
Other business services / miscellaneous issues	18-19
Reimbursements	20
Commission	21
Secondment	22
Independent Personal Services	23
Things to watch out!	24
Q & A	

R-FTS: Broad framework under the Act

- **S. 9 – R/ FTS is income deemed to accrue or**
 - **Nature**
 - Gross basis (Non Permanent Establishment [‘PE’] situation) both under the Act (S.115A) & DTAA
 - Net basis (if attributable / effectively connected to NR’s PE in India) under the Act (S. 44DA) & DTAA
 - **of taxation of R/ FTS arise in India**
 - R / FTS taxation provisions introduced from w.e.f. 1 June 1976 i.e. AY 1977-78
 - Royalty - Section 9(1)(vi) read with Explanations thereto
 - FTS - Section 9(1)(vii) read with Explanations thereto
 - R / FTS deemed to accrue or arise in India if payable by:
 - Government
 - Residents except when payment is for business / profession / source outside India
 - Non-residents where payment relates to business / profession / source in India
- Note: Source = Not the payer of income but where activities / business carried out by Indian Entity (Havells - Del HC) but there are contrary decisions as well
- **S. 90 (2):** Provisions of the Act prevail over provisions of DTAA to the extent they are more beneficial
 - **S. 90(4):** TRC from Tax Resident State to avail benefits of DTAA
 - **S. 94A:** DTAA benefits denied to NR of Notified Jurisdictions (lack of effective exchange of information)
 - **S. 206AA** – Higher initial withholding tax in absence of PAN/ TRC (TRC introduced vide Rule 37BC w.e.f. 26 June 2016) - [Del HC in Dansico / Del AT in Emerson International and Pun AT in Serum Institute held that DTAA's override S.206AA]

Meaning of Royalty under ITA

- **Section 9(1)(vi)** - Royalty payable in respect of any right, property or information used or services for business / profession as stipulated
- Explanation 2 to Section 9(1)(vi): Royalty means consideration for (includes lump sum consideration but excludes income chargeable under the head 'Capital Gains') for:
 - a) Use of or Transfer of all or any rights in - including granting of any license:
 - patent, invention, model, design, secret formula or process or trademark or similar property
 - copyright, literary, artistic or scientific work including films or video tapes but excludes consideration for sale, distribution and exhibition of cinematographic films

- **Knowledge of IPR law very relevant**
- **Underlined text indicates overlap as FTS**

- b) Imparting of any Information concerning:
 - working of or use of patent, model, design, secret formula, process, trademark or similar property
 - **technical, industrial, commercial or scientific knowledge, experience or skill**
- c) Use or right to use:
 - **industrial, commercial or scientific equipment** (excluding those covered under Section 44BB) [Introduced from AY 2002-03]
- d) **Rendering of any services in connection with activities constituting Royalty**

Explanation 3 to Section 9(1)(vi): Computer software means any computer program recorded on any disc, tape, perforated media or other information storage device and includes any such programme or customized electronic data [from AY 2001-02]

Widening ambit of Royalty-Computer Software

The Finance Act 2012 - Expansion of Royalty definition retrospectively w.e.f. 1 June 1976

Explanation 4 added to s. 9(1)(vi)

- *For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a **computer software** (including granting of a license) irrespective of the medium through which such right is transferred*

As per Memorandum to Finance Bill

- *Some judicial decisions have interpreted this definition in a manner which has raised doubts as to whether consideration for use of computer software is royalty or not **Considering the conflicting decisions of various courts in respect of income in the nature of royalty and to restate the legislative intent, it is further proposed to amend the Income-tax Act***

- **India in its comment on the UN MC 2011 has recommended “The use of and right to use computer software irrespective of the medium through which such right is transferred is to be construed as ‘Royalty’ (Article 12)”**
- **As an observer member, India has reserved its positions on several paragraph of the OECD MC – cases of reservations which extend to software, ICS experience, undersea cables, payments for roaming calls, spectrum allocation, etc.**

