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Services via an E-commerce Platform: Tax Complexity

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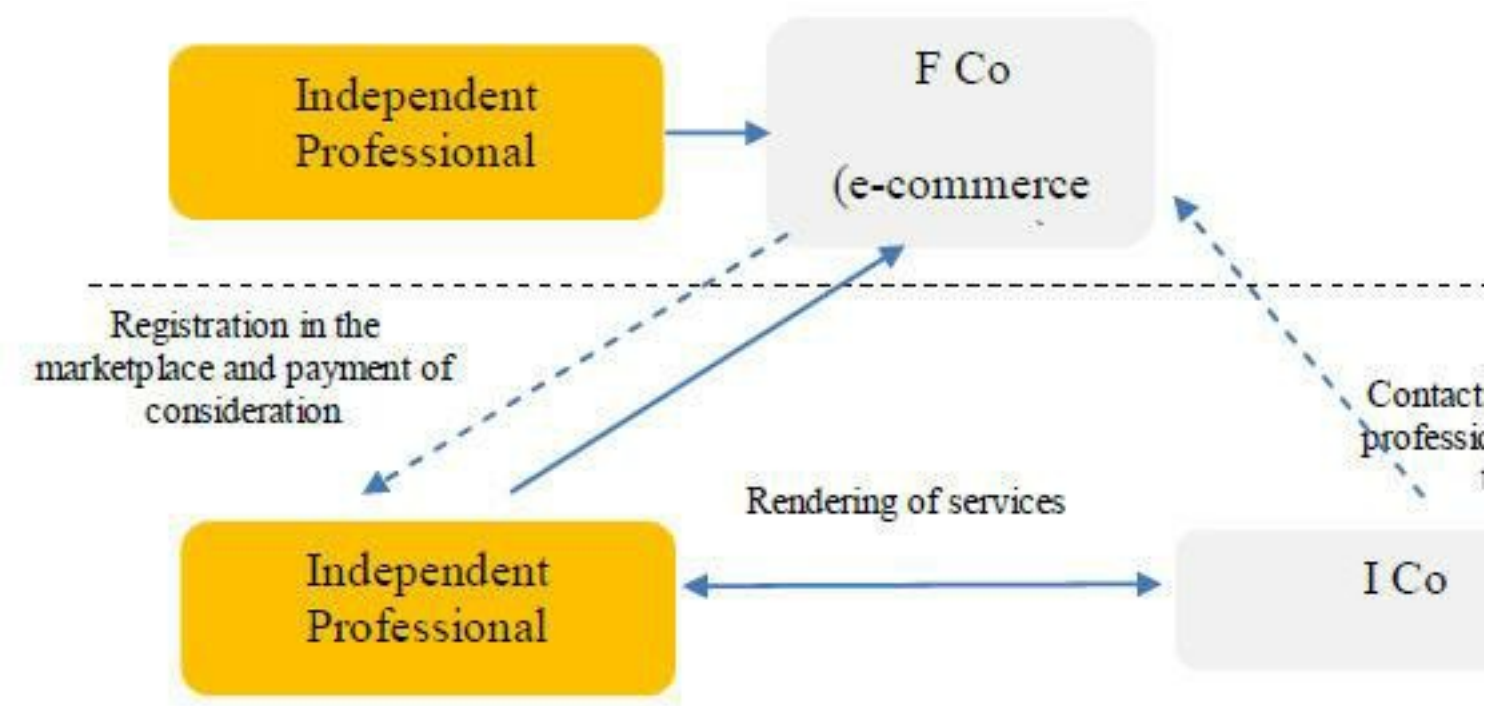
In today's world, Digitization and digital transformation have become utmost priorities than ever as businesses have shifted towards hybrid work models and customers have increasingly embraced online channels. While this digital transformation has definitely unified the various geographical territories into single marketplace and has created numerous opportunities, it has also created the complexity and difficulty in collecting the right share of tax by different jurisidictions or we should say it will likely become an area of litigation between taxpayers and tax authorities. In this digital race, the evolution of e-marketplace for professionals and entities requiring the services of these professionals has enhanced the ability of working professionals to work as remote free lancers and rendering services to any entity having presence anywhere in the world. This has also provided the entities with an option to choose the right resources for the right time-period without having any employee related liabilities.

