BMR Legal

ADVOCATES

Fees for Technical Services under Sec. 9(1)(vii) under Income Tax Act 1961

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Concept of Fee for Technical Service

Background on Fee for Technical Services

- Indian tax regime is based on 2 ways of taxation(Section 5):
  - Residence based
  - Source based
- Section 9 creates a deeming fiction by applying source based taxation

[Section 9(1)(vii)]

Background on Fee for Technical Services

- India has been a net importer of technology
- Substantial payments were made to non- residents
- No model tax convention (UN, US and OECD) had an article dealing with taxability of such a service
- In an endeavour to protect its tax base, introduced FTS in 1976

Definition and Development of FTS

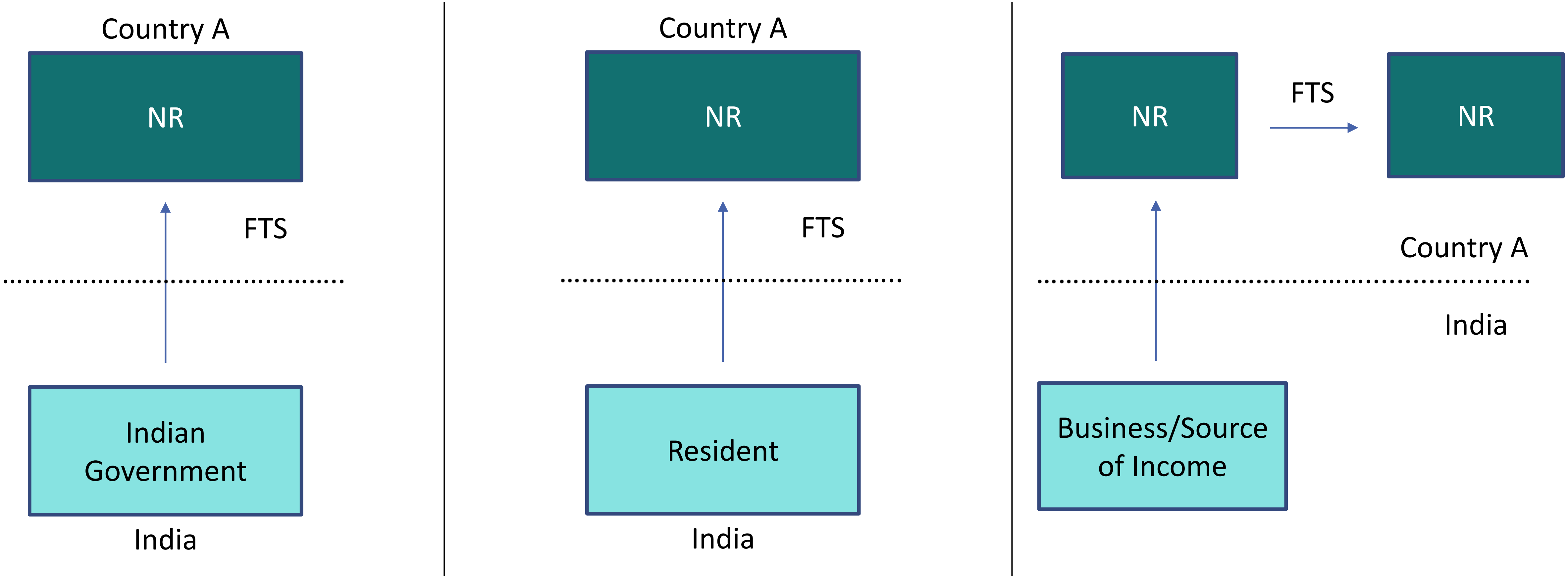
Who is the payer ?

