news flash

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SUPREME COURT RULES ON TAXATION OF PAYMENTS TOWARDS PROVIDING AN ADVICE/OPINION

The Supreme Court of India, recently in the case of *GVK Industries v ITO* [(2015) 54 taxmann.com 347 (SC)], has held that fees paid by a resident company for obtaining an advice/opinion from a non resident is payment towards consultancy service and thus, taxable as fees for technical services **("FTS")** under section 9(1) (vii) of the Income Tax Act, 1961 **("IT Act")**.

Facts

GVK Industries **("the assessee")** is a company incorporated under Companies Act 1956 for the purpose of setting up a power project in India. The assessee entered into an agreement with ABB – Projects & Trade Finance International Ltd., Switzerland **("Non-Resident Company")** to develop comprehensive financial models for the project and assist the assessee in loan negotiations and documentation with the lenders. The assessee was to pay the non resident company a 'success fee' as fixed percentage of total debt financing for providing said services, under the arrangement. The assessee approached the Income Tax Department for obtaining a no objection certificate **("NOC")** for remitting the success fees without deducting tax at source **("TDS")**. The assessee moved the high court after the department refused to issue a NOC. The high court also upheld the order of the department refusing to issue the NOC.

Assessee's contentions

The assessee contended that the non resident company had no place of business in India; and all the services rendered by it were from outside India. The assessee claimed that as the fees were paid for services rendered outside India, and the non resident company has no business connection in India, no part of the success fee could be said to accrue or arise in India under section 9(1)(i) of the IT Act, in the hands of the non resident company. The assessee further argued that services rendered by the non resident company were not technical in nature, hence, the success fee cannot be charged to tax in India as fees for technical services **("FTS")** and thus, the assessee was under no obligation to deduct TDS under section 195 of the IT Act.

Revenue's contentions

The Revenue, on the other hand, contended that the non resident company not only made arrangements for the loan but also rendered several financial services, and thus acted as a financial advisor/consultant. Thus, the success fees being in the nature of FTS, and payable by

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the assessee (being a resident) would be deemed to accrue or arise in India under section 9(1)(vii) (b) of the IT Act. Hence the assessee would be liable to deduct tax before remitting any money to the non resident company.

Judgment

The Supreme Court upheld the order of the High Court, and observed that success fees being payments towards provision of consultancy services would qualify as FTS under section 9(1)(vii) of the IT Act and thus would be an income deemed to accrue or arise in India in the hands of the non resident company. In this regard, the court relied on the meaning of the term "consultancy services" as elucidated by the Delhi High Court in the case of *CIT v Bharti Cellular Limited and others* [(2009) 319 ITR 139] that consultancy service would include an act of providing professional advice or opinion or services in a specialized field entailing human intervention.

Hence, the Supreme Court observed that preparation of scheme for required finances, and the nature of services provided by the non resident company were "consultancy services" within the meaning of the section 9(1)(vii) of the IT Act, and thus would be taxable in India.

Conclusion

It is important to note that the decision of the Supreme Court is restricted to the provisions of the IT Act. The provisions of the India-Switzerland Double Taxation Avoidance Agreement **("DTAA")** (the tax treaty involved in the case) contain a similar definition of FTS as the IT Act. However, the decision of the Supreme Court, in our view, may not apply to cases under other tax treaties where the definition of FTS under the tax treaty is narrower than the definition under the IT Act. For example, the India-US DTAA contains "make available clause" which implies that India cannot levy tax on payments in the nature of FTS arising in India, unless the person acquiring the technical service is enabled to independently apply the technology.

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