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# Role of Deeming Fiction in Domestic Legislation vis-à-vis Tax Treaty – An Exposition by UK Supreme Court in Fowler's Judgment

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In a recent judgment of Fowler v. Her Majesty's Revenue and Customs[1], the Supreme Court of United Kingdom had an occasion to deal with the role of deeming fiction in the domestic legislation and their applicability in the context of tax treaties. The said judgment elucidates certain important aspects which would have bearing on the international taxation. In this article, we would detail the facts, the reasonings and conclusions arrived by the Honourable Supreme Court of United Kingdom (UK SC) and also try to apply such principals to the Indian context to see the consequences arising thereof.

## Background:

Mr Martin Fowler (Mr Fowler) is a resident in the Republic of South Africa (SA). Mr Fowler is a qualified diver and during the 2011-12 and 2012-13 tax years, he undertook certain diving engagements in the waters of UK Continental Shelf. The Court has assumed that he has undertook the said services as an employee, rather than as a self-employed contractor.

HMRC[2] claims that the said income earned by Mr Fowler is in the nature of employment income and accordingly as per the provisions of Article 14 of UK-SA DTAA[3], the said income is taxable in UK, because the provisions of Article 14 states that income arising from employment is taxable in a state where such employment is exercised. Since Mr Fowler has exercise the employment of diving engagements in UK, HMRC's claim is that the income is taxable in UK.

On the contrary, Mr Fowler contends that by virtue of UK domestic legislations, divers have been given a special dispensation to treat their employment income as income arising from trade and applying such deeming fiction to his situation, the character of income would be in the nature of trade and not employment. Since the character of income by virtue of applying a deeming fiction in domestic legislation is trade and Mr Fowler contends that he is guided by Article 7 of UK-SA DTAA and not Article 14. By applying Article 7 of UK-SA DTAA, the taxability of Mr Fowler's income in UK would arise only if there is a permanent establishment (PE) and in absence of such PE, there is no income which would be taxable in UK. Mr Fowler based his arguments by placing reliance on Article 3(2) of UK-SA DTAA, which states that terms used in DTAA but not defined has to be understood from the domestic legislations with deal with tax.

The Court of Appeal has agreed to the contention of Mr Fowler and stated that he has to be treated as self-employed and accordingly there would not be any taxation of his income in UK. The HMRC not satisfied with the order of Court of Appeal has approached the UK SC.

In the above set background, the UK SC has proceeded to examine the contentions of Mr Fowler and HMRC. Before opining on the same, the UK SC has made an observation that the outcome of decision by Court of Appeal would render the income earned by Mr Fowler not taxable in both the jurisdictions,

[1] [2020] UKSC 22 delivered on 20 May 20.
[2] Her Majesty Revenue and Customs
[3] Double Taxation Avoidance Arrangement

namely UK (by virtue of Article 7) and SA (by virtue of Article 14). The UK SC stated that since the UK-SA DTAA does not speak about 'double non-taxation' and the question whether SA did tax the earnings of its residents employed abroad was not investigated, the same would not be of any help in construing the DTAA.

**Analysis by UK SC:**

The UK SC thereby is required to resolve under which particular Article of DTAA, the income of Mr Fowler gets covered. For answering this, it is important to understand the definitions of 'employment', 'business' and 'enterprise'. The Court observed that Article 3 which deals with definitions, has defined the terms 'business' and 'enterprise'. However, the term 'employment' has not been defined. Hence, in order to understand that definition of term 'employment', it is necessary to invoke the provisions of Article 3(2) of DTAA.

The Court then proceeded to examine the OECD Commentary on Model Tax Conventions on Article 7 and Article 14 (the predecessor article being Article 15). The Court specifically making reference to Para 8.1 of Commentary of OECD Model Tax Conventions observed that 'It may be difficult, in certain cases, to determine whether the services rendered in a State by an individual resident of another State, and provided to an enterprise of the first State (or that has a permanent establishment in that state), constitute employment services, to which Article 15 applies, or a services rendered by a separate enterprise, to which Article 7 applies or more generally, whether the exception applies'.