PAYER	CONDITIONS
a) Indian Government	No conditions
b) Resident in India	• All cases • Except where services utilised by such person outside India or earning any income from any source outside India
c) Non-Resident in India	Only when fees is payable for a business or profession carried on by such person in India or for earning any income from any source in India

Fee for Technical Services - Section 9(1)(vii) of Income Tax Act 1961

- FTS defined under Explanation 2 of Section 9(1)(vii)
  - Fees for technical services' (FTS) means any consideration (including lump sum consideration) that is received for **rendering** any:
    - **Managerial services**
    - **Technical services**
    - **Consultancy services**
  - FTS, however, does not include consideration from the following:
    - Construction
    - Assembly
    - Mining or like projects
    - Income chargeable under the head 'Salaries'

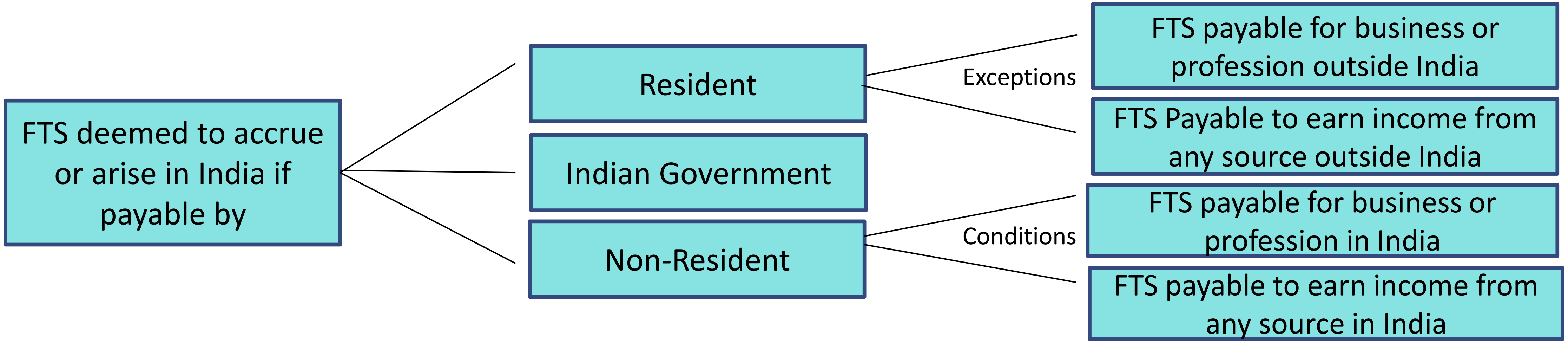
Who is the payer ?



Exceptions to FTS

FTS payable to the Non-Residents, could be from the following Payors:

- FTS payable by the Indian Government
- FTS payable by Resident to Non-Resident
- FTS payable by One Non-Resident to another Non-Resident



Development in FTS vis a vis Amendments

- Section 9(1)(vii) was one of the first provisions of section 9 to generate significant controversy in Indian tax jurisprudence regarding extra-territorial operation.
- Supreme Court ruling in Ishikawajima Hairima Heavy Industries Ltd. v. DIT laid down a new test for taxability of fees for technical services rendered by a non-resident.

  (a) utilised in India and

  (b) rendered in India.
- Agitated by the new interpretation put forth by the Court and its consequences on the taxability of lucrative services transactions, an amendment in the law was ensured within months and incorporated in the Finance Act,2007.

Development in FTS vis a vis Amendments

- Amendment turned out to be inadequate to change the exposition of the law as stated by the Supreme Court.
- In Jindal Thermal power Co. Ltd. v. DCIT the Karnataka High Court held that while the amendment clearly did away with the criteria of residence, place of business and business connection,
- The twin criteria of rendering and utilising services in India laid down by the Supreme Court in Ishikawajima remained unaffected by the explanation.
- The matter was sought to be resolved finally by Parliament vide the Finance Act, 2010

Key terms under FTS

Importance of ‘Rendering of Services’

Flag Telecom Group Ltd. v. Deputy Commissioner of Income-tax, [2015] 54 taxmann.com 154 (Mumbai- Trib.)

Facts:
The Assessee, a Bermuda based company had built a FLAG Cable System for telecommunication.
To render service, the concept of standby maintenance was made in the agreement.

Decision:
The word ‘rendering’ qualifies the other terms used for the FTS. The word “rendering” connotes to “provide” or “deliver” or “to do something”. It was held there was no rendering of services and no FTS.