Widening ambit of Royalty – Use / Possession and Process

The Finance Act 2012 - Expansion of Royalty definition retrospectively w.e.f. AY 1977-78

- **Explanation 5 added to s. 9(1)(vi)**

- *For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, **property** or information, **whether or not***

- (a) the possession or control of such right, property or information is with the payer;*

- (b) such right, property or information is used directly by the payer;*

- (c) the location of such right, property or information is in India*

- **Use of Process : Explanation 6 added to s. 9(1)(vi)**

- *For the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret*

- **Inserted primarily to overturn Delhi High Court’s decision in the Asia Sat case**

- **The term Transmission not defined**

Meaning of FTS under ITA

- Explanation 2 to Section 9(1)(vii). FTS means any consideration (includes lump sum consideration) for rendering any:

- Managerial
- Technical
- Consultancy Services

- Includes

- Provision of services of technical / other personnel

- Excludes:

- Construction; Assembly; Mining; Any like project; Income chargeable as 'Salary

- The SC in Ishikawajima (2007) 288 ITR 408(SC) held that offshore services not only must be utilized in India but also be rendered in India as part of its business or have sufficient territorial nexus - live link with India to become taxable

- The FA 2007 inserted an Explanation to Section 9 w.r.e.f. 1 June 1976 to indicate that Interest, Royalty and FTS would be included in total income of NR irrespective of their place of resident or place of business or business connection in India or rendering of services in India (introduced subsequently by FA 2010)

- Decisions under 194J also relevant

- SC in R. Dalmia (1977) – Meaning of Managerial services

- SC in Bharti Cellular (2010) – Meaning of Technical Services – Human element critical as the term technical is between consultancy and managerial service

- SC in Kotak Securities (2016) - Not a Technical services unless specifically sought by users (tailor made) + Human Element

- SC in GVK Industries (2015) – Meaning of Consultancy Services

- SC in A. P. Moller Maersk (2017) – Global facility to all Agents on cost allocation and reimbursement basis is not a technical service

Royalty – Computer Software / Software

Software as Copyrighted Article (shrink wrap software)

Not Royalty as payment is for acquiring a copyrighted article and not for use of copyright or transfer of right to use of copyright [Access codes are generally not granted and utilizing software only for self- business purposes:

- Sandvik Tooling Sverige AB - Pun AT - Mar 2019
- ONGC – Del AT - Nov 2018
- Reliance General Insurance Co. Ltd. - Mum AT - Aug 2018
- Ciena India – Jun 2018 – Del AT
- Reliance Communication Ltd. - Mum AT - Feb 2018

Sale of Software

Not Royalty as payment is not for use of copyright or transfer of right to use copyright and various other rationale:

- Micro Focus Ltd. - Del AT - May 2018
- Intec Billing Ireland – Mum AT – Jan 2018
- Qualcomm Incorporated – Del AT – Apr 2018
- Landmarks Graphics Corp. - Del AT - Jul 2017
- National Stock Exchange of India Ltd. – Mum AT – May 2017
- Dassault Systemes - Mum AT - Feb 2017

Software embedded in hardware

Not Royalty as software embedded in equipment enables use of the hardware sold, there is no independent right to use the software and software cannot operate without hardware :

- Agfa Healthcare N.V. – Mum AT – Aug 2018
- Nortel Networks Singapore (P.) Ltd. - Del AT - Apr 2018
- HITT Holland Institute of Traffic Technology B.V. - Kol. AT – Feb 2017
- ZTE Corporation - Del HC - Jan 2017
- TTI Team Telecom International Ltd. – Mum AT - Nov 2016

Reliance Infocomm Ltd – Feb 19 – Bom HC: Amendments in the Act cannot be read into the DTAAs

Mar 2017

- First Advantage (P.) Ltd. - Mum

Royalty - Online Journal / Database

- **American Chemical Society – Mum AT – April 19 [Journal subscription]**

- Journal subscription is not Royalty

as does not provide any information arising from assessee's previous experience which lies in the creation of / maintaining such information online. By granting access to the journals, the assessee neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them.

