Taxation of Fee for Technical Services

BY PRAKASH SACHIN & CO.

Discussion on Definition of FTS as per Act.

Source Rule – Section 9 (1)(vii)

- **When does FTS accrue or deemed to accrue or arise in India – SOURCE RULE**
- Where FTS is payable by the Government.
- Where FTS is payable by the resident, except where the FTS is payable in respect of services utilized in a business or profession carried on by such person (i.e., the payer) outside India; or for the purposes of making or earning any income from any source outside India.
- Where the FTS is payable by a non-resident where the fees are payable in respect of services utilized in a business or profession carried on by such person in India; or for the purpose of making or earning any income from any source in India.

Meaning of FTS under the Income Tax Act, 1961 ('Act')

- "Explanation 2. For the purposes of this clause, "fees for technical services" means 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) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"."

Meaning of FTS under the Income Tax Act, 1961 ('Act')

- Consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.
- The technical services comprise of following broad elements:
- Managerial Services
- Technical Services
- Consultancy Services
- Provision of services of technical or other personnel

Services excluded from the scope of FTS as defined in the Act

- **Explanation 2 to Section 9(1)(vii) specifically excludes the consideration for the following from the scope of FTS:**
  - any construction,
  - assembly,
  - mining or
  - like project undertaken by the recipient or
  - consideration which would be income of the recipient chargeable under the head "Salaries"."

Business must be in existence:

- Shriram Capital Limited, *W.P.No.4965 of 2011, Madras High Court :*
- Facts: The Indonesian firm has provided "Consultancy Service" to the Indian company and made the payment without deducting TDS on the ground that the service utilised for the business or profession carried on by such person outside India. Referring exception provided in Section 9(1)(vii)(b) of thse Income Tax Act, 1961 or outside the Explanation 2 to said Section.
- Held: If the service utilized by the petitioner abroad was for **pre existing business in Indonesia,** the petitioner could have legitimately stated that the service provided was utilized for a business of profession carried out outside India or for the purpose of making or earning any income from any source from outside India. There is no source that is existing in Indonesia.

Source Rule – Section 9 (1)(vii)

- **When does FTS accrue or deemed to accrue or arise in India – SOURCE RULE – Explanation to s/s (2)**
- Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-
- (i) the non-resident has a residence or place of business or business connection in India; or
- (ii) the non-resident has rendered services in India.

Havells India (352 ITR 376) (Delhi HC)

- Facts: The assessee-company was engaged in manufacture of switch gears, energy meters, cables and wires, electrical fans, compact florescent lamps and related Components and made the payment without deducting TDS, assessee paid a certain amount to a USA company for the purpose of obtaining witness testing of AC contractor as part of CB report and KEMA certification. The assessee contended that as the testing was carried out by the US Company outside India, no income arose or accrued to the US company in India and, therefore, the provisions of section 40(a)(ia) could not be invoked to disallow the payment on the ground of non-deduction of tax at source.

Havells India (352 ITR 376) (Delhi HC)

- Facts: The Assessing Officer held that the amount paid represented fees for technical services rendered by the US company to the assessee within the meaning of Explanation 2 below section 9(1)(vii)(b) and, therefore, the amount was assessable in the hands of the US company as income deemed to have accrued or arisen in India and since no tax was deducted by the assessee from the remittance of the amount, the amount was liable to be disallowed under section 40(a)(ia).

Havells India (352 ITR 376) (Delhi HC)

- Decision: In order to fall within the exception provided in Sec 9(1)(vii)(b), the source of the income, and not the receipt, should be situated outside India. That condition is not satisfied in the present case. The Tribunal have not examined the case from this aspect. Its conclusion that the technical services were not utilised for the assessee's business activity of production in India does not bring the assessee's case within the second exception in Sec 9(1)(vii)(b) of the Act. It is not sufficient for the assessee to prove that the technical services were not utilised for its business activities of production in India, but it is further necessary for the assessee to show that the technical services were utilised in a business carried on outside India. Therefore, we cannot also approve of the Tribunal's order to the extent it seems to suggest that the assessee satisfies the condition necessary for bringing its case under the first exception.