Though one cannot deny the benefits of e-marketplace of professionals but it is also essential to understand the tax implications on payments made to such e-marketplace or to professionals. In order to understand

it better, lets take an example of an Indian company (say I Co) which receives assistance from various independent professionals who renders services to I Co on a project-to-project basis. These independent professionals are contacted via an e-commerce platform (say F Co), a non-resident entity, which is a marketplace connecting entities with independent professionals. F Co only provides a platform where independent professionals and the entities (i.e. prospect service recipients) can connect for any project. F Co does not provide any customized services and restricts its scope to providing of a common e-commerce platform which is an automated facility and requires a minimal human intervention. These independent professionals provide services directly to I Co and I Co pays charges to F Co which in turn remunerates to the professionals after deducting their commission.

The flow of services and corresponding considerations is explained with help of a diagram:



Looking into above business structure, it becomes quite interesting to understand the income tax implications from tax deduction at source ('TDS') perspective relevant to the payment made by I Co to F Co.

For a better understanding, the above structure is analysed under two scenarios:

- Scenario 1 - Independent professional is a resident of India and;
- Scenario 2 - Independent professional is not a resident of

India.

Scenario 1 - Independent professional is a resident of India

Tax implications in the hands of F Co.

As per the provision of section 5(2) of the Income Tax Act, 1961 ('the Act'), in the case of non- resident, scope of total income, inter-alia, includes all income from whatever source which is deemed to accrue or arise to such non-resident in India. In the present case, the payment is made to F Co, which is a non-resident and therefore, it is necessary to examine whether such income can be said to be deemed to accrue or arise in India.

Given the nature of services, it is pertinent to analyze if the services rendered by F Co qualify as Fees for Technical Services ('FTS') under the provisions of section 9(1)(vii) of the Act and can be said to be deemed to accrue or arise in India.

Explanation 2 to section 9(1)(vii) of the Act defines the term FTS to include any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel). The terms managerial, technical or consultancy have not been defined under the Act and hence, their meaning needs to be drawn from the common parlance or guidance needs to be taken from judicial precedents pronounced in this regard. The Hon'ble Supreme Court in the case of *CIT v. Bharti Cellular Ltd.* [2010] 193 Taxman 97/[2011] 330 ITR 239/[2010] 234 CTR 146 (SC) has had the opportunity to explain the meaning of the terms appearing the definition of FTS as per section 9(1)(vii) of the Act. As per the said ruling, the terms Managerial, Consultancy and Technical have been defined in the following manner:

> ***Managerial Services*** - The word managerial has been defined in the Shorter Oxford English Dictionary, Fifth Edition as:- *of pertaining to, or characteristic of a manager, especially a professional manager of or within an organization, business, establishment, etc.* Further, a manager has been defined as:
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> *a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization etc; a person controlling the activities of a person or team in sports, entertainment, etc.*

The above definitions clearly explain that a managerial service would be one which a manager performs and undoubtedly, it entails a human intervention.

Consultancy Services - the word consultancy has been defined in the Dictionary as the work or position of a consultant, a department of consultants. Consultant itself has been defined, inter alia, as a person who gives professional advice or services in a specialized field. It is obvious that the word consultant is a derivative of the word consult which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the Dictionary as ask advice for, seek counsel or a professional opinion from, refer to (a source of information), seek permission or approval from for a proposed action. It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being.

Technical Services - Since the term Managerial and Consultancy involves human element, applying the rule of *noscitur a sociis*[1], the word technical as appearing in Explanation 2 to Section 9 (1)(vii) would have to be construed as involving a human element. Accordingly, a service involving the use of technology and having human intervention can be termed as Technical service.

The above meaning of FTS is also followed by the Hon'ble Supreme Court in the case of *CIT v. Kotak Securities Ltd.* [2016] 67 taxmann.com 356/239 Taxman 139/383 ITR 1/285 CTR 63 (SC)[2]

Hence, one can say with a reasonable certainty that in order for a technical service to qualify as FTS, there has to have a human intervention while rendering the services. In a scenario, where everything is automated or a standard facility is being provided, the same cannot be classified as FTS. Now applying the above principle in our business structure, it is a rational conclusion that the services rendered by F Co to I Co cannot be termed as FTS as F Co does not provide any customized services according to the needs of its customers and in fact, provides a common "facility" to all its customers.