- Journal subscription results in Customers getting only right to search, view and print and no other rights including in contents or IPRs. The customers only acquire copyrighted article which transaction is akin to purchase of book. The customers have no control or dominion over the servers in any way. Thus, there is no Royalty.

- **Elsevier Information Systems GmbH – Mum AT – April 19**

- Online database subscription is not Royalty

as it does not result in granting any right to use copyright in the database or any other reproduction or sale or licensing rights to users and also there is no imparting of any information of ICS experience or use of any ICS equipment.

- The payment is for use of a copyright article rather than use of any copyright.

- There is no FTS as people who prepare database do not interact with the subscribers and so human involvement is absent. Further, there is no customized answers provided in the database. Subscriber may not access database in spite of payment.

- **Mc Kinsey Knowledge Centre India P. Ltd. – Del AT – May 17**

- Payment for database of Thomson is not Royalty as it was for compilation of general information, relating to share market which was neither relating to Thomson's own experience nor was it a secret or non-divulged information.

- The payer had not received any knowledge as to how databases were maintained nor did it have any license for commercial exploitation of copyright with regard to database maintained.

- The payment made by assessee for use of 'copyrighted material' rather than for use of copyright falling within the definition of term 'royalty', under section 9(1)(vi) as well as DTAA.

Royalty - Web-hosting

▪ **Rackspace USA – Mum AT – May 2019**

- Web hosting charges paid to US company for using its servers is a standard facility and not Royalty since the Assessee did not possess or have any control over server or servers space being deployed while providing e-services.
- The term 'use' or 'right to use' for the purpose of the tax treaty entails that the payer has a possession/ control over the property and/ or the said property is at its disposal.
- No change in Treaty even if there is a change in the Act.

▪ **EPRSS Prepaid Recharge Services India (P.) Ltd. - Pun AT – Oct 2018**

- Web hosting charges paid to US based company for using its servers not in the nature of Royalty since assessee did not possess or have any control over server or servers space being deployed by said company while providing e-services
- Explanation 5 of S. 9(1)(vi) cannot be read into the Treaty and no such situation is envisaged under Treaty.

▪ **Godaddy.com LLC – Del AT – Jul 2018 (Against the taxpayers and requires reconsideration)**

- US Company but not Tax Resident of USA therefore decision solely under the Act.
- Offered web hosting service income to tax in India as Royalty but claimed domain name registration charges as non-taxable.
- Domain Name Registration is a tool which equips the customer with the right to use the server of Godaddy and web hosting charges are ancillary and subsidiary to domain registration.
- SC decision in Satyam Infoway Ltd (AIR 2004 SC 3540) relied to conclude that internet domain names are subject to same norms as IPRs.
- Domain registration is rendering of services in connection with the use of an intangible property which is similar to trademark and the underlying charges are Royalty

[Whether the decision could have been different had it been under the DTAA?]

Royalty - Online transaction activities

- **Reuters Transaction Services Ltd - Mum AT - Aug 2018**

- The payments by Indian clients / subscribers for foreign exchange deal matching software / platform constitute use and right to use of such equipment and information and is in nature of Royalty

- **MasterCard Asia Pacific Pte. Ltd. - AAR – Jun 2018**

- Transaction processing fees paid by Banks to MCA carried a disguised charge for use of trademark / logo / brand whose use is a dominant purpose for sales / marketing by Banks and there is no incidental, limited or restricted use and influenced further by various other factors.
- MasterCard Interface Processor (MIP) along with MasterCard network and processing technology constitute equipment/process royalty.
- Explanation 5 of S. 9(1)(vi) requires no control and there is no test of control under the Treaty.
- Transaction processing uses several patented and secret technology and hence part of the payment is for secret process and therefore Royalty.
- Services held not to be FTS under India Singapore DTAA as make available condition not satisfied.

