No FTS under Indo-USA DTAA if services rendered don't clear 'make available' benchmark

Summary – The Mumbai ITAT in a recent case of WNS North America Inc, (the Assessee) held that where assessee had not made available any technical knowledge, skill, experience etc. services rendered by assessee would not be chargeable to tax as FIS under article 12 of Indo-US DTAA. Where similar business activities were carried on by an enterprise of contracting State in other contracting State through PE as well as without involvement of PE, force of attraction rule under article 7 of Indo-USA DTAA applied.

Facts

- The assessee was a tax resident of United State of America. It was engaged in the business of rendering, marketing and management services to WNS which was its associated enterprise in India.
- The assessee had received an amount of Rs. 68.15 crore towards marketing and management services rendered by it to WNS Since the assessee's employees visited India for providing managerial services, WNS constitutes service PE under Article 5(2)(1) of Indo-USA DTAA. According a sum of Rs. 6.52 crore had been attributed to such service PE because the services were rendered in India and the remaining amount received by the assessee was regarding the services rendered outside India.
- The Assessing Officer noted that the assessee rendered expertise and technical knowledge to WNS India. Accordingly, he held that the marketing and management services rendered by the assessee to WNS India was 'Fees for included Services' (FIS) under Article 12(4)(b) of Indo-US DTAA.
- On appeal, the Commissioner (Appeals) deleted the order of the Assessing Officer.
- On appeal before the Tribunal, the revenue contended that since services which were rendered in India and outside India was same or similar in nature entire service was attributable to service PE in India by applying force of attraction Rule.

Held

Services rendered by assessee are not taxable as FIS

- For the earlier assessment years 2003-04 to 2006-07 an identical issue has been considered and decided by the Tribunal in favour of the assessee. It is further noted that in the assessment years 2004-05 and 2005-06 the order of this Tribunal has been confirmed by the Hon'ble Jurisdictional High Court. In the latest decision dated 14-12-2012 for the assessment year 2006-07 in *WNS North America Inc.* v. *Asstt. DIT* (*International Taxation*) [2012] 28 taxmann.com 173 (Mum.) the Tribunal has again considered and decided this issue as under:

> The scope of section 9(1)(*vii*) is somewhat different in comparison with the article 12(4)(*b*). In order to rope in any amount within the purview of FIS under the article 12(4)(*b*) of DTAA, which

has been invoked by the Assessing Officer, it is essential that the payment should be to make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. On the contrary there is no such requirement of 'making available' any managerial, technical or consultancy services. Simple rendition of such services is sufficient. It is not the case of the revenue that the assessee made available some managerial, technical or consultancy service to WNS India. Even if it is considered for a moment that the marketing and management services rendered by the assessee were in the nature of technical services as per section 9(1)(*vii*), the same would not become FIS as per the DTA because of the language of article 12(4)(*b*) which mandates that such services must be made available to the payer of the consideration. As the assessee in the instant case has not made available any technical knowledge, experience, skill *etc.* to WNS India, the same cannot be subjected to tax by considering the provisions of section 9(1)(*vi*) on stand-alone basis. Further, the provision of the Act or the relevant Double Taxation Avoidance Agreement, whichever is more beneficial to the assessee, shall apply. As the provisions of article 12(4)(*b*) are beneficial to the assessee in comparison with section 9(1)(*vi*), it is the prescription of article 12, which shall apply in supersession of section 9(1)(*vi*) of the Act. It is, therefore, held that the marketing and management services rendered by the assessee to WNS India are not chargeable to tax as FIS under article 12 of the DTAA.

- Following the earlier orders of this Tribunal as well as Hon'ble High Court this issue is decided against the revenue and in favour of the assessee.

Force of attraction Rule

- The plain reading of article 7(1) makes it clear that only in case when enterprise of Contracting State carries on business in the other Contracting State through its PE as well as otherwise and both the activities are of same or similar kind then the business activities carried on not through PE shall also be treated as attributable to the PE and the profit of the enterprise may be taxed in the other State so much of them as it is attributable to PE. There is no scope of any ambiguity as the article 7(1) gives a clear understanding that the force of attraction Rule applied only in respect of business carried on by an enterprise of Contracting State in other Contracting State through PE as well as without involvement of PE. Therefore, the two essential conditions emerge for applying the force of attraction rule are (*i*) the business activity carried on should be in the other State where the PE is situated (*ii*) the business activity carried on must be of the same or similar kind as those effected through PE. In the case in hand the condition of business activity carried on in the other State where the PE is situated is not satisfied because the marketing and management services in question are provided by the assessee outside India. Marketing and management services in question were rendered outside India and income of such services cannot be said to have accrued or arisen to the

assessee or deemed to have accrued or arisen to assessee in India, the existence of service PE in India would not make it taxable under Article 7 of Indo-US DTAA.