Considering the perspective of tax authorities, one may argue that F Co is only a facilitator and end services being provided by the independent professional need to be analysed before concluding the requirement to deduct tax as I Co is essentially making payment for those services. However, it is important to note that section 194-O of the Act

specifically provides for the deduction of tax by the e-commerce operator (i.e. e-marketplace in our case) while making payment to participant. In the instant case, it is clear that F Co is an e-commerce operator and independent professionals along with I Co are participants. Hence, where the Act has already casted the liability to deduct tax on a separate person (i.e. F Co in the given case), I Co cannot be made liable for tax deduction. It would be the responsibility of F Co to undertake the required tax deduction under section 194-O of the Act on the payments made to the independent professionals.

Scenario 2 - Independent professional is not a resident of India

Under this scenario, the analysis on the taxability of the payments of services rendered by F Co to I Co should remain same under the Act.

However, the only point which is relevant for consideration under this scenario is that unlike in the case of resident independent professionals, the Act does not cast any responsibility on the e-commerce operator to deduct tax while making payments to non-resident independent professionals. Hence, one may argue that the nature of payment made to the ultimate service provider (i.e. non-resident independent professionals) should also be taken into consideration while determining the requirement to deduct tax on payments made to F Co by I Co.

Having said above, it is relevant to observe that section 194-O of the Act specifically excludes non-resident in its ambit. Hence, the law gives an opportunity to contend that if the intention was to include the payment by e-commerce operator to non-resident e-commerce participant in the TDS net, it would not have specifically excluded non-resident from the scope of section 194-O. Given that there is no specific section for tax deduction on payment made to non-resident e-commerce participant unlike resident e-commerce participant, it would be reasonable to conclude that as of now the Act does not provide for tax deduction on payments made to independent professionals - nor by F Co neither by I Co.

With due consideration to above analysis, it is also pertinent to go through section 195 of the Act which casts the responsibility to deduct tax on payments made to non-resident to the person who is responsible for making payment to such non-resident. In the given case, it is F Co

(and not I Co) which is responsible to make payment to the non-resident independent professionals (i.e. e-commerce participant) and hence, one may conclude that I Co is not under any obligation to deduct tax on the payment being made by F Co to the non-resident Independent consultant.

In view of above discussion, it is reasonable to conclude that nature of services rendered by independent professionals would not be relevant for determining the requirement of tax deducted at source on payments made to F Co by I Co.

The above analysis covers only two of various scenarios that are possible under similar transactions and given the evolution of digital transformation across world economy, one needs to be aware while taking any position on the tax matters. Even though one cannot be sure of the possibility of litigation on account of tax positions adopted, it would always be worthwhile to make a decision in an informed environment covered with legal, logical and reasonable boundaries.

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1. This rule says that the questionable meaning of a doubtful word can be derived from its association with other words
2. Similarly, following judicial precedents also established the similar interpretation of meaning of the term FTS:
   (*i*) *CIT* v. *Vodafore South Ltd.* [2016] 72 taxmann.com 347/241 Taxman 497/290 CTR 436 (Kar.);
   (*ii*) *Bharati Airtel Ltd.* v. *ITO (TDS)* [2016] 67 taxmann.com 223/47 ITR(T) 418/178 TTJ 708 (Delhi - Trib.);
   (*iii*) *Seimens Ltd.* v. *CIT (Appeals)* [2013] 30 taxmann.com 200/23 ITR(T) 86/142 ITD 1/152 TTJ 689 (Mum.);
   (*iv*) *Vodafone East Ltd.* v. *Addl. CIT* [2015] 61 taxmann.com 263/43 ITR(T) 551/[2016] 156 ITD 337 (Kol. - Trib.);
   (*v*) *Idea Cellular Ltd.* v. *CIT (TDS)* [2016] 65 taxmann.com 116 (Pune - Trib.);
   (*vi*) *Dishnet Wireless Ltd.* v. *Dy. CIT (TDS)* [2015] 60

taxmann.com 329/[2016] 45 ITR(T) 430/[2015] 154 ITR 827/172 TTJ 394 (Chennai - Trib.);

(*vii*) *Bharti Hexacom Ltd.* v. *ITO (TDS)* [2016] 68 taxmann.com 388/[2015] 42 ITR(T) 686 (Jaipur - Trib.)