Motif India Infotech Pvt Ltd. (2018) 409 ITR 178 (Guj.) (HC)

- Facts: The assessee company is engaged in the business of software development and provides software related services to its overseas clients. For providing such services the assessee had entered into contracts for availing services with a Philippines based company. The assessee made payments in the nature of FTS without deducting TDS. The AO disallowed the payments on failure to deduct TDS under Section 195 of the Act. The CIT (A) held that the services were utilised outside India for the purpose of earning income outside India and therefore they fall under the exception clause of 9(1)(vii)(b). The ITAT upheld the decision of the CIT (A).

Motif India Infotech Pvt Ltd. (2018) 409 ITR 178 (Guj.) (HC)

- **Decision :** The Court observed that the payments made by the assessee were for technical services provided by a non resident and were utilized for providing services to foreign clients. In such a scenario the FTS was paid by the assessee for the purpose of making or earning any income from any source outside India. Since the source of income i.e. the assessee clients were foreign companies, the FTS paid outside India for earning such income is not taxable in India.

What Constitutes FTS?

- *Explained by the Supreme Court in **GVK Industries Ltd [2015] 371 ITR 453 (SC)***
- **Facts** – The question pertained to whether certain services rendered to the Assessee fall under the ambit of Explanation 2 to Section 9 (1)(vii).
- **Services rendered** – The services included financial structure and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the company in loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a coordinated and expeditious manner. These services were given on the basis of a success fee mandate i.e. the consideration was stated to be a success fee.

What Constitutes FTS?

- **Decision** – The Court held that the services received by GVK amount to technical services. The Court did not consider the taxonomy of ‘success fees’ to decide whether the consideration fell in line with any other technical services within the ambit of section 9(1)(vii)(b).

What does ‘rendering of services’ mean ?

- Consideration of technical, managerial and consultancy services would only amount to FTS in terms of Section 9 when the services are RENDERED. Therefor, it is crucial to understand when services are rendered.
- ***Flag Telecom Group Ltd. v. Deputy Commissioner of Income-tax, [2015]***
- Facts - The Assessee, a Bermuda based company had built a high capacity submarine fibre optic telecommunication cable (FLAG Cable System) providing a telecommunication link between the UK and Japan to increase the telecommunication traffic between and among Western Europe, Middle East, South Asia, South East Asia and Far East. 14 parties, including assessee, was the part of consortium and in India VSNL was one of the consortium. To render such service, they entered into a cable sales agreement (CSA) and such CSA laid down the concept of standby maintenance, payments, obligations, management decisions, etc., in a separate agreement titled as 'Construction and Maintenance Agreement’ (C&MA). The C&MA was for the period of 25 years, which coincided with the life of the cable.

What does ‘rendering of services’ mean ?

- Findings: The Assessing Officer held that, the income from standby maintenance activities, which was separately received, was held as taxable under the head 'fee for technical services' within the meaning of section 9(1)(vii), because the maintenance required highly skilled and technical personnel
- Decision: A very important phrase preceding the word managerial, technical and consultancy services is, "rendering". **The word 'rendering' qualifies the other terms used for the FTS. The word "rendering" connotes to "provide" or "deliver“ or "to do something".**
- *Thus, rendering services means that some kind of actual services is being provided or delivered which are in the nature of managerial, technical or consultancy.*

Meaning of managerial Services

- ***Endemol South Africa (Proprietary) Ltd. vs. DCIT, [2018] 98 taxmann.com 227 (Mumbai -Trib.)***
- Services rendered –
- The Assessee as a line producer was to act as a facilitator and coordinator for filming of the series in South Africa for an Indian Company. The scope of work included arranging for locational crew, transportation, paper work for various stunts to be performed and other requirements for setting up and filming series etc.

