

New series – International Business Transactions!!

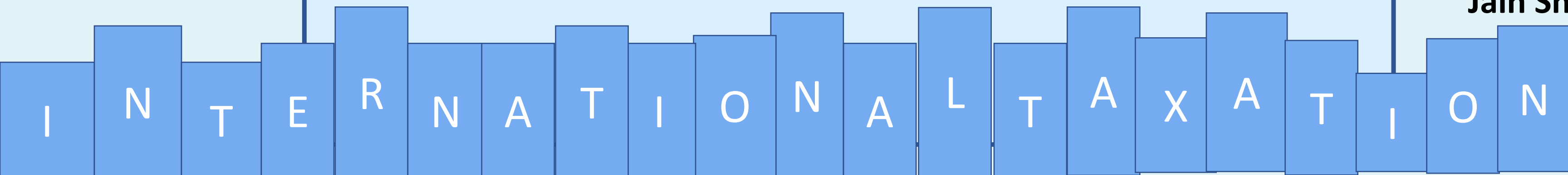
PART-I

#Nature of transaction

Fees paid to non-resident for rendering services related to Project Review, Feasibility Study and Report

06.01.2024

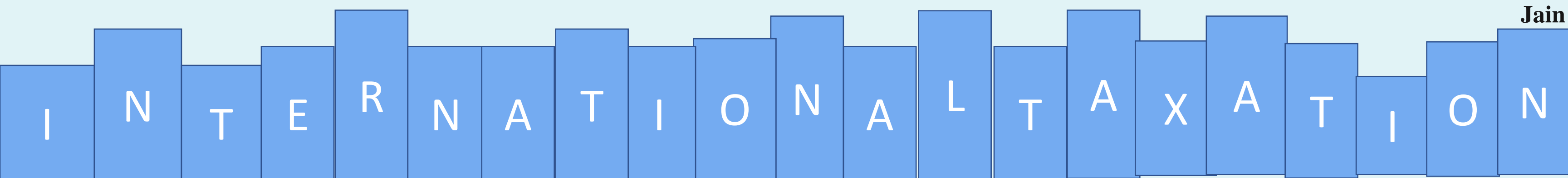
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Concepts

Project Review, Feasibility Study & Report:

- Project Feasibility Study Report consists an assessment of the practicality of a proposed project plan or method.
- Technical advisor or consultant, be it resident or non-resident studies and prepares report on the basis of its study where the risks or issues are identified, address the same and suggest alternative solutions, so that the senior lenders and the project developers could implement the best solution possible.
- Testing the feasibility of a project and on the basis of research and findings, preparing the reports is in itself a very technical job and requires a domain expertise.
- Such reports prepared are generally used to get the funds from the foreign investors and financial institutions, before initiating a project. Hence study or testing the feasibility of a project can be performed by few of such people who possess the technical or special skills or knowledge.



Determining the taxability as per the act

- **Income Tax Act: Explanation 2 to section 9(1)(vii)** of the act defines the scope of FTS, which includes the **consideration received for rendering of any managerial, technical, or consultancy services** but does not include consideration received for construction, assembly or mining or like projects undertaken by the recipient or income received chargeable to tax under the head “salaries”.
- Therefore, referring to the meaning and nature in the earlier slide and above, for services like project feasibility or project study and report, we can safely assume that **such services shall come under the ambit of ‘FTS’ since such services are a part of technical as well as consultancy services.**
- Hence as per the provisions of the act, income earned from rendering services related to preparing feasibility study report or technical appraisal shall be taxable as FTS under income tax act.
- Although the terms ‘managerial’, ‘technical’, and ‘consultancy’ is not defined in the income tax law. The Hon’ble courts in various case laws have defined such terms in various cases like-
 - i. **[2012] 26 taxmann.com 267 (Bom) Zuari Agro Chemicals Ltd. v. CIT**
 - ii. **[2013] 378 ITR 205 (Delhi) CIT v. Grup Ism (P) Ltd.**

