'Make Available' Clause- Tracing the Contours

The taxation of fees for technical services/fees for included services ('FTS/FIS' in short) is of paramount importance and probably one of the most debated topic in the context of international taxation. There are various issues vis-a-vis taxability of FTS, namely taxability of cross charges, the existence of human intervention whether a prerequisite, what constitutes a 'standard facility', taxability in cases where the double taxation avoidance agreement ('DTAA/Treaty' in short) does not have FTS clause, etc. Interpretation of the 'make available' condition in certain Treaties is also the most contentious issue amongst others.

1. 'Making Available' Fees for Technical Services

Section 9(1)(vii)(b) of the Income-tax Act, 1961 ('Act' in short) provides that FTS shall be deemed to accrue or arise in India where such FTS is payable by a resident. The Explanation after Section 9(2) as inserted by the Finance Act 2010 clarifies that FTS shall be deemed to accrue or arise in India whether or not the services are rendered in India. Accordingly, under the Act, FTS would be taxed based on the 'payer rule', *i.e.* based on the residence

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of the payer, irrespective of the place of rendering the services. It may be noted that the condition of 'make available' does not exist in the provisions of the Act dealing with FTS.

As regards the taxability of FTS in terms of the respective DTAA, under most of the tax treaties entered by India with other countries, technical services shall be deemed to arise in a Contracting State in which the payer is a resident. However, the Source State may also have right to tax the same. While in certain DTAA's[1], the definition of FTS/FIS is more restricted as it requires satisfaction of the 'make available' condition with respect to such services. There are certain DTAAs[2] which do not contain the condition of 'make available' specifically in the Article on FTS but in the form of a Most Favoured Nation (MFN) clause in the Protocol.

A distinction needs to be made between services 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 Authority for Advance Ruling (AAR) in the case of *Intertek Testing Services*[3] has reflected upon the difference between the rendering of services and 'make available' of services. The Authority held that in order to fit into the terminology of 'make available', the following conditions need to be satisfied:

i. Technical knowledge, skills, *etc.* must remain with the person receiving the services even after the agreement comes to an end.
ii. The technical knowledge or skills of the provider should be imparted to the recipient.
iii. The recipient should be in a position to deploy similar skills or technology or techniques in future without the aid or assistance of the service provider.

None of the DTAAs referred above defines as to what is meant by the expression 'make available' except for the India-USA DTAA. The explanation provided in the Memorandum of Understanding (MOU) appended to the India-US DTAA is as follows:

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 Authority for Advance Ruling (AAR) in the case of Intertek Testing Services has reflected upon the difference between the rendering of services and 'make available' of services.

"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." (Emphasis supplied)

Apart from the explanation with respect to the term 'make available', the MOU even gives examples of certain services like bio-technical services, food processing, geological surveys, *etc.* wherein technology is made available.

2. Analysing Taxability of Bio Analytical/ Clinical Testing Service *vis-a-vis* FTS/FIS

There are quite a few rulings which have analysed the taxability of payments made to non-residents for services in the nature of bio-analytical test, clinical tests, and other certifications of similar nature. The Ahmedabad Tribunal recently in the case of *B.A. Research India Pvt Ltd*[4] has analysed whether the payments for bio-analytical services would be chargeable to tax in India as FTS/FIS by virtue of the provisions of the Act read with the respective DTAAs. In the instant case, the non-resident entities carried on bio-analytical services on the sample supplied by taxpayer. The non-resident entity performed the requisite tests outside India and submitted its report to the taxpayer. The non-resident entity did not have a PE in India. The services were utilised by the taxpayer

[1] India-Australia; India-Canada; India-Netherlands; India-Singapore; India-Finland; India-Malta; India-UK; India-USA; India-Cyprus; India-Portugese Republic
[2] India-Belgium; India-France; India-Hungary; India-Israel; India-Kazakastan; India-Spain; India-Sweden
[3] Intertek Testing Services India (P.) Ltd., *In re* [2008] 307 ITR 418 (AAR)
[4] *ITO vs. B.A.Research India Pvt. Ltd. (ITA No 3106/Ahd/2011) dtd 30-11-2015*

for earning income from source in India which is manufacturing of drugs in India and subsequent sales.