Meaning of managerial Services

- **Decision –** Services held not to be FTS as the services provided by the assessee were found to be in the nature of administrative services (such as making logistic arrangements etc.). With regards managerial services the Tribunal held that the term ‘managerial services’ ordinarily means:
- **handling management and affairs**
- **controlling, directing, managing or administering the business or part of a business of service recipient**

Meaning of Consultancy Services

- ***GVK Industries Ltd [2015] 371 ITR 453 (SC) 35.***
- The SC held the services received by GVK to be in the nature of consultancy services.
- The Court relied on the decision of the Delhi HC in ***Bharti Cellular Ltd. [2009] 319 ITR 139/[2008] 175 Taxman 573 (Delhi)***, wherein it was observed *that, 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 specialised field. "****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. A machine cannot be regarded as a consultant.'*

Meaning of Consultancy Services

- ***Le Passage to India Tours & Travel (P.) Ltd. [2014] 369 ITR 109 (Delhi ITAT)***
- ***Facts:*** The assessee was engaged in the business of organizing tours and travel arrangements for foreign tourists coming to India. In order to promote its business in foreign countries the assessee had appointed agents in various countries to market its services and paid representation charges/retainership fee and commission. The Assessing Officer held that the payment of representation charges and commission and tour expenses were in the nature of fee for technical services defined under section 9(1)(vii).

Meaning of Consultancy Services

- ***Le Passage to India Tours & Travel (P.) Ltd. [2014] 369 ITR 109 (Delhi ITAT)***
- ***Decision –*** The Tribunal held such Services not held to be FTS.
- *"Consultancy: is generally understood to mean an advisory service. Further, it may be fair to state that not all kinds of advisory could qualify as technical services.* ***For any consultancy to be treated as technical services, it would be necessary that a technical element is involved in such advisory.*** *Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such advisory."*

Meaning of Technical Services

- The ordinary meaning of the term ***"technical"*** involves the application of specialized knowledge, skill or expertise with respect to a particular art or science.
- In ***Endemol South Africa Case*** the Mum Tribunal held the following:
- *The term 'technical services' takes within its sweep services which would* ***require the expertise in technology or special skill or knowledge relating to the field of technology.*** *As per the concise oxford dictionary, the term* ***'technical services' means belonging or relating to art, science, profession or occupation involving mechanical arts and applied sciences****. As the administrative services, viz., arranging for logistics, etc., by the assessee did neither involve use of any technical skill or technical knowledge, nor any application of technical expertise on its part while rendering such services, the same cannot be characterised as technical services.*

Meaning of Technical Services

- ***In the case of Kotak Securities Ltd [2016] 383 ITR 1 (SC) question that arose -***
- Whether the transaction charges paid by a member of the Bombay Stock Exchange to transact business of sale and purchase of shares amounts to payment of a fee for 'technical services' rendered by the Bombay Stock Exchange?
- **Decision –** The SC held that transaction charges paid do not amount to FTS. As per the SC "'Technical services' like 'Managerial and Consultancy service' would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would, therefore, stand out in distinction to the former."

Professional Service Vs. Technical Service

- **Whether professional services are included within he meaning of "fees for technical services"?**
- ***TUV Bayren (India) Ltd. [2012] 23 taxmann.com 127 (Mum.)*** *upheld by the Bombay High Court in* **Director of Income-tax, Mumbai vs TUV Bayren (India) Ltd. [2015] 61 taxmann.com 443 (Bombay)**
- **Facts :** The assessee, a German company, had a branch in India. The Indian branch was engaged in the business of audit and procedure of norms for ISO 9000 certification. The services offered by Indian branch were ISO 9000 quality system certification where in quality system auditor of assessee company would visit the company opting for ISO certification, carry out a pre-assessment audit and then a certification audit and submit report to the assessee. After verification of report by the assessee, ISO 9000 certification was granted. The assessee treated its income as business income. The AO opined that such services should be taxed as FTS.