Meaning of Managerial Services

Endemol South Africa (Proprietary) Ltd. vs. DCIT, [2018] 98 taxmann.com 227 (Mumbai -Trib.)

Facts:

Assessee was to act as a facilitator for filming of a series in South Africa for an Indian Company.
The scope of work included arranging for locational crew, transportation, paper work etc.

Decision:

Services held not to be FTS as the services provided were administrative services.
'Managerial services' means:
1. handling management and affairs.
2. controlling, directing or managing the business or part of a business.

Meaning of Managerial Services

Intertek Testing Services India Pvt Ltd., [2008] 175 Taxman 375 (AAR)

Facts:

The applicant, being a subsidiary of the Intertek Group has entered into Global Management Services Agreement (GMSA) to avail 'corporate head office services'; 'divisional global services'; and 'divisional regional services' which relate to financial, executive, marketing and administrative matters.

Decision:

The term "managerial" relates to "manager" or "management". Further, a "manager" is a person who manages an industry or business or who deals with administration or a person who organizes other people's activity

Meaning of Managerial Services

Credit Lyonnais vs ADIT [2013] 35 taxmann 583 (Mum ITAT)

Facts:

The assessee paid sum of 26.75 crore, out of total amount of 37.07 crore paid to the sub-arrangers by way of sub-arranger fees and commission, was paid in US$ to non-residents.

Decision:

'Managerial service' essentially involves controlling, directing or administering the business. When one talks of rendering 'managerial services' in relation to some activity, it is the management of such overall activity. Doing bits or small parts of overall activity independently cannot be considered as rendering of a 'managerial service' in relation to such activity

Summary of Principles laid down for Managerial Services

- The expression "managerial service" needs to be considered in a commercial parlance.
- It signifies **service for management of affairs or services rendered in performing** management functions.
- It involves **controlling, directing or administering** the business.
- It means **managing the affairs** by laying down certain policies, standards and procedures and then **evaluating the actual performance in light of the procedures** so laid down

Meaning of Technical Services

CIT vs Kotak Securities Ltd. (2016) 239 Taxman 139 (SC)

Facts:

The Assessee-Appellant who was a member of the Bombay Stock Exchange ("**BSE**") was paying transaction charges to the BSE for the transactions related to the sale and purchase of shares.

Decision:

Services which are specialized, exclusive and customized to user/consumer qualify as "fees for technical services". "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

Meaning of Technical Services

Endemol South Africa Case

Facts:

Assessee was to act as a facilitator for filming of a series in South Africa for an Indian Company. The scope of work included arranging for locational crew, transportation, paper work etc.

Decision:

- The term ‘technical services’ means expertise in technology or special skill or knowledge relating to the field of technology.
- The services were administrative and not technical services.

Meaning of Technical Services

Expeditors International (India) Pvt. Ltd. Vs ACIT [2010] (2 ITR (Trib.)153) (Delhi ITAT)

Facts:

The Assessee was paying the internet linking and communication charges (VSAT uplink charges) to its parent company, Expeditors, USA

Decision:

Payment for fees for standard services (cellular network, VSAT up linking, use of internet bandwidth) is not in the nature of FTS. The mere fact that the service provider has installed sophisticated equipment does not itself make it FTS. A technical service without human intervention would not be covered within the ambit of the definition of "FTS"

Meaning of Technical Services

Atos Information Vs. DCIT (ITA NO. 237, 238, 239 &240 / MUM / 2016), Mum ITAT

Facts:
The Assessee (Non-Resident Company) is providing computing services for data processing to the Standard Chartered Bank of India.

Decision:

Payment towards data processing involved provision of a standard facility without any human intervention and would not constitute FTS

Summary of Principles laid down for Technical Services

- Services are of technical nature when **special skills or knowledge or education related to a technical field are required** for the provision of such services
- Technical services are **not limited to the professional services referred to in Article 14, paragraph 2**. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc., may also constitute technical services **if those services involve the provision of specialized knowledge, skill and expertise.**

Meaning of Consultancy Services

GVK Industries Ltd. [2015] 371 ITR 453 (SC)

Facts:

A non resident rendered services such as financial structure and security package to be offered to the lender, making assessment of export credit agencies and documentation with lenders.