- **Google India – Bang AT – May 2018**

- Payments by Google India to Google Ireland for purchasing advertisement space (for resale to distributors in India) under the Google Adword Distribution Agreement and Services Agreement constitute Royalty as it involved licenced to use the trade marks, IPRs, brand features, derivative workss

All the above decisions need reconsideration

Digital Services – Online Platform

- **Akamai Technologies Inc., In Re – Delhi AAR – May 2018 (Content delivery solutions)**
 - Solutions provided through digital platform without human intervention to enable faster content delivery to the end user are not in the nature of FTS as
 - They do not provide any technological knowledge, skill, etc.
 - Solutions provided are neither specialized nor exclusive and do not cater to individual requirements of the customer.
 - The Solutions are offered through its platform and they remain the same for all customers who avail the facility, irrespective of the business/website content.
 - They cannot be termed as specialized, exclusive and individual requirement of the customer so as to qualify as 'technical services'.
 - Use of equipment / process to provide Digital Solutions does not result in grant of any right to use equipment, thus not Royalty.

R-FTS - Bandwidth / Channel Distribution /Production

- **Reliance Infocomm Ltd – Feb 19 – Mum HC & Reliance Jio Infocomm Ltd. – Mar 19 – Mum AT [Bandwidth services]**
 - Payment for Bandwidth services is not in the nature of Royalty.
 - Amendment in the Act do not override DTAA provisions.
 - Availing bandwidth services is a standard telecom services and not for any process (secret or not) or use of any ICS equipment absence any type of control / use by the payer.
- **MSM Satellite (Singapore) Pte. Ltd. – Bom HC – Apr 19 [Distribution rights]**
 - Grant of non-exclusive distribution rights of the channels is a commercial right and not same any right to use or exploit any copyright. The distributor is not concerned with the programs broadcasted by the NR company are copyrighted or not.
- **Geo Connect Ltd. – Del AT – Jan 2017 (India-USA DTAA)**
 - Payment of International Private Leased Circuit (IPLC) charges for use of dedicated private bandwidth for call connectivity and transmission not taxable as Royalty as it is not a payment for use of equipment or process but for the transmission of data.
 - The payment is also not FTS in absence of any human intervention (except for setting up or faults or enhancements) and also make available condition not satisfied.
- **Madhyanchal Vidyut – All HC – Jan 2017 (Section 194J)**
 - Payment for transmission of electricity does not constitute payment for technical services as it not exclusive services and grid was common and transmission lines used by several distributors

Royalty - Information concerning ICS experience

- **Marck Biosciences Ltd. – Ahd AT – Mar 2017 [Professional services]**

- Payment to a US company as professional fee for global bio-pharmaceutical strategic counselling and advisory services is not Royalty under article 12(3)(a) of DTAA between India and USA as:
 - Payment being was for rendition of services
 - The payment was not for right to use any information concerning industrial, commercial or scientific experience

- **ABB FZ-LLC – Bang AT – Jun 2017**

- Regional service activities to group companies is Royalty as information concerning ICS experience as:
 - Access given to various secret, confidential, IPRs / other information acquired from past experience.
 - Dominant character was for sharing secret, confidential and IPRs information
 - Information provided was in nature of know-how contract commercial / industrial purposes and further this special knowledge and experience remains unrevealed to the public.

In future, tax litigation on this aspect is going to be the most prominent.....

R-FTS - Designs and Drawings, etc

• **Creative Infocity Ltd. – Guj HC - 2017**

- Payment for outright sale / towards supply of designs and drawing not Royalty taxable under section 9 and recourse to tax treaty was also not warranted.
- Rendering of marketing services on reimbursement basis fully support with evidences and certificates not taxable as neither Royalty nor FTS and was simple reimbursement of expenses.

• **TVS Motors – Mad HC - 2018**

- Payment for designing 3-valve cylinder head in a combustion engine with handing of all designs was for service agreement and not Royalty merely because know-how / patent and ideas remain property of Service Provider (Austrian Company).