Professional Service Vs. Technical Service

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- **Decision –** *The income of the assessee was held to be business income and not FTS.*
- The Court came to a finding that services in question relate purely to audit work of ISO certification. Furthermore, there is no element of advise given or consultancy provided. Both the authorities below have simply observed that even the audit work and certification work comes within the realm of FTS.

Assembly Services

- **Linde AG, Linde Engineering Division v/s DDIT [2014] (365 ITR 1) (Delhi HC)**
- Services relating to design and engineering inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and forming an integral part of the said supplies, would not be amenable to tax under Section 9(1)(vii) of the Act as FTS.

Construction Services

- **Hotel Scopevista Ltd vs. ACIT [2007] (18 SOT 183) (Delhi ITAT).**
- Consideration payable in relation to construction of a project will not be treated as FTS

Construction Services

- **OHM Limited vs. DIT (AAR No. 935 of 2010) affirmed by Delhi HC in 212 Taxman 440 (2013).**
- Income from services rendered in connection with seismic surveys cannot be regarded as FTS since this fits within the scope of the term “mining”.

Reimbursement of expenses – FTS?

- It is settled that only that amount which constitutes to be income in terms of Section 2(24) of the Act will be taxed under the Act. The Supreme Court of India in **A.P. Moller Maersk A/S [2017] 392 ITR 186/246 Taxman 309/78 taxmann.com 287 (SC)** has held that "Once the character of the payment is found to be in the nature of reimbursement of the expenses, **it cannot be income chargeable to tax."**
- However, as Withholding Tax-related provisions dealing with contractual payments, payment of FTS use the expression 'any sum' there is a dispute on the issue of whether reimbursement of expenses can partake the character of "fees for technical services".

In favour of assessee

Reimbursement of expenses – FTS?

- Supreme Court of India, in the case of ***GE India Technology Center P Ltd.*** **[2010] 193 Taxman 234 (SC)** held that the obligation to withhold tax should be limited to the appropriate proportion of such income chargeable to tax under the IT Act.
- According to the Court, one cannot state that the obligation to withhold tax arises the moment there is a remittance. Therefore, **plain reimbursement to a non-resident is not the income chargeable under the IT Act, and consequently, should not attract Withholding Tax provisions.**

In favour of assessee

Reimbursement of expenses – FTS?

- ***Cochin Refineries Ltd, [1996] 222 ITR 354 (KER.)***
- **Facts -** Cochin Refineries Ltd. requested Foster Wheeler Energy Corporation to evaluate whether coke produced from a blend of vacuum bottoms and clarified oil from Bombay High crude is suitable for making anode for aluminium industry for which **assessee made payments which included reimbursement of amounts paid by foreign company to its personnel.**
- **Decision -** The Court held that the a even the payments which were in the nature of **reimbursements would amount to FTS as these payments would be part and parcel in the process of advice of a technical character** and would fall for coverage only within the meaning of the *Explanation 2 of Section 9 (1)(vii).*

In favour of Revenue

Centrica India Offshore (P.) Ltd., [2014] 44 taxmann.com 300 (Delhi)

- **Facts** - To seek support during initial year of its operation, assessee sought some employees on 'secondment' from the overseas entities. For this purpose, it entered into an agreement with the overseas entities in which the latter seconded some employees for fixed tenure. In terms of the secondment agreement, the employees so seconded worked under assessee's direct control and supervision. The AAR held that reimbursement of salary cost paid/payable by the assessee to overseas entities under the terms of Secondment agreement was in the nature of income accrued to the overseas entities; and, therefore, tax was liable to be deducted at source u/s 195.