Held:

Consultancy is generally understood to mean an advisory service given by professional. GVK had the skill, acumen and knowledge in the specialized field and the services were 'Consultancy services'. Managerial, technical or consultancy service, have to be understood in general and common usage of the said words.

Meaning of Consultancy Services

CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239 (SC)

Facts:

The Respondent is a cellular service provider and by the virtue of the interconnect agreement with the BSNL pays interconnect/access/port charges to BSNL/MTNL .

Held:

The word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Service of consultancy 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

Intertek Testing Services India Pvt. Ltd., [2008] (175 Taxman 375) (AAR)

Facts:

The applicant, being a subsidiary of the Intertek Group has entered into Global Management Services Agreement (GMSA) to avail 'corporate head office services'; 'divisional global services'; and 'divisional regional services' which relate to financial, executive, marketing and administrative matters.

Held:

Advisory service which merely involve discussion and advice of routine nature or exchange of information cannot appropriately be classified as consultancy services.

An element of expertise or special knowledge on the part of the consultant is implicit in the consultancy services

Meaning of Consultancy Services

Le Passage to India Tours & Travel (P.) Ltd. vs DCIT [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 in lieu thereof, representation charges/retainership fee and commission was paid to them.

Held:

The consultancy should be rendered by someone who has special skills and expertise in rendering such advisory

Technical	Managerial	Consultancy
Architectural Services	Human resource development	Advising in development of business strategies
Feasibility and Project report	Overall management, supervision and direction	Advising and assisting in development of information systems
Customization/modification of software	Overseeing operations/functions	Locating new business opportunities
Provision of technical assistance in preparation of drawings or designs	Managing financial operations	Supply of skilled labour by an employment agency
Provision of consulting and engineering services in the preparation technical design	Building relationship with vendors and seeking their feedback	Conducting market surveys
Fabrication of item on job work basis	Supplier development and material management	Project management services
Rendering technical assistance in preparation of project report	Development and administration of dealers, sales and marketing services	Liasing and coordination services
Geological Surveys		Legal and Financial advisory
Seismic Survey		Services by an umpire or match refree
Inspection and Testing services		Advise on production related problems
Quality Check Certifications		

Including the provision of services of technical or other personnel

- The placement of this phase under the definition is very intriguing.

- This can lead to two interpretations

- Which interpretation do you think is more plausible and why?

For Section 9(1)(vii) click here

Concept of Human interaction

Human Intervention

Presence of Human Intervention in the provisions of managerial, technical and consultancy services is critical.

CIT vs Bharti Cellular Limited [2011]330 ITR 239,

➢ Supreme Court held that:

Both managerial and consultancy services involve a human element and applying the rule of noscitur –a-sociis the word technical as appearing in Explanation 2 would also involve human element.

ITO vs Right Florists Limited [2013] 25 ITR (T) 639:

It was held that fee for online advertisement could not be considered as FTS as there was no human element in rendering of the service.

Taxability under the Income Tax 1961 Act

Taxability of FTS under Indian Tax Law

- Non Resident
  - Section 115 A
    - Income earned by Non resident through FTS from Indian Concern other than the income referred u/s 44DA shall be taxable under Sec 115A(1)(b) at 10% of the income from FTS
  - Section 44DA
    - Income earned by Non resident where he/she carries business through PE shall be computed under the head ‘Profits and gains of business or profession’.
- Resident
  - Section 194 J- the TDS applicable to a resident payee shall be 2% for FTS.

Withholding of Tax – Sec 195

- Sec 195 requires deduction of tax on any payments to non-residents which is chargeable to tax under the ITA
- Deduction shall be made at the rates in force, Subject to DTAA

FTS under DTAA's and conflicts therein

FTS under Model Tax Conventions

UN Model, 2017	India- US DTAA
• Article 12 A of the UN Model defines 'fee for technical services'. • Includes Managerial, Technical and Consultancy Services. • Ambit of definition is broader.	• Article 12(4) of India-US DTAA defines 'fee for included services'. • Includes only technical and consultancy services. • Restrictive definition and doesn't include managerial services.