• **Outotec (Finland) Oy – Kol AT – May 2019 (India-Finland DTAA)**

- Designs & drawings sold for setting up plants and not commercial exploitation is use of copyrighted article and not use of a copyright and thus business income and not Royalty.
- Testing Services – Covered separately in FTS slides

• **Tata Steel Limited – Mum AT – Mar 2018**

- Designs and drawings inextricably linked to operation and maintenance of plant without which the plant could not be installed / commissioned constitute cost of plant and not FTS as were not exploited for business purposes.

• **Pidilite Industries - Mum AT – Jan 18**

- Payment for outright purchase of copyrights and technical know-how along with title and interest did not constitute royalty within meaning of 'royalty' in section 9(1)(vii) and not liable for TDS u/s. 194J

FTS - Make Available (1 of 2)

- **ONGC– Delhi AT – Jan 2019 (Advise, support / investigation services)(India-NL DTAA)**

- Accident Investigation services – not FTS as make available condition not satisfied as recipient of services could not independently undertake such endeavor in future.

- **Buro Happold Ltd. – Mum AT – Feb 19 (India- UK DTAA)**

- Applying 'ejusdem generis, the words 'or consists of the development and transfer of a technical plan or technical design' takes colour from 'make available technical knowledge, experience, skill, know-how or processes' and therefore supply of designs / drawings / plans which cannot be used for any other project do not satisfy make available condition and not taxable as FTS.

- **Bio Tech Vision Care (P.) Ltd.- Ahd AT – Apr 2018 [India-UK DTAA)**

- MoU to the India-US DTAA applied to interpret India-UK DTAA and no FTS as- (i) “Make Available” condition not satisfied simply because the recipient learns something due to technical / consultancy services; and (ii) There is no transfer of technology as service recipient is not enable to provide the same service without recourse to the service provider.

- **Petronet LNG Ltd. – Del AT – Apr 2018 [India-USA DTAA]**

- Payment for review / recommendation of alternative vaporization process for LNG terminal / generating power through utilization of LNG were not FIS as make available condition not satisfied – the user of services was not able to

- **Fractal Analytics Pvt. Ltd. – Mum AT – Mar 2018 [India-Singapore DTAA]**

- Marketing and Business development services are not in the nature of ‘managerial’, technical or consultancy services under S. 9(1)(vii) and they also do not satisfy make available criteria under DTAA.

- **Soregam SA – Del AT – Nov 2018 [India-Belgium DTAA / MFN using India-Portugal DTAA]**

- Routine IT services did not satisfy the make available under the DTAA.

FTS - Make Available (2 of 2)

- **Renaissance Services BV – Mum AT – Jun 2018 (Training services) (India-Netherlands DTAA)**

- Training services to Indian Hotels did not satisfy make available criteria as they only enable recipient to perform their work better and they were also not incidental / ancillary to Brand / Intangibles as service provider did not receive any Royalty from the Payer
- CRS, Property Management System and Other Systems provided to the Indian Hotels are common facilities in the ordinary course of business provided to the members of the Marriott chain of hotels across the world and were not tailor made services to suit specific requirements and could not be construed as 'technical services'.

- **Dimension Data Asia Pacific Pte. Ltd. – Mum AT – Oct 2018 (India-Singapore DTAA) (Against)**

- Services of assistance / guidance in setting up internet data centers ('IDC') enabled carrying out the setting up of the IDCs by the Indian Company on its own in future - Make available condition satisfied and hence taxable as FTS.

- **J.C. Bamford Excavators Ltd. – Del AT – Jul 2018 (India-UK DTAA)**

- Consideration received for providing SAP / CAD software related support taxable as FTS, being ancillary and subsidiary to the enjoyment of the right / property for which royalty was received, and therefore make available limb not applicable.

- **Spencer Stuart International BV – Mum AT – Jun 2018 (India-Netherlands DTAA)**

- Executive Search Services were not FTS as they were not ancillary or subsidiary and independent to the agreement (as held in APA) for use of license whose income was taxable as Royalty + 'make available; conditions also not satisfied.