Centrica India Offshore (P.) Ltd., [2014] 44 taxmann.com 300 (Delhi)

- **Decision:** There is no distinction between the provision of services by the overseas entities and the mere secondment of employees, since the services provided by the overseas entities is the provision of technical services through the secondees. The Court held that where in terms of 'secondment agreement' entered into by assessee with overseas companies, employees of those companies used their technical knowledge and skills while assisting assessee in conducting its business of quality control and management, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to 'fee for technical services' liable to tax in India.

In favour of Revenue

Intel Corporation [2016] 76 Taxmann.com 125 (Bangalore ITAT)

- Payments made by the Indian company on account of reimbursement of salary relocation and other costs of all expatriates was in the nature of 'fees for technical services', since all the expatriates were holding managerial position and were experts in their respective fields of managerial skills and were rendering managerial and highly expertise services.

In favour of Revenue

DIT vs. HCL Infosystem Ltd. [2005] 144 Taxmann 492 (Del)

- **Facts -** The question that arose was whether the remittances made by the assessee to HP (USA) in respect of salaries paid by HP (USA) on behalf of the assessee to four "foreign technicians"/expatriates, be not treated as ‘fee for technical services’ and subject to the provisions under Section 195 of the Act.
- **Decision** - The Court upheld the decision of the Tribunal that the **remittances were by way of ‘salaries’ and were not ‘fee for technical services’** as claimed by the Revenue. Tribunal, observing that fee for technology transfer and for transfer of know-how had already been quantified and separately received and the assessee was correctly paying salary to the technicians which were deputed and whose services were placed at disposal of assessee.

In favour of assessee

Temasek Holdings Advisors (I) (P.) Ltd. v. DCIT [2013] 27 ITR(T) 125 (Mumbai ITAT)

- It was held that payments made by the Indian company on account of **reimbursement of salary of two employees and other costs, was not in the nature of 'fees for technical services',** being rendering of managerial and consultancy services within the ambit of section 9(1)(vii).

In favour of assessee

Rate of tax u/s 115A

Discussion on Sec 115A

- As per Sec 115A(1)(b), a non resident, not being a company, or to a foreign company, includes any income by way of royalty or FTS, other than income referred to in Sec 44DA, received from Indian concern…….the income tax payable shall be the amount of income tax calculated on the income by way FTS if any included in the total income @ 10%.

Discussion on Sec 115A

- As per Sec 115A(5), it shall not be necessary for an assessee receiving FTS to file ITR if the tax deductible at source under the provisions of Part B of Chapter XVII has been deducted from such income and the rate of such deduction is not less than the rate specified under Sec 115A(1)(b).

As amended in Finance Act 2020

Rate of tax as per treaty

- **BOC Group Ltd. [2015] - 64 taxmann.com 386 (Kolkata - Trib.)** when tax rate is determined under DTAA, then tax rate prescribed thereon shall have to be followed strictly without any additional taxes thereon in form of surcharge or education cess

Taxation u/s 44DA

Special provision for computing income by way of royalties, etc..

- **As per Sec 44DA.** The income by way of royalty or FTS received from an Indian concern ……..by a non-resident, not being a company, or a foreign company where such non-resident carries on business in India through a PE situated therein, or performs professional services from a fixed place of profession situated therein, the fees for technical services are paid is effectively connected with such PE or fixed place of profession, as the case may be, shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of this Act.

Special provision for computing income by way of royalties, etc..

- **Provided** that no deduction shall be allowed,—
- (*i*) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or
- (*ii*) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices.

Special provision for computing income by way of royalties, etc..