Having recognised the difficulty in arriving, whether a particular activity would be a contract of service or contract for service, the Court then proceeded to recognise that the said issue has to be decided based on the domestic law of the state applying the treaty is likely to prevail, but subject to two qualifications. The first one being, that the context may require otherwise (an article 3(2) situation) and the second qualification as expressed in Para 8.11 of the Commentary, which is

> the conclusion that, under domestic law, a formal contractual relationship should be disregarded must, however, be arrived at on the basis of objective criteria. For instance, a State could not argue that services are deemed, under its domestic law, to constitute employment services where, under the relevant facts and circumstances, it clearly appears that these services are rendered under a contract for provision of services concluded between two separate enterprises …. Conversely, where services rendered by an individual may properly be regarded by a State as rendered in an employment relationship rather than as under a contract for services concluded between the two enterprises, that State should logically also consider that the individual is not carrying on the business of the enterprise that constitutes that individual's formal employer

Having referred to the Commentary, the Court then proceeded to examine the domestic legislations to understand the terms which are not defined in the UK-SA DTAA. The Court referred to Section 4 of Income Tax (Earnings and Pensions) Act 2003 (ITEPA) for the purposes of definition of 'employment' and referred to Section 6 and Section 7 of ITEPA which dealt with 'employment income'. The Court after noticing that Section 6(5) of ITEPA which was amended by Section 882(1) and Para 585 of Schedule I to Income Tax (Trading and Other Income) Act, 2005 [ITTOIA] has recognised that the employment income as defined in section 4 of ITEPA is not charged to tax under section 6, if it is within the charge to tax under Part 2 of ITTOIA by virtue of Section 15 of that Act which deals with divers and diving supervisors.

In other words, the Court recognised that the employment income earned by divers and diving supervisors would not be charged to tax under ITEPA but subjected to tax under provisions of ITTOIA.

Then, the Court proceeded to refer to Section 15 of ITTOIA which dealt with divers and diving supervisors.

Before proceeding to examine further, it is noteworthy to understand the deeming fiction carved by Section 15(2) which is the heart of the subject issue. **Section 15(2) stated that the performance of duties of employment is instead treated for income tax purposes as the carrying on of a trade in the UK.** Mr Fowler by virtue of Article 3(2) invokes the deeming benefit enshrined in Section 15(2), wherein it was held that employment of diver is deemed to be carrying on a trade and accordingly pleading that his activity would fall under Article 7 instead of Articl1e 14.

The Court referring to the history behind the introduction of section 15 stated that, this class of divers commonly incurred their own costs, and therefore deserved the more generous expenses regime afforded to the self-employed, by comparison with employees and summarised the provisions of Section 15 as under:

- said section applies only to a particular class of employed divers, whose employment income would otherwise taxable under ITEPA
- the type of divers covered are defined by reference to a particular kind of diving, and only if undertaken in UK or related waters
- It may therefore apply only to part of the activities of diver under a particular contract of employment since they might also be engaged to do other types of divings as well, or diving of the specified type in other waters

The Court stated that the role of Section 15(2) was not to resolve some legal or factual uncertainty about whether such divers were genuinely employed or self-employed and held that on contrary, section 15 applies only to employed divers. The Court then proceeded to the observations made by the Court of Appeal qua interpretation of Section 15(2), wherein the later has held as under:

> What, then, is the state of affairs which section 15(2) requires us to imagine? In my judgment there can be no room for doubt about the answer to this question. It is that the relevant duties of Mr Fowler's actual employment are instead to be treated for income tax purposes as the carrying on of a trade in the UK. Accordingly, in the imaginary world which we have to enter, the actual earnings of Mr Fowler from his employment must instead be regarded as profits (or, more accurately, as receipts which form part of a computation of trading income) of the trade which he is now deemed to have carried on. It follows that this deemed trade is the only source, for income tax purposes, from which taxable income can arise to Mr Fowler in respect of his relevant activities

However, the Court has not agreed with the above interpretation by stating that the starting point is that the question which of Article 7 and 14 of UK-SA DTAA shall apply to Mr Fowler's diving activities depends upon the true construction of those articles. The articles have to be interpreted in the context of the treaty as a whole and its purposes, within the meaning of terms within those articles ascertained as required by Article 3(2) by reference to UK tax law. The Court held that nothing in Article 7 and Article 14 to be applied to the fictional, deemed world which may be created by UK tax legislation, unless the effect of Article 3(2) is that a deeming provision alters the meaning which relevant terms of treaty would otherwise have. If it is not for Section 15 of ITTOIA, the Court stated that there would not be any doubt that Article 14, not Article 7, would apply. The meaning of 'employment' is laid down in Section 4 of ITEPA, and his remuneration plainly constitutes

employment income within sections 6 and 7 and UK tax law would not regard him as making profits from a trade, or his business that of an establishment.