Business / Excluded Services

- **Endemol South Africa (Proprietary) Ltd. - Mum AT - Oct 2018 [Coordination / Facilitation services]**

- The coordination / facilitation services rendered by South African Company viz., arranging for locational crew, transportation, paper work for various stunts to be performed and other requirements for setting up and filming series etc., were in nature of Line Production Services and could not be termed as technical, managerial or consultancy services constituting FTS.
- As work was commissioned by Indian company, it was the owner of the copyrights under the IPR law and therefore there was no assignment of copyright pursuant to the said work and no Royalty.

- **Ershisanye Construction Group India (P.) Ltd. – Kolkata AT – Apr 17 (India-China DTAA)**

- Followed Chen AT – Cosmic Global: Training services to teach English language to Chinese engineers visiting India for various purpose is not 'technical' service as the translator is using his proficiency in two languages, not explaining meaning of the text and is not having knowledge of applied science or craft of techniques in respect of text which has to be translated.
- Did not give any ruling on whether FTS was required to be performed in India.
- Payment to Law Firm - IPS Article being specific Article would override Article on FTS

- **Reebok India Company – Del AT – Mar 2017**

- Payment made by assessee to ICC as 'Rights fee' was exclusively for use of Marks of ICC for purposes of promotion / advertisements and not for manufacture and sale of licensed products and not **Royalty**

FTS - Miscellaneous

- **Outotec (Finland) Oy – Kolkata AT – May 2019 (India-Finland DTAA)**

- Testing Services - Dual accrual conditions read into the FTS article – one where the payer is a resident of a contracting state and second case of services rendered in the contracting state. Thus, FTS paid by Indian payer taxable even if rendered outside India.

[Note: compare with India-China and India-Israel DTAA where services are required to be performed in source state for taxability]

- **Dorf Ketal Chemicals - Mum AT - Mar 2018**

- US Company was Resident of India due to Control / Management in India and had made payment to another US company for patent / technology towards product it contract manufactured in India by its Indian Parent for exports to USA.
- Royalty is deemed to accrue or arise in India due to business connection through Indian Manufacturing and is not for business in USA

- **Production Testing Services Inc. – Mum AT – Oct 2017**

- Following Oil & Natural Gas Corpn. Ltd [2015] 376 ITR 306 (SC), the activities of prospecting for extraction or production of mineral oil are not FTS due to Explanation 2 of S. 9(1)(vii) and stand covered by S. 44BB

Reimbursements

- **A.P. Moller Maersk A S – SC – Feb 2017 (India-Denmark DTAA)**
 - Global telecommunication facility provided by shipping company to all its Agents on cost allocation and reimbursement basis is a common facility and an integral part of business allowing agents to discharge their role more effectively. It is in the nature of reimbursement of expenses (without any profit element) and therefore is not income chargeable to tax. It is also not a technical service.

- **Organizing Committee Hero Honda FIH World CUP- SC - Nov 2018**
 - Payments to Federation of International Hockey for acting as a facilitator for arranging provisional services connected with event of Hockey World Cup such as travel, hospitality and provision of food etc., represented reimbursement of expenses not liable to tax.
 - The fact that there was no privity of contract between the payer and service provider considered relevant for reimbursement.

- **Hospira Healthcare India (P.) Ltd- Chn AT - Mar 2018**
 - Amounts billed specifically for reimbursement of expenditure such as room rent, air fare, car rental in the course of rendering technical services is in nature of reimbursement and not FTS. If there was a single bill for the fees and reimbursement then obligation to deduct tax on entire sum.

- **T-3 Energy Services India (P.) Ltd- Pun AT- Feb 2018**
 - The cost allocation without any profit element for providing bandwidth services/ lease line charges is in the nature of reimbursement and there was no liability to withhold tax. The payment is also not Royalty as amendments in the Act cannot be read into the Treaty. **[See decision in C. U. Inspections (I) (P.) Ltd. – Mum AT – Mar 2013- Availing third party services and routing payment through holding company then for TDS applicable as if payment made to independent party directly]**

Commission

▪ **IndusInd Bank – Bom HC – April 19**

- The payment made to UAE Bank for services rendered in relation to issuance of GDRs not FTS since purely commercial in nature and arose as well as consumed outside India.