- (2) Every non-resident, not being a company, or a foreign company shall keep and maintain books of account and other documents in accordance with the provisions contained in section 44AA and get his accounts audited by an accountant as defined in the *Explanation* below sub-section (2) of section 288 and furnish along with the return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

Applicability of Sec 44BB and Sec 44DA

- ***Whether technical services in relation to oil exploration and drilling activities falls outside the purview of section 44BB read with section 44DA/Explanation 2 to section 9(1)(vii) of the Act?***
- The taxation of activities pertaining to extraction of oils is governed by Section 44BB of the Act. Section 44BB does not have any ambiguity. However, the applicability of Section 44BB had been wrought with controversy as the Act also provides a separate regime for taxation of FTS by means of Section 44D, 44DA and 115A of the Act.
- Questions have arisen with respect to the applicability of Section 44BB as against Section 44DA which refers to Explanation 2 of Section 9(1)(vii).
- The Supreme Court in ***ONGC vs CIT, [2015] 59 taxmann.com 1 (SC)*** has finally settled this question to hold that Section 44BB will be applicable with respect to activities pertaining oil exploration and extraction.

FTS/FIS under Tax Treaties

Definitions under the UN Model - Article 12A

- ***FEES FOR TECHNICAL SERVICES***
- *1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
- *2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ percent of the gross amount of the fees [the percentage to be established through bilateral negotiations].*

Definitions under the UN Model - Article 12A

- *3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:*
- *(a) to an employee of the person making the payment;*
- *(b) for teaching in an educational institution or for teaching by an educational institution; or*
- *(c) by an individual for services for the personal use of an individual.*

Definitions under the UN Model - Article 12A

- *4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with:*
- *(a) such permanent establishment or fixed base, or*
- *(b) business activities referred to in (c) of paragraph 1 of Article 7.*
- *In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.*

Definitions under the UN Model - Article 12A

- *5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.*
- *6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.*

Definitions under the UN Model - Article 12A

- *7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.*

Difference between FIS and FTS

- Some treaties instead of the FTS clause have the ‘fees for included services clause’
- Example India – US Treaty
- Article 12 contains the FIS Clause.

Extract – Article 12, India-US DTAA

- *4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*
- *a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
- *b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

Extract – Article 12, India-US DTAA

- *5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid :*
- *a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;*
- *b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;*
- *c) for teaching in or by educational institutions ;*
- *d) for services for the personal use of the individual or individuals making the payments ; or*
- *e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).*

DTAAs which restrict the scope or terms FTS only to technical and consultancy services

- **Examples are India's DTAAs with:**
- 1. Canada, 2. US, 3. UK, 4. Finland, 5. Netherlands
- ***Whether managerial services can be considered within the scope of "fees for technical services" where the Treaty includes only technical or consultancy services within the said definition?*** If the treaty does not contain the term 'managerial services' then such services it cannot be included under the definition of FTS.
- ***Measurement Technology Ltd. United Kingdom, In re, [2015] 60 taxmann.com 1 (AAR - New Delhi)*** - Since amendment effective from 11-2-1994 to DTAA between India and UK, managerial services are not covered in definition of 'FTS' and even technical or consultancy service, if they do not meet criterion of 'make available', cannot be treated as FTS.

DTAAs containing the make available clause

- *Examples – India's DTAAs with US, UK Canada, Australia, Finland, Singapore* • Meaning of the "Make available" clause in the definition of "fees for included services" under the Treaty
- *Where a DTAA in the context of fees for technical services provides for a condition that technical knowledge or expertise must be made available then unless and until the non-resident makes avail able technical knowledge, experience, skill, knowhow or processes or transfers technical plan or technical design, then there is no question of the payments being treated as FTS. Different views have emerged recently in the context of this clause.*

DTAAs containing the make available clause

- Specific examples:
- India – US Treaty – FIS containing ‘make available clause’ and the India – UK Treaty – FTS containing the ‘make available restrictions’ contain the following make available clause.
- *That the services make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.*

Discussion through Case Laws

CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]

- The assessee is a private Indian company in the business of prospecting and mining diamonds and other minerals. It has been granted licences (reconnaissance permits) by various state governments. Reconnaissance is an early stage of exploration.
- To carry out a geophysical survey, the assessee entered into an agreement with Fugro Elbocon BV, Netherlands (Fugro).
- Fugro conducted an airborne survey using its specialised equipment to provide high-quality and high-resolution geophysical data suitable to select probable kimberlite targets. For the survey, a helicopter was hired by the assessee.
- All the logistics of the survey such as the flight schedule, re-flight survey lines, control lines, positioning, etc. were set up by Fugro. Fugro deputed technical personnel to conduct the survey. The data collected was provided to the assessee in a particular format (i.e. digital plot files, maps and photographs).

CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]

- Consideration was paid to Fugro, under the agreement, for providing specific data for which it was required to conduct the airborne survey, without deduction of tax under the Income-tax Act, 1961 (the Act).The assessing officer (AO) held that the consideration paid to Fugro is FTS in terms of Article 12 of the tax treaty and treated the assessee as an assessee-indefault for failure to deduct tax under the Act.
- **Decision :**
- ***Fugro had rendered technical services as defined under section 9(1)(vii) of the Act, as it did not satisfy the 'make available' as contained in the tax treaty. Therefore, the liability to tax was not attracted.***
- By virtue of the protocol to the India Netherlands DTAA, the HC applied the meaning of 'make available' contained in the India-Singapore Double Taxation Avoidance Agreement. According to it, FTS means payments of any kind to any person in consideration for technical services if they make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply technology contained therein.

CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]

- The Court held that :
- It is clear that the assessee acknowledged the services of Fugro for conducting aerial survey, taking photographs and providing data information and maps. The assessee can make use of the data supplied by way of technical services and put its experience to identify the location where the diamonds arefound and carry on its business.
- But the technical services which were provided by Fugro will not enable the assessee to independently undertake any survey either in the same area or any other area in the future.
- **They did not get any enduring benefits from the aforesaid survey. Therefore, Fugro had not made available the aforesaid technology with the aid of which the assessee will be able to collect the data, which was earlier passed on by Fugro.**

CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]

- **Director of Income-tax vs. Guy Carpenter & Co. Ltd. [2012] 20 taxmann.com 807 (Delhi)**
- The Court held that the amount received by international reinsurance intermediary (broker) for services rendered to insurance company in India in process of re-insurance of risk placed by Indian Insurance company with international reinsurance companies would not amount to 'fees for technical services' as the make available clause was not satisfied.

Buro Happold Ltd. vs. DCIT, [2019] 103 taxmann.com 344 (Mumbai - Trib.)

- ***Facts: T***he taxpayer is a company registered in the UK and is a tax resident of the UK. It is in the business of providing consulting and engineering services in relation to structural and MEP (Mechanical, Electrical and Public health) designs for buildings.
- The taxpayer had a subsidiary in India, namely Buro Happold Engineers India Pvt Ltd (Buro India). Buro India rendered consulting engineering services to its clients. However, in areas, such as master planning, acoustics engineering, environmental engineering, etc., for which they lacked the expertise, the said services were availed from the taxpayer.
- During the year under consideration, the taxpayer had received income for the provision of consulting and engineering services and income on account of cost recharge to Buro India.
- **Decision:** The Tribunal held that the payment received by assessee a U.K. based company for providing consulting services to an Indian entity will not be considered as fees for technical services under article 13(4)(c) of India-UK DTAA as supply was contract specific and was not made avaialble to Indian entity to be used in any other project in future.

Key Takeaways

- Simplistically understood, a mere rendition of services does not fall within the gamut of the term "make available" unless the recipient of services is enabled and empowered to make use of the technical knowledge by itself in its business or for its own benefit without recourse to the original service provider in the future.
- The condition of "make available" is satisfied when the recipient acquires a means to an end, i.e. he acquires the technical knowledge, experience, skills, know-how or processes from the provider which acts as a means and enables him to use the same for achieving a further end. The condition of make available is not satisfied merely where the services itself serves as an end for the recipient and he does not acquire any technical knowledge, experience, skill, know-how, or processes from the service provider

Key Takeaways

- Services are said to be “made available” if the recipient of services is at liberty to use the technical knowledge, skill, know-how and processes in his own right.
- For instance, if a US tax resident simply provides some consultancy services to an Indian tax resident, payment towards the same would not satisfy the “make available” criteria and hence, would not qualify as FIS as per Article 12 of the India- US DTAA.