No mention of FTS under the OECD Model.

India-Germany DTAA defines FTS under Article 12, on similar lines to UN model but **includes the provision of services by technical or other personnel**.

Summary of Article 12A under UN MTC

FTS may be taxed both, in the country of which the recipient is a resident and in the country in which it arises

Para 1 outlines the basic rule that **FTS may be taxed in the state of residence**

Para 2 **entitles the state of source to tax FTS** to the extent as agreed in bilateral negotiation

Para 3 **defines the term FTS**

Para 4 provides **exception to FTS income** which arises through a PE to which article 7 or article 14 applies

Para 5 states the condition under which **FTS income is deemed to arise** in a contracting state

Para 6 indicates when a FTS income is not deemed to arise in a contracting state Para 7 provides for

adjustment of an amount which is in excess of arm's length principle

Indian DTAA's with different categories of FTS clause

Make Available Clause

- The expression make available assumes great significance in the context of determining the taxability of payment of FTS.
- Some of the DTAAs which India has entered into, USA, UK, Singapore, Netherlands, Cyprus etc. contain a more restrictive definition of FTS as it requires satisfaction of the make available condition with respect to such services

- The DTAA's which contain make available clause provide that FTS paid by a resident to non-resident shall be liable to tax in India only if such 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.
- The presence of this clause limits the scope as well as the taxability of such services in the Source State

Make Available Clause Contd.

Mere rendition of services does not fall within the gamut of the expression 'make available' unless the following conditions (illustrative) are fulfilled:

- The technical knowledge, skills, etc. remain with the person receiving the services even after the agreement comes to an end.
- The technical knowledge or skills of the provider are imparted to the recipient.
- The recipient is in a position to deploy similar skills or technology or techniques in future without the aid or assistance of the service provider.
- The technical information which is imparted or transmitted remains at the disposal of the recipient for taking benefit therefrom

Make Available Clause Contd.

- A distinction needs to be made between services which are rendered and services which are made available.

- While all services that are made available are necessarily rendered, not all services that are rendered, 'make available' the technical knowledge, skill, etc. to enable the recipient to derive an enduring benefit and apply the technology contained therein

- The expression 'make available' has not been defined in any of the DTAA's except for the India-USA DTAA. The explanation provided in the Memorandum of Understanding appended to the India-USA DTAA is as follows:

  "Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available."

Make Available Clause

Tata Technologies v. Acit [2022] 136 taxmann.com 161(Pune):

Facts:

The Assessee (TTL-US) received a sum towards 'Provision of Design and Engineering services' from TTL India for providing services to TML India and said sum was construed by the Assessing Officer as fees for technical services. In this regard, the assessee contended that it did not 'make available' any technical knowledge, experience or skill etc. through the services and hence, was outside the ambit of taxation in terms of Article 12(4) of the DTAA.

Held:

'Make available' means that the technical knowledge, experience, skill etc. should not get exhausted in the service itself.

Make Available Clause

CIT v. De Beers India Minerals [2012] 346 ITR 467

Facts:
The Assessee which is engaged in the business of prospecting and mining diamonds and other minerals, paid consideration to the Dutch Company, Fugro Elbocon BV in lieu of the provision of specific data for which it was required to conduct an airborne survey using its specialised equipment to provide high-quality and high-resolution geophysical data suitable to select probable kimberlite targets.

Held:
If the recipient is able to carry on his business in future without the technical services rendered then it is not made available.

No FTS Clause in Tax Treaty

ACIT vs. Paradigm Geophysical Pty Ltd. [2010] 122 ITD 155 (Del)

- When FTS clause is not available in the tax treaty, the income would be assessable as business income & be taxed in India only if the service provider has a PE in India and the income is attributable to the activities of the PE.

Most Favoured Nation Clause and Make Available

India has entered into DTAA's having a Most Favoured Nation (MFN) clause with various countries Netherlands, France, Spain, Belgium, Switzerland, Sweden, Finland, Hungary, etc.