▪ **Evolv Clothing Co. (P.) Ltd. – Mad HC – Jun 2018**

- The provision market survey services by foreign agents is incidental to function of commission agent of procuring orders and cannot be regarded as FTS

▪ **Hero Motocorp Ltd. – Del HC – May 2017**

- Activities of selling motor vehicles using technology does not amount to rendering of any managerial, technical or consultancy services and export commission is not R-FTS.

▪ **Credit Lyonnais – Bombay HC – Feb 2016**

- Payments to non-resident sub-arrangers for mobilizing funds outside India is neither managerial, technical or consultancy services and therefore not FTS

▪ **Hical Infra Private Limited - Bang AT – Apr 2019**

- The commission agent activities were FTS as it involved technical expertise of checking the quality of goods and Assessee could not substantiate that this work could be done by persons who do not have the technical expertise

▪ **Shri Jogendra L. Bhati – Ahd AT – Apr 2019**

- Agent's activities in the nature of liaising with local authorities, registration of products, export of goods, clearance of goods from customs, storage, warehousing and physical delivery of goods do not amount to managerial, technical or consultancy services and hence not FTS. However, market research and market survey for new pharma products is FTS.

▪ **Welspun Corporation Ltd – Ahd AT - Jan 2017**

- Export commission not FTS merely because product sold was highly technical as it does not change character of selling activity of agents and familiarity of agents with technical details of products was only towards end of selling.

Secondments

- **Reimbursement of salary / other expenses of seconded employees to overseas entities – not FTS :**

- Secondees under the Control / Command / Supervision of Indian entity who is responsible for their risks / reward / outcome
- Obligation of Indian Entity to pay salary to the secondees
- Payment to secondees subject to withholding under Section 192 as Salaries
- Terms of appointment between the Indian entity and seconded / secondment agreement
- Employer – employee relationship between the Indian entity and seconded (Right to appoint / terminate the secondment, etc.); Real and economic employer instead of legal employer
- No mark up / profit element on reimbursements, if any, to Foreign Entity

- **Favorable :**

- Faurecia Automotive – Pune AT – Jul 2019
- AT & T Communication Services (India) (P.) Ltd. – Delhi AT – October 2018
- Morgan Stanley Asia (Singapore) Pte. Ltd. – Mum AT – Jul 2018
- Burt Hill Design (P.) Ltd. – Ahd AT – Mar 2017
- DLF Projects Ltd - Del AT – Nov 18 (Only mark-up on Secondment subject to TDS u/s 195 but not salary reimbursements)

- **Against:**

- Flughafen Zurich, AG – Bang AT – Mar 2018
- Intel Corporation – Bang AT – Sept 2016
- Food World Supermarkets – Bang AT – Oct 2015
- Centrica India Offshore P. Ltd. – Delhi HC – April 2014 (SLP dismissed by SC but is not in the nature of law of land as it does not amount to affirmation of HC decision on merits)

Independent Personal Services (IPS)

- **Cadila Healthcare Ltd- Supreme Court – Feb 2019**

- Payments of consultancy fees to professional law firms who did not have any fixed base available in India is not taxable in India – SLP dismissed basis that it was question of fact and not question of law

- **Grant Thornton – Del AT – Jan 2019**

- Income derived by an individual or a partnership firm by rendering professional services is covered under IPS Article 15 of various DTAA's and hence taxable in country of its residence.
- Also, no technical knowledge has been made available to the Assessee in the process of rendering services and hence cannot be held as FTS.