The taxpayer's contention was that since the services did not 'make available', the same were not taxable in India by virtue of the relevant Article on FTS/FIS. The Revenue placed reliance on the decision of *Jindal Thermal Power Company Limited (2009) 225 CTR 220* and contented that the payments made to non-residents are to be included in the total income whether or not services have been rendered in India.

The Tribunal held that the taxpayer had sent samples to the experts outside India and the experts submitted their report. The services rendered to the taxpayer were neither made available nor was the taxpayer subsequently in a position to apply the skill on its own. As regards the contention of Revenue, the Tribunal held that post amendment of Section 9, the decision in the case of *Jindal Thermal (supra)* on this issue is no longer a good law. The Tribunal even observed that the Revenue has not placed any material on record to rebut that the services were actually not made available to the taxpayer. Thus, it was held that the said services cannot be categorised as FTS/FIS under the DTAAs with USA and Canada.

As regards the interpretation of the connotation 'make available' in the definition of fees for technical services in the tax treaties are concerned, it has been held in many cases[5] that the issue is no more res integra and the judicial view on the similar factual matrix is more or less settled. 'Make available' in many judicial precedents is held to be a condition precedent for invoking the clause for FTS/FIS.

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).

The connotation 'make available' has not been specifically defined either under the Act or in the DTAAs and therefore, recourse to the available judicial precedents shall be required. While there are numerous judgments[6] on which reliance can be placed while adopting a view as to whether services are 'made available', for the sake of brevity and with an intent to limit the discussion around the specific scope of services as discussed in the case of *B.A. Research (supra)*, reference is being made to only few of the following cases to analyse how Courts have interpreted the expression 'make available':

- ***De Beers India Minerals Pvt. Ltd.***[7]

  In the instant case, for the purpose of carrying out the geophysical survey, the taxpayer entered into an agreement with M/s Fugro Elbocon B.V. Netherland to conduct the air borne survey for providing high quality, high resolution, and geophysical data suitable for selecting probable kimberlite targets. The Karnataka High Court while deliberating upon as to what is the meaning of 'make available' observed as under:

  "22. ... The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc. so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort, and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered

[5] *ABB Inc vs. DDIT (2015) 59 Taxmann 159 (Bang Trib); ITO vs. Veeda Clinical Research (P) Ltd.(2013) 156 TTJ 115(Ahd Trib)*

[6] Guy Carpenter & Co. Ltd. 346 ITR 504 (Del); Endemol India Private Limited [2014] 361 ITR 340 (AAR); Worley Parsons Services Pvt. Ltd. 313 ITR 74 (AAR); Shell Technology India Private Limited [(2012) 345 ITR206(AAR)]; *Wockhardt Ltd. vs. ACIT [(2011) 10 Taxmann.com 208 (Mum ITAT)];* RR Donnelley India Outsource Private Limited [AAR No.883of 2010]

[7] *CIT vs. De Beers India Minerals (P) Ltd. (2012) 21 Taxman 214 (Kar)*

Payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

"made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is 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. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

- ***Anapharm Inc***[8]

In this case, fees were paid for clinical and bio-analytical services provided to pharmaceutical companies in India. The methods of analysis were not disclosed to the clients. The AAR observed the following:

"It is, thus, fairly clear that mere provision of technical services is not enough to attract Article 12(4) (b). It additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how, etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin tests of rendering services and making technical knowledge available at the same time is satisfied."

- ***Denial Measurement***[9]

In this case, the taxpayer made payments to non-resident in respect of wet calibration and testing of ultrasonic meters. The services were provided outside India, and only the certificate/report was given to the taxpayer which did not mention the process of how the testing or calibration was carried out. Therefore, the Tribunal held that due to non-compliance of the 'make available' condition, the services could not be treated as fees for technical services.

- ***Wockhardt Ltd.***[10]

In the instant case, the taxpayer in order to market the generic drugs in markets overseas like USA/Canada was required to carry out bio-equivalence tests through CROs. Accordingly, generic drugs developed by the taxpayer were sent for testing at the laboratories of CROs in USA, UK, Canada, *etc.* CROs conducted the test and experiments on these drugs and send back analysis report containing results of such test and experiment. The Tribunal observed that the CROs use their own skills, equipment's, *etc.* to prepare the report. The CROs supplied only an analysis report to the taxpayer, and there is no parting with their skills and know-how to the taxpayer.