The Court stated that the question is whether section 15 gives a different meaning to the relevant terms. In other words, whether in terms of section 15, the term 'employment' was given a different meaning to consider the activities of Mr Fowler as 'trading' for the purposes of Article 7? The Court stated that section 15(1) uses 'employment' and 'employment income' in exactly the same way as is prescribed by section 4, 6 and 7 of ITEPA, and the phrase 'performance of the duties of employment' in section 15(2) again uses 'employment' in the same way. **Section 15 is about the taxation of income arising from the performance of those duties of employment, but, introduced by the word 'instead', provides that the income is to be taxed as if, contrary to the fact, it was profits of trade.**

In simple words, the Court interpreted that since the meaning of 'employment' has not undergone any change qua the domestic legislation, it is only the method of arriving taxable income which was changed by using the phrase 'instead' in section 15(2), the phrase 'employment' cannot be called as 'trade' by virtue of Article 3(2). The Court stated that nothing in Section 15 purports to alter the settled meaning of the relevant terms of the treaty, rather it takes the usual meaning of the terms as its starting point, and erects a fiction which, applying those terms in their usual meaning, leads to a different way of recovering income tax from qualifying divers.

**Conclusion arrived by UK SC:**

The Court concluded that the purpose of Section 15 is to create a fiction not for the purpose of deciding whether diver is carrying on employment or trade but for the purpose of adjusting how that income is to be taxed, specifically by allowing a more generous regime for deduction of expenses. Then the Court proceeded to analyse the purpose for which the fiction is created. When inquired for what purposes and between whom the fiction is created, it is plainly not for the purpose of rendering a qualifying diver immune from tax in UK, nor adjudicating between UK and SA as the potential receipt of tax and it is for the purpose of adjusting the basis of a continuing UK income tax liability which arises from the exercise of employment income. The Court accordingly concluded that applying the deeming provision in section 15(2) so as to alter the meaning of terms in the Treaty with the result of rendering a qualifying diver immune from UK taxation would be contrary to its purpose and also produces anomalous results. The Court also held that Article 3(2) of the treaty should not be construed so as to bring a qualifying diver within Article 7 rather than Article 14 and doing so would be contrary to the purposes of treaty and stated that the claim of HMRC should succeed. Accordingly, the income of Mr Fowler on a purposive interpretation falls under the scope of Article 14 and not under Article 7, thereby vesting power to UK to tax such income since the subject income is arising out of exercise of employment in UK.

**Take – Aways:**

The following would be the significant take-aways from the above exposition by UK SC:

- The role of Article 3(2) should be construed in such a way that, an item of income otherwise which would fall under the treaty, whereby source country has a right to tax, cannot be taken away from that particular country, by virtue of a deeming fiction under the domestic legislation. In other words, the deeming fiction erected in domestic law in source country cannot act against the source country unless the context otherwise requires so. Doing so, would go against the purpose of treaty.

- By virtue of Article 3(2), the plain meanings of terms not defined under the treaty, have to be picked from the domestic legislation but not the fictions created surrounding them.

**Applying to Indian Scenario:**

Under the Indian domestic legislation, there are various deeming fictions and provisions created by the legislature certain results. The deeming fictions when interpreted in the domestic legislation scenario would not present any challenges but when juxtaposed with treaty situation, there would arise certain challenges. Let us proceed to examine certain instances (not exactly the fact pattern in Mr Fowler's matter) and arrive at conclusion by using the rationale delivered by UK SC in the matter of Mr Fowler's verdict.

**Case Study:**

**Issue:**

Mr A is an Indian citizen who carries business in United Arab Emirates (UAE) and a resident of UAE for the last couple of years. He visits India occasionally and stays for certain time in India and his stay does not trigger any residency issues in India. During a particular visit, he has purchased a non-agricultural land in India and has paid the consideration through normal banking channels. In subsequent years, the tax authorities have come to know that Mr A has purchased the subject land at a value less than the stamp duty value of such property. Accordingly, the tax authorities proceeded to tax such difference amount in terms of Section 56(2)(x)(b)(B) of Income Tax Act, 1961 (ITA). Can Mr A take a stand that the role of deeming fiction created in domestic legislation cannot made applicable to him since he is covered by the India-UAE DTAA?