Some peculiar questions with respect to the ‘make available’ clause

- Where the services, though technical in nature, did not make available technical knowledge, skill, etc., payment for such services can be taxed under the enlarged definition under the Act?
- Whether in such circumstances, the payment would be construed as business profit of the non-resident service provider, liable to tax in India only after there is a Permanent Establishment (“PE”) in India..

Some peculiar questions with respect to the ‘make available’ clause

- When FTS clause is not available in the tax treaty, the income would be assessable as business income and it can be brought to tax in India only if the service provider has a PE in India and the earning of the said income is attributable to the activities of the PE (ACIT vs. Paradigm Geophysical Pty Ltd. [2010] 122 ITD 155 (Del))
- Whether the Memorandum of Understanding appended to the India US DTAA can be used for interpretation of similar Article in other DTAAs, wherein the make available clause exists??
- The explanation as provided in the MOU to the India-US DTAA should be equally applicable to all other DTAAs India has entered into wherein the “make available” criteria is provided.

Some key points for discussion

Where the Protocol provides for restrictive definition of "fees for included services" / "fees for technical services", whether separate notification is required in this regard?

- Delhi High Court in the case of **Steria (India) Ltd. [2016] 386 ITR 390 (Delhi)** held that payment for managerial services cannot be taxed as Fees for Technical Services (FTS) in view of the Most Favoured Nation (MFN)2 clause under the India-France tax treaty (tax treaty) and thus not not subject to withholding of tax.

Where the Protocol provides for restrictive definition of "fees for included services" / "fees for technical services", whether separate notification is required in this regard?

- The High Court observed that the MFN clause given in the protocol to the tax treaty cannot be interpreted restrictively.

Where the Protocol provides for restrictive definition of "fees for included services" / "fees for technical services", whether separate notification is required in this regard?

- In view of clause 7 of 'Protocol' forming part of India-France DTAA, less restrictive definition of expression 'fees for technical services' appearing in Indo-UK DTAA, must be read as forming part of India-France DTAA as well, hence payment by an Indian company to a French company for management services would not constitute Fees for Technical Services under India-French DTAA

Where the Protocol provides for restrictive definition of "fees for included services" / "fees for technical services", whether separate notification is required in this regard?

- In, **Apollo Tyres Ltd. [2018] 92 taxmann.com 166 (Karnataka)** the Karnataka HC held that in terms of protocol clause of India-Netherlands DTAA, separate notification is not required to be issued by Central Government for applying subsequent India-Finland DTAA to assessee's case.

Whether MOU/Notes/ Protocols given in various DTAA to other DTAA where terms used in DTAA are the same and implications of Most Favoured Nation ('MFN') clause?

- The Delhi High Court, in **Perfetti Van Melle Holding. B.V. [2014] 52 taxmann.com 161 (Delhi)** held that here Authority for Advance Rulings refused to look into Indo-Portugese DTAA or Indo-USA DTAA and memorandum of understanding between India and USA on ground that only Indo-Netherlands DTAA needed to be looked into, matter was to be remanded to consider entire matter afresh

Whether MOU/Notes/ Protocols given in various DTAA to other DTAA where terms used in DTAA are the same and implications of Most Favoured Nation ('MFN') clause?

- The Mumbai Tribunal in the cases of **Raymonds Ltd [2003] 86 ITD 791 (Mum)** and **Boston Consulting Group Pte Ltd [2005] 94 ITD 31 (Mum)** held that the MOU appended to the India-USA tax treaty and the India-Singapore tax treaty can be looked into as aids to the construction of the India-UK tax treaty.

Questions & Answers

Thank You

Prakash Sachin & Co.

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