The Protocol to the DTAA's with said countries ('relevant DTAA') provide that

if under any DTAA between India and a third State ('subsequent DTAA'),

India limits its taxation to a lower rate or a more restricted scope than the rate or scope provided in the relevant DTAA,

The same rate or scope as is applicable in the subsequent DTAA shall also apply under the relevant DTAA

In simple terms MFN clause is a provision in the DTAA by which one state agrees to accord to the other State a treatment that is no less favourable than that which it accords to the third States

Practical challenges in using FTS

FTS vs Business Income

This aspect is typically dealt with in Article 12A(4) of the UN Model – if FTS is effectively connected to a PE of the recipient, then it shall be covered under Article 7 business profits

To tax the FTS as business profits under Article 7 the following conditions are to be satisfied:

FTS arises in contracting state (state of source)

The beneficial owner is a resident of other contracting state (state of residence)

Such beneficial owner carries on business in state of source through PE situated or performs independent personal services from a fixed base situated therein and

FTS is paid is effectively connected with such PE or fixed base

- The above conditions are required to be satisfied on a cumulative basis.
- It is very important that the PE should be situated in a contracting state and not in a third state for Article 7 to apply

Cases

M/s. McKinsey Business Consultants Vs DDIT, IT Appeal No. 5452/MUM/2014

- **Issue:**

In the present case the issue whether consideration for rendering of services is taxable in India as fees for technical services (FTS) in the absence of FTS clause in India-Greece was raised.

- **Held:**

The Tribunal held that in absence of FTS clause in the India-Greece DTAA, the fees received by the assessee the fees cannot be treated as FTS and the same to be treated as business profits in the absence of India-Greece DTAA. The court relied on the decision of its own decision in the case of Mckinsey (Thailand) wherein it was held that if the income is earned in the ordinary course of business it would be business profits unless in DTAA it is specifically treated as other income. Thus, in the present case since the clause of FTS is missing in DTAA, the possibility of taxing income as FTS have been ruled out and such income taxable as business profits only. Since the resident assessee company does not have PE in India its business profits cannot be taxed in India.

Royalty and FTS

Atos Information Vs. DCIT (ITA NO. 237, 238, 239 &240 / MUM / 2016), Mum ITAT

- **Issue:**

i. Whether the infrastructure facility translated into functional process by a defined service flow for various geographic locations and for different business applications, would constitute "process". And thereby qualifying as being in the nature of “royalty” as per Explanation 2 to Section 9(1)(vi) of the Income Tax Act, 1961 .

ii. Whether the assessee has provided the technical, managerial and consultancy services within the meaning of technical services as defined in Explanation 2 to section 9(1)(vii) of Act to Standard Chartered Bank.

Cases

- **Held:**

i. The Tribunal held that payment made by the Standard Chartered Bank does not fall within the definition of 'royalty' because there was on transfer or application technology as the agreement only provide for the processing of data through a network of computer systems in Hong Kong to ensure quality and standard. Further, the technology, infrastructure, data centre, etc. was solely used by the taxpayer for its own purposes and was not make available to Standard Chartered Bank.

ii. With regard to the FTS, it was held that the payments does not qualify in the nature of FTS as the services are primarily standard facility and there is no constant human endeavour or human intervention which is required to provide the service. Considering the magnitude of transactions undertaken, it substantiates the fact that it is standard facility through which data is processed.

Secondment Agreements and FTS

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

- ‘Secondment agreement’ entered into by assessee with overseas companies, employees used their technical knowledge and skills, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to FTS liable to be taxed in India.

DCIT v. IBM India [2018] 100 taxmann.com 230 (Bangalore trib)- There was secondment of employees. The tribunal held that the foreign entity is the real employer but in absence of the provisions in the DTAA to tax for FTS there arose no liability.