**Analysis:**

As stated above, since Mr A is a resident of UAE in terms of Article 4(1) of India -UAE DTAA, he would be in a position to access the said treaty. The next question, that would arise is, under which Article of the Treaty, the said income as proposed by tax authorities would fall in. This is important because, each article would have a distributive rule vesting the taxing rights to India or UAE. In order to answer this, the nature of income which is proposed to be assessed by tax authorities in India has to be known.

Part F of ITA deals with chapter 'Income from Other Sources' (IFOS). Section 56 to Section 59 are covered under the said head. By virtue of Section 56(2)(x), a deeming fiction is created to charge income tax under the head IFOS stating that any person who is in receipt from any person any sum of money, immovable property or property other than immovable property in certain circumstances would be treated as his income. There are certain exceptions and the facts in the current case study would not fit therein.

One of the items mentioned in Section 56(2)(x) is the receipt of immovable property for a consideration less than stamp duty value fixed. In the facts of the case study, Mr A has purchased the immovable property less than the stamp duty value fixed for such property. Hence, the tax authorities would proceed to tax on the difference amount (stamp duty value – purchase consideration) as IFOS.

Now, the question, is, whether this particular income which is deemed to be treated as 'other income' or 'income from immovable property', seen in from the perspective of India – UAE DTAA. This is crucial because, if the said deemed income is treated as 'income from immovable property', then India would be having right to tax such income, on the other hand, if the deemed income is treated as 'other income', then the right to tax such income vests with UAE. Let us proceed to analyse the same.

First, let us deal with Article 6, which deals with 'income from immovable property'. Article 6(1) states that income derived by a resident of contracting state from immovable property situated in the other contracting state may be taxed in other state. In other words, the contracting state, where the immovable property is located has a right to tax, which is India in the instant case. Further, Article 6(3) states that provisions of Article 6(1) shall apply to income derived from the direct use, letting, or use in any other form of immovable property. On a plain reading of Article 6, it would be evident that the ambit extends only to incomes which are directly or intimately connected with the immovable property.

However, the question, whether the deemed income (stamp duty value – purchase consideration), would fall under the ambit of 'income from immovable property' or not, has to be examined, to conclude that said deemed income would fall under Article 6(1) read with Article 6(3) and accordingly India has right to tax.

In order to answer this, the meaning of the term 'immovable property' has to be seen. Article 6(2) states that the term 'immovable property' shall have the meaning which it has under the law of the contracting state in which the property in question is situated. The said article further states, in any case, immovable property includes property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and natural resources.

From the above, it is evident that the term 'immovable property' has to be understood from the meaning that it has under the law of the contracting state in which the property in question is situated. Further, the Article 3(2) states that any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that state concerning the taxes to which the agreement applies.

Hence, taking clue from Article 6(2) and Article 3(2), it is required to understand the term 'immovable property' from the provisions of ITA. However, ITA does not define 'immovable property' and the only way left is to understand the same with the help of Article 31 of Vienna Convention on Law of Treaties (VCLT) which states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose.

Applying the same to the given context, the term 'immovable property' has to be given the ordinary meaning and may not be interpreted that the deeming income by virtue of Section 56(2)(x) will fall into the ambit of 'income from immovable property' despite the source for such deeming income is immovable property. Article 6(2) also states that apart from the definition of 'immovable property' given by the contracting state, the said term also includes the following:

- property accessory to immovable property
- rights to which provisions of general law respecting landed property apply
- usufruct of immovable property
- rights to variable or fixed payments as consideration for working of
- rights to work, mineral deposits, sources and natural resources

The deeming income, which is difference between the consideration actually paid by Mr A and the stamp duty value fixed for such property does not fall under any of the above specifically mentioned items to fall under the ambit of term 'immovable property'.

Article 6(3) also states that provisions of Article 6(1) shall also apply to income derived from direct use, letting or use in any other form of immovable property. It is beyond doubt that the deeming income does not fit in the description of 'direct use or letting'. We also opine that the said income does not fit into the residuary category of 'use in any other form of immovable property', because the phrase 'any other form of immovable property' is qualified by the term 'use', which signifies that it covers only such stream of incomes which by usage of immovable property emanates and not the incomes which are just connected to the immovable property but not arising from the usage.

