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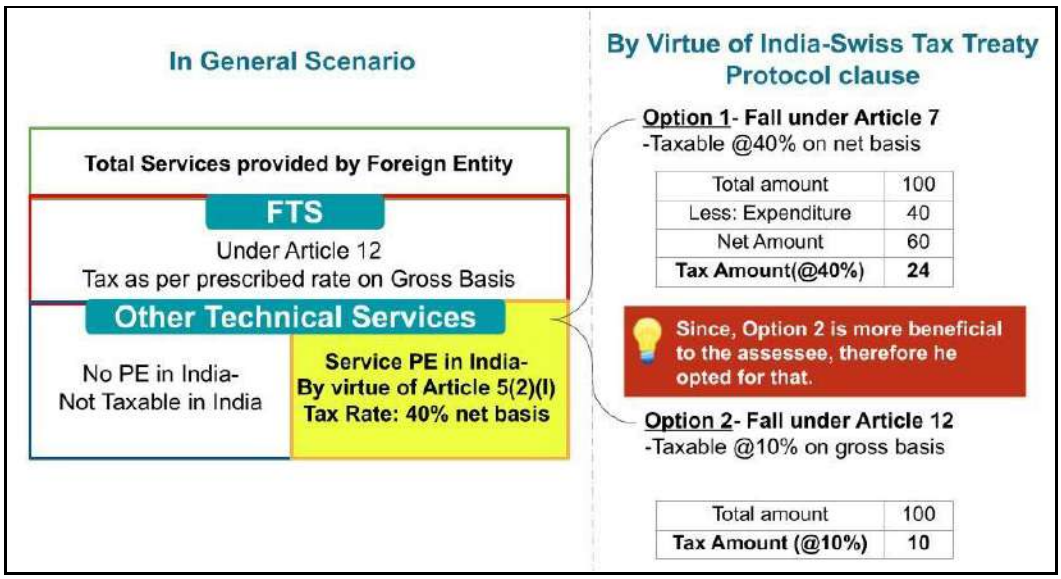
AGT International GmBH vs DCIT[1]

Article 12 - Fees for technical service doesn't necessarily include all types of technical services



Facts:

- The taxpayer, a resident of Switzerland, receives payment for services provided to an Indian company. The Indian company deducted tax at 42.024% on the entire amount. Whereas the non-resident service provider offered the same to tax at 10% on the gross basis under Article 12(2) of the tax treaty.

Assessee's contention:

- The taxpayer had relied on the Protocol to the tax treaty wherein **on request of the enterprise** the services falling under 5(2)(l) could be taxed as business income under Article 7 or at the rate provided under Article 12(2).

Revenue's contention:

- The Assessing Officer (AO) observed that the services rendered by the taxpayer did not satisfy the criteria under Article 12(4) as the role of the taxpayer was only of buying and selling services.

[1] **[2020] 114 taxmann.com 51 (Mum.)**

- Thus, even when Tax was deducted at 42.024% assessee claimed the benefit of protocol and paid tax at 10%.

- Further, the services rendered by the assessee in India did not amount to fees for technical services as defined in Article 12 and that a Service PE was established in India by virtue of Article 5(2)(l). The A.O. computed the income by allowing expenditure @ 40% on an estimated basis and taxed the remaining 60% amount at the normal income tax rates applicable to foreign companies (40% +applicable surcharge and cess).

Ruling:

- The Tribunal referred to the Protocol clause 2, of the India-Swiss Treaty which specifies that if any service is covered by article 5(2)(l), then the assessee has a choice to be taxed either rate prescribe under article 7 (Net basis) or on request under article 12(2) (Gross basis).

- A combined reading of Article 5(2)(l) along with the related Protocol clause says that on Service PE being triggered on account of rendition of services by a Swiss entity in India or vice versa, it can never make the assessee worse off so far as the tax liability in source jurisdiction is concerned unless the assessee has a lower tax on PE profits on a net basis under article 7 vis-à-vis taxability of FTS on a gross basis under article 12(2), the PE trigger does not trigger the higher tax.

Our comments:

- It is important to check the protocol for any treaty for amendments/additional provisions if any. This could substantially change the taxability of transactions.

- Technical services as per Article 12 are limited to certain kinds of technical services which are managerial and consulting in nature. There could be other technical services also.

- When the protocol itself mentions that it applies to all kinds of technical services (except technical as services as per Article 12), the benefit of the option given to assessee needs to be given.

Section	**Article 5(2)(l), 7, 12(2), Protocol to DTAA**
DTAA/Country	**India-Swiss**
Court	**Mumbai Tribunal**
Date of decision	**31.01.2020**

Note: Case law name in Red- in favour of the Revenue, Green- In favour of the Assessee, Orange = Partial.

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Thank you