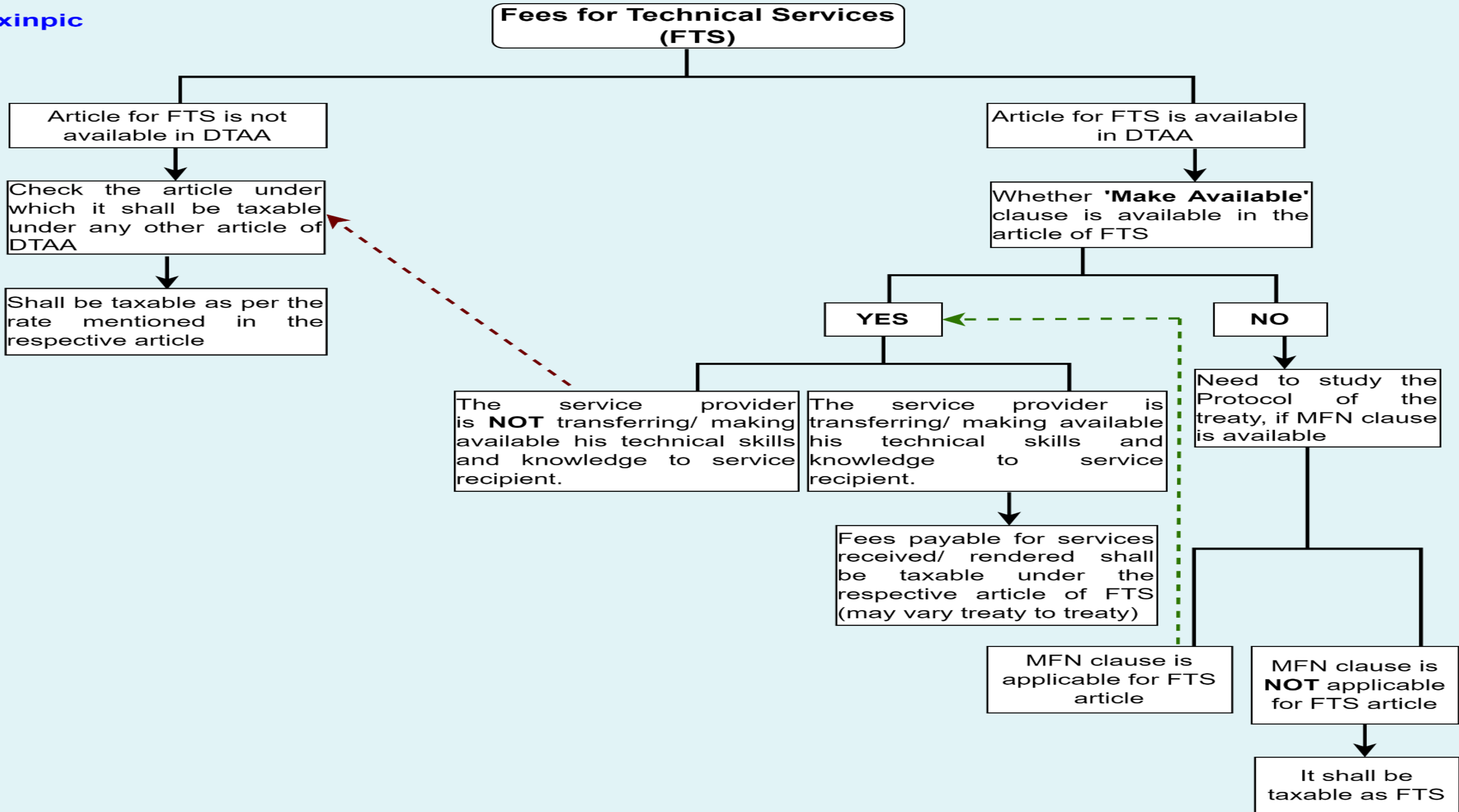
Since such transaction and services of feasibility study reports or technical appraisal are taxable as per the provisions of income tax act. Now, therefore we shall test the taxability as per the provisions of DTAA.

Determining the taxability as per DTAA

▪ FTS as per DTAA:

- As per DTAA, generally 'FTS' means payment of any kind to any person in consideration for the rendering of any managerial, technical or consultancy services (including through the provision of services of technical or other personnel).
- However, one should need to read the respective DTAA before applying the provisions of it because every DTAA has different nuances in FTS article, which vary agreement to agreement and therefore creates a huge impact on the transaction between countries.
- As discussed earlier, the services under discussion shall fall under the ambit of FTS as per the DTAA, accordingly such income of FTS arising in a contracting state and paid to a resident of the other contracting state may also be taxable in the contracting state at the rate mentioned in DTAA between the respective countries. Consequently, the rate of tax may vary from country to country and agreement to agreement.
- For example, where such services received by an Indian resident from a resident of France, then the tax on payment of such fees shall be 10% of the gross amount of fees, whereas in case if such services are rendered by a resident of UK, the rate of tax on such fees shall be 20% of the gross amount. However, India-UAE DTAA does not have a FTS clause, which means if such services are rendered by a resident of UAE, then for the purpose of taxability we shall have to see if it falls under other articles.

Further with regards to understand the taxability as per DTAA for such transactions, we shall try to understand the flow of taxability with the help of a flowchart which is shared in the next slide.



Case Laws relating to the nature of payment/ transaction

In favor of Revenue

- ITO v. Sinar Mas Pulp & Paper (India) Ltd.- (2004) 85 TTJ 794(Del.), 2003-TIOL-19-ITAT-DEL
[India-Singapore DTAA]
- ONGC v. ACIT- (2006) 9 SOT 8 (Del.), (2007) 107 TTJ 551 (Del.)
[India-UK DTAA]

In favor of assessee

- C.E.S.C. Ltd. v. DCIT, [2005] 275 ITR (A.T.) 15, [2003] 87 ITD 653 (Kol.) (TM)
[India-UK DTAA]
- Schlumberger Asia Services Ltd. v. ACIT (IT), [2012] 22 taxman.com 165 (Delhi)
[India-Hongkong DTAA]
- Charbonnages De France International SA v. DCIT, Circle 2(1), Mumbai [2008] 19 SOT 509 (Mumbai)
[India-France DTAA]



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