The Honourable Supreme Court in the matter of PAVL Kulandagan Chettiar[4] had an occasion to deal with the ambit of 'use in any other form of immovable property'. The Court while dealing with taxation of capital gains arising from immovable property stated that the said capital gains would fall under the ambit of phrase 'use in any other form of immovable property'. The facts of PAVL Kulandagan Chettiar were that Indian resident has sold certain immovable property which was situated in Malaysia. The Revenue was of the view that the Article VI of India-Malaysia DTAA deals only with direct use, letting or use in any other form of immovable property and transfer or alienation does not fall under the ambit of 'use in any other form of immovable property'. The Honourable Supreme Court stated that the capital gains is always treated as income arising out of immovable property though subject to a different kind of treatment and the definition of 'income' used in Article VI, therefore includes capital gains and accordingly capital gains will form part of Article VI[5].

From the above, it can be argued that the 'use in any other form of immovable property', covers any streams of income including the income which arises from sale of such immovable property but should result from use of such immovable property. In other words, the said entry includes only incomes which result from usage of immovable property and not mere connection with the immovable property. However, the above view is not free ambiguity.

In the context of interpretation of Article 6(2), the recent judgment of First Tier Tribunal Tax of United Kingdom in the matter of Royal Bank of Canada[6] (RBC) is quite interesting. The facts in RBC matter was that RBC which is engaged in banking business in Canada has loaned a huge amount to Sulpetro Limited (Sulpetro), a Canadian company, to help fund the exploitation by its group companies of rights to drill for oil, in Buchan Field of North Sea. The right to drill the Buchan field were held in the subsidiary of Sulpetro, which was incorporated in Sulpetro UK Limited (SUKL). On grant of license by UK government, Sulpetro entered an 'illustrative agreement' that Sulpetro would incur all the development and exploitation cost in relation to Buchan Field and, in return, Sulpetro would receive the SUKL share of oil won from the Buchan Field. Sulpetro entered into financial difficulties and RBC has appointed a receiver. Sulpetro sold its interest in Buchan Field to BP Petroleum Development Limited (BP) a UK incorporated company under a sale and purchase agreement (SPA).

Vide the SPA, BP agreed, in addition, to make a series of other payments which included the payment (what was described as) royalty to Sulpetro in respect of all production from the Buchan Field, which were payable where the market price per barrel of oil (less certain expenses) exceeded USD $ 20 per barrel. Pursuant to the court order (as a consequence of Sulpetro being gone into receivership), the BP royalty interest was assigned to RBC for almost nil consideration. BP's interest in the Buchan Field

[4] [2004] 267 ITR 654 (SC)

[5] The Supreme Court relied on its own judgment in Sevantilal Maneklal Sheth [1968] 65 ITR 503 (SC) which deals with clubbing provisions under the old IT Act and opined use of assets includes income arising from sale of such assets.

[6] [2020] 118 taxmann.com 77 (UKFTT)

were then transferred to Talisman Energy Inc (Talisman). As a result, Talisman took the legal obligation to make payments pursuant to SPA.

The payments made by Talisman to RBC were subject matter of appeal. The HMRC[7] claims that the subject payments though described as royalty, they are actually of the nature of 'right to work' the natural resources and accordingly the said income is taxable in hands of RBC in UK. RBC contended that the nature of income is not 'right to work' and does not fit in the ambit of Article 6(2), since neither Sulpetro nor BP has authority to grant right to work. RBC argued that the subject payment has different colour than the original payment and hence pleaded that the same cannot be seen as falling under Article 6(2) of UK-Canada DTAA. HMRC argued that Article 6(2) will be applicable not only where payments were in exchange for the 'right to work' natural resources, but also where they were considerations for the 'working' of them. There are various other contention by RBC supporting this primary contention, which are not that important for the current deliberation.

The FTT rejected the contention of RBC and stated that given the purpose of the provision of Treaty [Article 6(2)] is clearly to focus on profit derived directly by working the resources or indirectly by letting out the right to do so, there is no reason for limiting the scope of Article 6(2) to cover only payments which are made directly to the owner of the rights in exchange for the grant of a right to exploit them. **The focus must be on the ultimate source of profit and it would be irrational and inconsistent with the apparent purpose of the provision if it were possible to avoid local taxation on that profit simply by interposing an assignment of royalty rights after they had been granted.** Accordingly, the FTT held that the subject payments which were received by RBC were capable to be characterised in the nature of Article 6(2).

