

SATURDAY INTERNATIONAL TAX GYAN !!! **#taxmadeeasy**

Deputy Director of Income Tax. Vs. Michelin ROH Co. Ltd.¹

In case of absence of FTS clause in DTAA, income earned by providing engineering services in India would fall under business income and would be taxed in accordance with article 7 of DTAA

Facts:

- Assessee is a foreign company incorporated in Thailand.
- Assessee is providing number of services, such as business planning and coordination, engineering services, product research and development etc. to its Indian subsidiary.
- Assessee did not offer any tax on the Income earned from the services provided.

Assessee's contention:

- The assessee stated that the services provided by it to its Indian subsidiary is in the Nature of Business Income.
- The financial statement of the assessee also shows that its income is in fact totally on account of general, administrative, business planning and coordination services.
- Thus, In the absence of FTS clause in DTAA between India-Thailand the income would be considered as Business Income as per Article 7 and in absence of PE in India, no taxability would arise in India.

Revenue's contention:

- The Assessing Officer contended that as there is no article for taxability of FTS under the India Thailand Treaty, the same are required to be included under article 22 of the Treaty under which other income is taxable.
- Hence, assessee is liable to pay tax under Article 22 of the treaty.

¹ [2022] 138 taxmann.com 497 (Delhi - Trib.)



Ruling:

- Let's first understand the **Article 7 and Article 22 of India-Thailand DTAA:**

Article 7:

“The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

As stated above, Business Income will be taxable in the other state (i.e., India in our case) only when there is Permanent establishment in India and income is attributable to such PE.

Article 22:

“Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.”

As stated above, Income will be taxable under Article 22 only when it is not dealt with any other article of DTAA.

- It was held that the Income earned by the assessee is in the nature of business income which will be covered under Article 7 of India – Thailand DTAA in absence of FTS clause in DTAA and not charge under Other Income clause under Article 22. Thus, the income is not taxable in India in absence of Permanent establishment in india.

Our comments:

- If we read Article 22 of DTAA in the first clause it states that other income **shall be chargeable to tax only in the resident state** however in clause 3 it mentions that such income arising in other state may be taxed in other state also and hence clause no. 3 is giving secondary power to other state also to withhold tax.
- Here is the list of countries in which there is no clause of FTS in DTAA with India :

S.No.	Name of country	S.No.	Name of country
1	Australia	11	Phillipines
2	Bangladesh	12	Saudi arabia
3	Brazil	13	Sri lanka
4	Greece	14	Syria
5	Indonesia	15	Tajikistan
6	Kenya	16	Tanzania
7	Libyan Arab Jamahiriya	17	Thailand
8	Mauritius	18	U.A.E
9	Myanmar	19	United Arab Republic (Egypt)
10	Nepal	20	Zambia

Section	Article 7 and 22 of DTAA
DTAA/Country	India- Thailand
Court	Delhi Tribunal
Date of Decision	27.05.2022

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

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