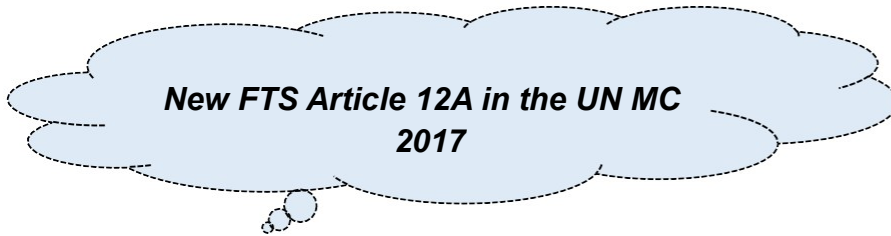
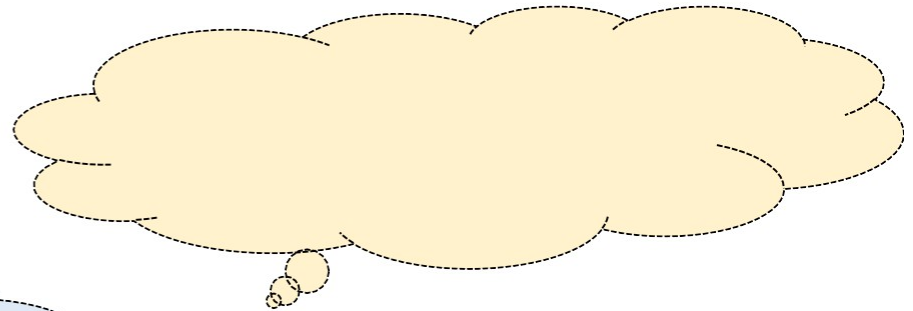
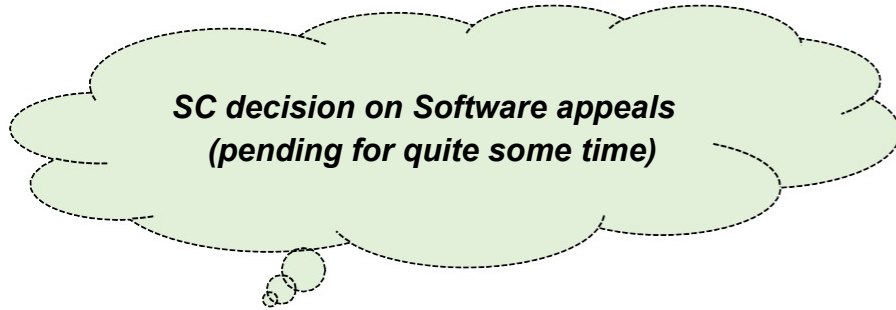
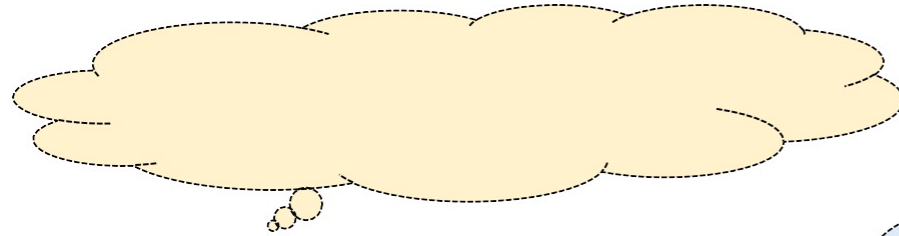
- **Hydrosult Inc. – Ahd AT – Jan 2019 / Wifi Networks P Ltd. – Bang AT – Apr 2019**

- Services rendered by overseas technical professionals covered under Article 14 – IPS and not Article 12
 - FTS and hence taxable only in the state of residence.

- **Poddar Pigments Ltd – Del AT - August 2018**

- Independent scientific services rendered by German and Swiss nationals were IPS and not taxable in India as they did not have any fixed base in India or they had not stayed for 120 days or more or 183 days or more in India respectively while providing the services.

R-FTS - Things to Watch Out!



Q & A



Questions



Answers

**THANK YOU ALL FOR YOUR
ATTENTION !**

CA Shabbir Motorwala

The views in this presentation are personal views of the Presenter. Further, the information contained is of a general nature for explaining the topics and issues. The presentation is not intended to serve as an advice or address the circumstances of any particular individual or entity. Although, the endeavor is to provide accurate and timely information, there can be no guarantee that there is an absence of any compilation error or such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such / this information without appropriate professional advice which is possible only after a thorough examination of facts / particular situation.