Taking the above rationale and applying it to the deeming income (stamp duty value - purchase consideration), the tax authorities may argue that the focus must be on the ultimate source of profit and not the result of the same and may try to tax it under Article 6(2).

However, the facts of the instant case and RBC can be distinguished by stating that in RBC case, it was the right to work the natural resources was the subject matter, whereas in the instant case, the deeming income is the subject matter. The RBC matter was occupied with further exploitation of source/main right of 'right to work', whereas the current case is only occupied with a deeming income which do not relate back to the immovable property (except for the measure).

The Madras ITAT in the matter of A.K.N Govindaswamy Chettiar[8] had an occasion to deal with interpretation of Article 6(2). The facts of the said matter were that the A.K.N Govindaswamy Chettiar was a resident of India and has received compensation for vacating the premises at Kuala Lampur apart from other incomes from Malaysia. The Revenue tried to tax the said income in India, whereas the Tribunal stated the compensation amount received for surrendering the tenancy right is a right in property and accordingly said income would fall under the ambit of Article VI of India-Malaysia DTAA. The Tribunal stated that though there is no specific provision dealing with the said income and though received on capital account, the income still can be treated as income from property to characterise such income from immovable property.

Relying on the above judgment, the tax authorities may argue that when the ambit of Article 6(2) is wide enough to cover the compensation received from surrender of tenancy rights, then why cannot

[7] Her Majesty Revenue & Customs
[8] [1993] 044 ITD 138 (ITAT Mad)

be the deeming income (stamp duty value – purchase consideration) be covered under Article 6(2) thereby the tax should be paid in India.

Further, the tax authorities may also argue that similar provision, deeming the stamp duty value as full value of consideration exists for the seller in terms of Section 50C, then it is beyond doubt that the said income is directly in relation to immovable property. Taking this further, the tax authorities may claim that the same income cannot be said to be not related to immovable property when it is being assessed in the hands of receiver.

However, on a closer reading of the judgments of A.K.N Govindaswamy Chettiar (supra) and PAVL Kulandagan Chettiar (supra), Mr A can argue that in both the cases, the income derived has intimate connection to the immovable property, but whereas in his case, there does not exists any such intimate connection. The connection exists only to the extent of arriving the stamp duty value of immovable property and actual purchase consideration, in other words, to identify the deemed income and does not in any other way connected to the immovable property.

Mr A can also argue that the difference between the stamp duty value of immovable property and purchase consideration is deemed to be income on a presumption that cash has been used to discharge the balance consideration. The presumption is based on the reasoning that no one would sell the immovable property for a value lower than the stamp duty value unless he was compensated in other means. Hence, the provision is to eradicate the abuse involved and cannot be said directly related to immovable property. Since the deemed value is assumed to be received, it is inevitable for the legislation to replace the same with actual consideration for the purposes of computation of capital gain in the hands of seller and for that sole reason, it cannot be said that the said income is directly related to immovable property, especially in the hands of the receiver. Assessment has to be done on Mr A based on the nature of receipt in the hands of Mr A but not the nature of receipt in the hands of seller.

We opine that Mr A would have fair chance to succeed in his claim that the said income would not fall under the Article 6 of India-UAE DTAA. Further, he can take the support of Fowler's (supra) verdict and claim that the term 'immovable property' has to be alone taken from the domestic legislation and not the fictions surrounding it. The deeming fiction carved under the domestic law for treating the balance consideration (stamp duty value – purchase consideration) either for seller or buyer [in terms of section 50C or section 56(2)(x)] cannot be used in characterising the income for the purposes of treaty. Hence, Mr A can argue that the said income does not fit under the ambit of Article 6. Let us proceed to examine, whether such income would fall under Article 22.

Article 22(1) of India-UAE DTAA states that items of income of resident of a contracting state, wherever arising, which are not expressly dealt with in the foregoing articles of the agreement, shall be taxable only in that contracting state. In other words, the taxing rights were given to the resident state. Hence, Mr A can argue that since the deeming income (stamp duty value – purchase consideration) is not expressly dealt with in the foregoing articles, the said income would fall under Article 22(1) and accordingly taxable in UAE and not in India.

Hence, there is a fair chance for Mr A to succeed stating that the deemed income falls under Article 22(1) instead of Article 6 and thereby not being subjected to tax in India. However, it would not be a cake walk for Mr A to see his claim wins.