Annexure

Section 9(1)(vii)

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

***Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.*

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

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";

Tax on Technical Fees - Sec 115A

Where the non-resident **does not have a permanent establishment (PE) or fixed place** of profession in India to which the FTS income is effectively connected

In such a scenario, the **FTS income would be taxable on gross basis (without allowing deduction of expenses)**

The applicable tax rates would be **10%** plus applicable surcharge and cess

Computation of FTS Income – Sec 44DA

Where the non-resident **has a PE / fixed place of profession in India** to which the FTS income is effectively connected and

FTS received by a non-resident **from the Government / Indian concern** under agreements entered after 31st March, 2003 and **effectively connected** to a PE / fixed place of profession in India, would be computed under the head "business income".

Accordingly, FTS **income would be arrived at after reducing permissible expenses** as per provisions of the Act (Sec 28 to 44C).

In computing FTS income, **deduction shall not be allowed for** –

- Expenditure which is **not wholly and exclusively incurred for the business of the PE** / fixed place of profession in India; or
- Amount **paid by the PE to its head office** / any of its other offices (other than actual reimbursement of expenses)

Computation of FTS Income – Sec 44DA

- Further, the non-resident would be required to **compulsorily maintain books of accounts** as per Sec 44AA of the ITA and get the **accounts audited (Form 3CE)**
- The tax rate applicable under Sec 44DA of the ITA is **40%** (plus applicable surcharge and education cess)
- Further, if the above mentioned FTS **is received from a non-resident** (i.e., not from the Government or an Indian concern), the applicable tax rate would be **40%** (plus applicable surcharge and education cess) as per Sec 28 of the ITA.
- However, in such a scenario, the **benefit of net basis of taxation would be available (allowability of deduction for expenses)**

Concept of "Effectively Connected"

- The term effectively connected is not defined under the ITA
- In general FTS income would be considered to be effectively connected with a PE or fixed base if the **technical services are closely related to or connected** with the PE or fixed base or if the **business activities are similar to those carried out through the PE**
- PE should have some role in carrying out of technical services and not when PE is set up for a completely different purpose
- PE should be engaged in performance of technical services or should be involved in actual rendering of services.

Article 12A of UN MTC

Article 12A(1)	FTS **arising in a contracting state** and paid to a resident of the other contracting state **may be taxed in that other state**
Article 12A(2)	• Such FTS **may also be taxed in 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 state**, the tax so charged **shall not exceed the percentage established through bilateral negotiations** of the gross amount of FTS (treaty rate)
Article 12A(3)	Meaning of the term FTS
Article 12A(4)	Provisions of the **Article shall not apply** for the beneficial owner of FTS being a resident of a contracting state, • **carries on business in the other contracting state** in which the FTS arise through a **PE situated** or • performs **independent personal services** in the other contracting state **from a fixed base** situated and the FTS are **effectively connected** with • such PE or fixed base or • business activities referred in Article 7 (Business Profits) or Article 14 (Independent Personal Services)

Article 12A of UN MTC Contd.

Article 12(5)

FTS 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, (irrespective of resident or not), **has PE or a fixed base** in connection with which the **obligation to pay the fees was incurred,** and such **fees are borne by the PE or fixed base**

Article 12(6)

FTS **shall not be deemed 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 PE 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 PE or fixed base**

Article 12(7)

Where by **reason of a special relationship** between:

- Payer and beneficial owner
- Payer, beneficial owner and some other person

the payment of FTS **exceeds than what would have been paid in absence of such relationship**, then the provisions of this **Article shall apply only to the extent of amount which is not in excess**.

The **excess amount shall be taxable as per the laws of the respective contracting states**

Taxability under DTAA

Article 12A prescribes the rate of taxability of FTS income, currently majority of FTS income is taxable as per Article 12 as the former is introduced recently

Taxability

FTS not attributable to PE in India of the non-resident

Would be **taxable on gross basis** (as per the DTAA)

Generally DTAAs levy tax rate in the range of **10-15%**

The assessee has an option to apply the tax rate prescribed as per DTAA or Sec 115A of ITA whichever is more beneficial to him

FTS is attributable to PE in India of the non-resident

The income liable to tax would be computed on **net basis** as per relevant Articles of the DTAA (i.e., Article 5 - PE read with Article 7 - Business Profits in most cases)

Applicable tax rate would be **40%** (plus applicable surcharge and education cess)