3. Some Thoughts to Ponder...

Apparently from the above discussion, it appears that if the 'make available' condition is not satisfied, bio-analytical test, clinical tests and other certifications of similar nature carried out by the non-residents shall not be taxable in India.

The Chennai Tribunal has held that in the absence of the FTS clause in DTAA, services rendered by non-residents may be made liable to tax in India as per the Indian tax laws. Bangalore Tribunal has however, held that in the absence of FTS clause, payments made even if assumed to be FTS will be governed by the respective Article dealing with business profits/income.

[8] Anapharm Inc. *In re* (2008) 174 Taxmann 124 (AAR)
[9] *ITO vs. Denial Measurement Solutions (2014) ITA No 828/AHD/2010 (Ahd Trib)*
[10] *Wockhardt Ltd. vs. ACIT (2011) 10 Taxman 208 (Mum Trib)*

However, it may be pertinent to note that there are numerous aspects that need consideration while analysing whether the services are taxable as FTS/FIS or not. Few observations/comments that need to be borne in mind are mentioned hereunder:

- There are various DTAAs like India-Mauritius, India-Malaysia, India-Sri Lanka, which do not have FTS/FIS clause in their respective tax Treaties. There are contrary views upholding the taxability or otherwise in such cases. The Chennai Tribunal has held[11] that in the absence of the FTS clause in DTAA, services rendered by non-residents may be made liable to tax in India as per the Indian tax laws. Bangalore Tribunal[12] has however, held that in the absence of FTS clause, payments made even if assumed to be FTS will be governed by the respective Article dealing with business profits/income.
- The expression 'make available' has been used in several DTAAs like Netherlands, Australia, US, UK, *etc.* However, the expression has been explained only in the Indo-US DTAA and therefore, the issue for consideration is that whether the same explanation can be imported to other treaties where the relevant article contains the term 'make available'? While it may be correct to say that the MOU relating to India-USA Treaty would not apply to any other treaty, but when the expression has been interpreted and explained in a way that is consistent with the meaning attributed to it, the explanation does become a valuable aid for interpretation. The Protocol to India-Netherland DTAA specifically mentions *"The memorandum of understanding and the confirmation of understanding, dated September 12, 1989 with reference to paragraph 4 of article 12 of the Indo-USA Double Taxation Avoidance Convention (DTAC), will apply mutatis mutandis for the purpose of paragraphs III, IV, V and VI above."* In view of above, it may be inferred that when the provisions are pari materia to each other, different meanings may not be assigned to the provisions unless there is anything repugnant in the context.

- Interestingly, there are some peculiar DTAAs as well, for example, the India-Israel DTAA, wherein apart from the MFN clause, other beneficial provisions[13] with respect to payments in the nature of FTS also exists. Payments in the nature of FTS shall be taxable in India only upon satisfaction of twin conditions *i.e.* services are rendered in India and the payer is a resident of India. Thus, where such stated services are rendered in Israel, the same shall not be taxed in India. However, this condition is in complete contradiction with the Explanation to Section 9(2) which states that services shall be taxed in India whether or not the non-resident has rendered services in India.

Another important issue that one needs to take cognisance of is whether the onus to prove that the taxpayer has transferred technology skill, *etc.* rests with the Revenue? Unlike the onus to prove the existence of permanent establishment (PE), there are not many judgments wherein this aspect has been analysed. The decision of the Hon'ble Ahmedabad Bench of ITAT in the case of *Veeda Clinical*[14] may be worth taking a note. The Tribunal held that *"In any case, in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve the transfer of technology. That onus is not at all discharged by the assessing officer or even by the learned departmental representative."*

In view of the rulings available now, it is hoped that the same will be taken note of by the assessing officers and would be of benefit to both sides in reducing litigation. ■

[11] TVS Electronics Ltd. (TS-421-ITAT-2012)(Chennai Trib)
[12] *Spice Telecom vs. ITO (2008) 113 TTJ 502 (Bang)*
[13] Article 12(5) of India-Israel DTAA- *"Fees for technical services shall be deemed to arise in a Contracting State when the services are rendered in that State and the payer is that State itself, a political sub-division, a local authority or a resident of that State."*
[14] *ITO vs. Veeda Clinical Research (P) Ltd(2013) 156 TTJ 115(Ahd Trib)*