



SATURDAY INTERNATIONAL TAX GYAN !!!

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Back to Basic Principles



SITG No. 246

If any income is not taxable in any particular article of Tax Treaty, whether the same would be taxable in residuary article (i.e. article on the other income)



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Introduction

- ❖ Tax treaties are entered into to allocate taxing rights between two countries using **specific articles for different types of income** (e.g., Business Profits, Interest, Royalties, Capital Gains, etc.).
- ❖ If an income type is covered under a specific article, it **must be taxed** (or exempted) **only under that article**.
- ❖ If an income falls under a specific DTAA article but is not taxable due to treaty conditions (e.g., no PE under Article 7), it cannot be taxed under "Other Income."
- ❖ **Only income that is truly not covered anywhere else in the treaty can be taxed under the "Other Income" article.**

Landmark Case

Case: Dy. CIT v. Ford India Limited (ITA Nos. 673 and 840/Chennai/2015) (Chennai - Trib.)[31-01-2017]

- ❖ Ford India Ltd. made payments to Thailand-based entities without deducting tax at source. The company argued that these payments were in the **nature of fees for technical services** and, since the recipients did **not have a permanent establishment** (PE) in India, the payments were not taxable under the India-Thailand DTAA.
- ❖ The officer contended that since the India-Thailand DTAA does not explicitly address fees for technical services, **domestic tax laws should apply**. Under Section 9(1)(vii) of the Income Tax Act, fees for technical services are taxable in India, and therefore, Ford India Ltd. should have deducted tax at source.
- ❖ The CIT(A) ruled in favour of Ford India Ltd., holding that since FTS is a type of **business profit**, since Thailand-based companies had no PE in India, the income was not taxable in India as per Article 7 of the DTAA.

Landmark Case

- ❖ Hon'ble ITAT, Chennai upheld the CIT(A)'s view, emphasizing:
 - India-Thailand **DTAA lacks a specific** provision taxing fees for technical services.
 - Such fees are a type of **business profit** and, under **Article 7** of the DTAA, can only be taxed if the recipient has a PE in India.
 - Since the recipients did not have a PE, the payments were **not taxable** in India.
 - Further, it was also held that if an income is getting covered under the operative articles (i.e. articles 6 to 21) it will not be taxable under residuary clause in article 22

Analysis of the Case Law

- ❑ There is a **difference** between **not falling in any Article** and **not taxable in any Article**. Since in the stated case law, the payment was falling under Article 7 (Business Profits) and was not taxable since the assessee did not have the Permanent Establishment in India.
- ❑ **Article 22** (Other Income) **cannot be used** to tax Fees for Technical Services if it is already **covered under another article** like Article 7 (Business Profits).

Various case laws

This principle which essentially implies that if any income is not taxable in any particular article of Tax Treaty, whether the same would be taxable in residuary article was discussed in various cases like –

- Dy. CIT v. TVS Electronics Ltd. [ITA No. 811/Mad/2010][Chennai Tribunal][Dated 25 May 2012]
- XYZ, In re Group Cases [AAR Nos. 886 to 911 of 2010][AAR][Dated 19 March 2012]
- Dy. CIT v. Andaman Sea Food (P.) Ltd. [ITA No. 1412/Kol/2011][Kolkata Tribunal][Dated 19 June 2012]

Our Comments

- ❖ Under Income tax act as we tend to tax any income under Income from other sources only when it is taxable as per income tax act and if it does not fall under any other head and provisions of the act and if it is allowed as deductible or exempt under any other head we don't cover it under Income from other sources.
- ❖ Similarly, in case of DTAA the residuary article is to be used only when it is not covered under any other article, if it is covered under other article and still not taxable then it cannot be charged or tested under residuary article of DTAA.

Reference of Previous SITG of Back to Basic Principles Series

S.No	Particulars	Link
1.	Right to Choose Between DTAA and IT Act	Click here
2.	If two views possible, view which is favourable to taxpayer should be adopted	Click Here
3.	Taxpayer can adopt taxability either under Act or under DTAA, whichever is beneficial for each stream of income	Click Here
4.	Treaty to be read as a whole and not in isolation	Click Here
5.	Retrospective amendment in the act cannot be read into DTAA	Click Here

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