

Saturday
International
Tax
Gyaan

SITG

SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.

188

New series – International Business Transactions!!

PART-II

#Nature of transaction

Surveys and the related services

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Jain Shrimal & Co.

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Concept and examples

Survey and related services:

- Generally in relation to such services assessee hire an agency or company to conduct various surveys. Surveys generally mean conducting study on people or to carefully study an object or place and providing an opinion or collect information. Some examples of such services include the following-
 - i. Airborne survey- For providing high-quality and high-resolution image of various places,
 - ii. Geological surveys, scientific services.
 - iii. Geophysical services to oil and gas exploration industry.
 - iv. Educational surveys,
 - v. Biological surveys,
 - vi. Public opinion surveys

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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 relating to survey, the **services shall come under the ambit of ‘FTS’ since for providing the service of conducting survey it involves technical as well as consultancy services.**
- Hence as per the provisions of the act, income earned from rendering services related to survey like geophysical, geological, environmental and ecological services and so on shall be taxable as FTS under income tax act.
- Although there are few exception for which services which won’t be covered under definition of FTS in explanation 2 above such as mining. However, any service in relation to mining activities such as conducting survey before mining starts would not fall under such exception and would be covered under the definition of FTS.

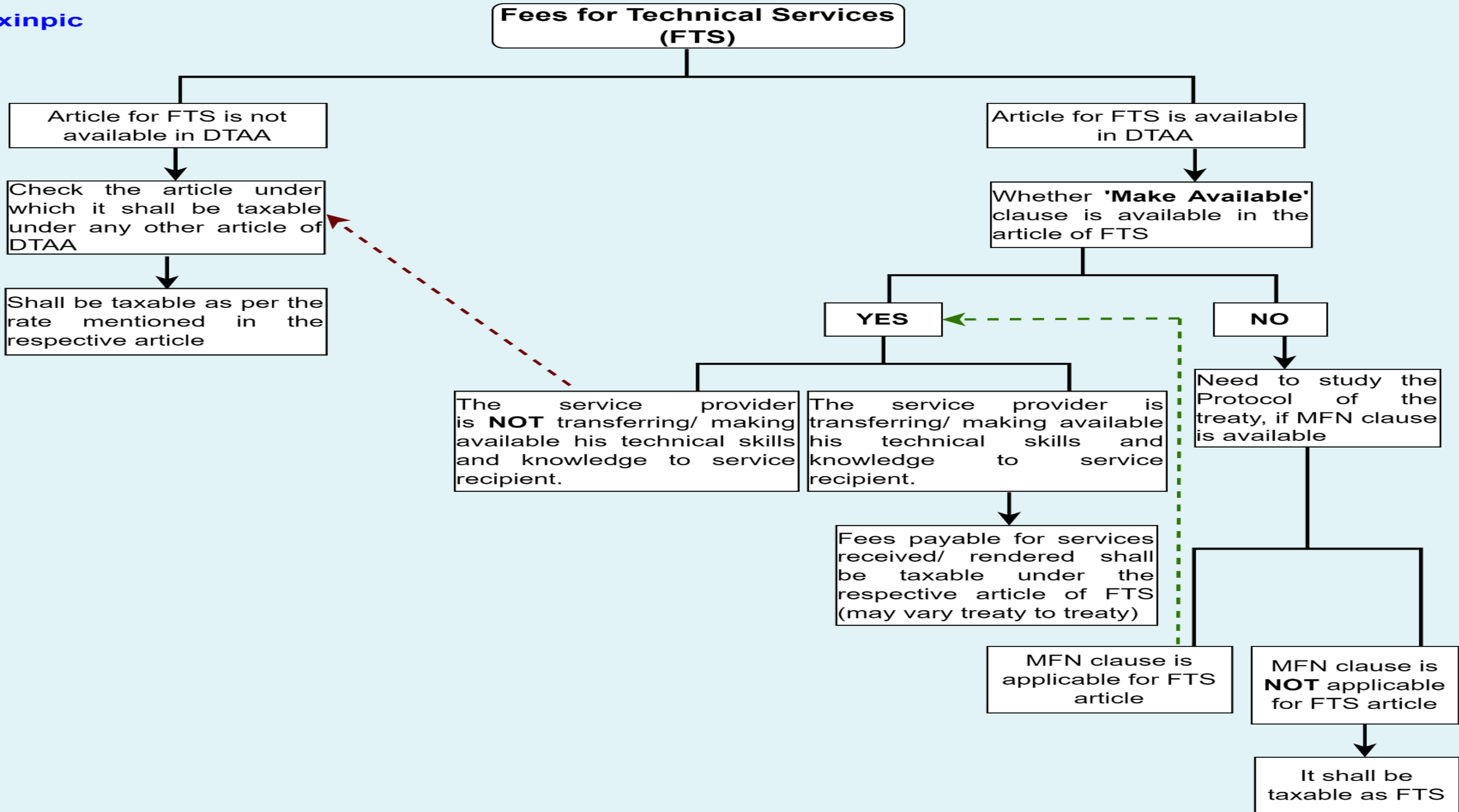
Since such transaction and survey related services are taxable as per the provisions of income tax act. Now, therefore we shall test the taxability as per the provisions of DTAA.

Taxability as per DTAA (UN MC)

▪ 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 read and rely on the respective DTAA before applying its provisions it because every DTAA has different nuances in the FTS article, which may vary from agreement to agreement and therefore create a huge impact on the taxability of transactions between countries.
- As discussed earlier, it 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 tax rate mentioned in DTAA between the respective countries.
- However, in the DTAA which includes the 'Make Available' clause, one should check whether the knowledge or technology is being made available during the course of such services or not. Examples of DTAA that have a 'Make Available' clause are the USA, UK, Singapore, Portugal, Netherlands, etc.
- We are enclosing a link where the list of DTAA's of various countries with India having a 'Make Available' clause is listed, for your reference- <https://jainshrimal.com/understanding-make-available-clause/>

Further with regards to understanding 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

- M-1 Overseas Ltd. [2012] 24 taxmann.com 73 (AAR- New Delhi) [Mud Engineering Services]
[India-Cayman Islands DTAA]
- SeaBird Exploration FZ LLC [2021] 124 taxmann.com 56 (AAR- New Delhi) [Geophysical services to oil and gas exploration industry]
[India-UK DTAA]

In favor of assessee

- CIT v. De Beers India Minerals (P.) Ltd. [2012] 21 taxmann.com 214 (Kar.) [Airborne Survey Services]
[India-Netherlands DTAA]
- HAL v. ACIT [2022] 139 taxman.com 31 (Bangalore- Tribunal)
- Aluminium Pechiney v. DCIT, [2023] 155 taxmann.com 512 (Delhi- Trib.)
[India-Portugal DTAA]

The common point where judgement has been in favour of assessee is because the make available condition was not fulfilled.



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