FTS & Make Available Clause – An Analysis

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1. INTRODUCTION:

'Fees for Technical Services' ("FTS") generally mean fees paid for any managerial, technical or consultancy services and generally require human intervention. In case no human intervention is required for the provision of services, the same may not qualify as 'FTS' as held by the Hon' Delhi High Court in ***Bharti Cellular Ltd***[1]' s case. Though this ruling was set aside by the Hon' Supreme Court of India[2] on another issue, these principles may still hold good.

However, what is to be covered in this article is taxability or otherwise of FTS because of the 'Make Available' clause in the Article pertaining to taxation of FTS with some countries that India has entered into a 'Double Taxation Avoidance Agreement' ("DTAA") with.

However, before delving into the taxability as per the DTAAs, it is pertinent to know about taxability of FTS as per the provisions of the 'Income tax Act, 1961' ("the Act"). As per **section 9(1)(vii) of the Act**, *FTS means any consideration (including any lumpsum 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'*. As can be noticed from the definition as provided in the Act, nothing has been mentioned about the 'Make Available' clause.

Some of the DTAAs that India has entered into with other contracting states provide for a restrictive scope for taxation of FTS by insertion of the 'Make Available' clause. For the sake of brevity, only India – United States of America DTAA has been considered here. As per Article 12(4) of India – USA DTAA, "*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*:

1. .....
2. *make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design*.

(Emphasis supplied)

As can be seen from the definition as provided in the DTAA, any payment will qualify as FTS only if it **'makes available'** technical knowledge, experience, skill, know-how, etc.

2. MEANING OF THE TERM 'MAKE AVAILABLE'

Several tribunals and courts in India have decided upon what may or may not qualify as FTS.

In ***De Beers India Minerals (P.) Ltd*** .[3], the Hon' Karnataka High Court while elaborating the meaning

of the term 'make available', held as under:

1. Service should be aimed at transmitting knowledge.
2. Recipient of the service should receive an enduring benefit and should be able to utilize the knowledge on its own in the future for performance of services without the aid of the service provider.
3. Payment would be regarded as FTS only when the twin test of rendering services and making technical knowledge available at the same time is satisfied.

If all of the above criteria are satisfied, then only can the payment meet the 'make available' criteria and hence, be considered as FTS as per the DTAA and chargeable to tax accordingly.

3. 'MAKE AVAILABLE' CLAUSE W.R.T. TO SECONDMENT OF EMPLOYEES

Having discussed the meaning of 'Make Available' clause above, the meaning of the term as applicable to the transaction of secondment of employees to have a better understanding of the restrictive clause (i.e., make available) is discussed hereunder:

1. In **'Centrica India Offshore Pvt. Ltd'**.[4]'**s ("CIOP")** case, assessee's holding company, based in UK, and engaged in the business of supplying gas and electricity, engaged assessee to provide back-office support to itself and its other subsidiaries (holding and subsidiaries other than CIOP in UK and Canada and henceforth collectively known as 'overseas entities'). To seek support during its initial year of operation, it seconded employees from the overseas entities and such employees even though being on the payroll of the overseas entities, worked under the direct control and supervision of CIOP. Since employee costs were borne by foreign company, CIOP reimbursed such salary costs to overseas entities on a cost-to-cost basis. On approaching the 'Authority for Advance Rulings' ("AAR") for determination of taxability on the amount to be reimbursed to the overseas entities, the AAR held that such services were managerial in nature, but consideration paid was not in the nature of FTS. However, it was held that the overseas entities constituted service PE on account of its employees in India and hence tax was to be deducted at the time of making payment to the overseas entities u/s 195 of the Act.

Aggrieved, assessee (CIOP) filed a writ petition before the Hon' Delhi High Court. The Delhi HC, while considering 'make available' clause in the 'Double Taxation Avoidance Agreements' ("DTAA") that India had entered into with UK and Canada, held as under:

1. It must not only be showed that technical services were performed, but that such knowledge etc. was 'made available' i.e., the enterprise must make available the skill behind the service to the other party.
2. The secondees were not only providing services to CIOP, but rather tiding CIOP through the initial period, and ensuring that going forward, the skill set of CIOP's other employees is built and these services may be continued by them without assistance. In essence, the secondees were imparting their technical expertise and know-how onto the other regular employees of CIOP. HC held that the activities of the secondees was thus to "transfer" their technical ability to ensure quality control vis-a-vis the Indian vendors, or in other words, 'make available' their know-how to CIOP for future consumption.

Hence, it was held that since secondment of employees 'made available' technical knowledge, the same would qualify as FTS as per the relevant DTAA. Further, 'Special Leave Petition' filed by CIOP against Delhi HC ruling was dismissed by the Hon' Supreme Court of India.

2. In **'Marks and Spencer Reliance India Pvt. Ltd**[5].' **("MSRPL")'s** case, employees were seconded by 'Marks and Spencer PLC' ("M&S PLC") (UK entity) to the Indian entity (joint venture of Marks and Spencer, UK and Reliance, India) and were on the payroll of MSRPL and tax on salary of such seconded employees was deducted u/s 192 of the Act. Such employees were seconded to provide services related to management, setting up of business, selection of properties, etc. The Hon' Bombay HC held that MSRPL's payment to M&S PLC was towards salary expenditure reimbursement of seconded employees and since no technology was made available by the seconded employees, the same would not be taxable as FTS under the DTAA.

4. 'MAKE AVAILABLE' AND 'MOST FAVOURED NATION' CLAUSE

1. **Import of restricted scope of 'Make Available' allowed**

Some DTAAs that India has entered into with other contracting states do not contain 'make available' clause. One such country is France which has 'Most Favoured Nation' ("MFN") clause in its DTAA with India. As per the MFN clause in India-France DTAA, if any convention, agreement or protocol signed between India and a OECD member State (which includes for example - treaty with UK) limits India's taxation at source on FTS to a rate lower or a scope more restricted than the rate of scope provided for" in India-France Convention, the same rate or scope as provided for in that Convention, agreement or Protocol shall also apply under this Convention. In **'Steria (India) Ltd'**.[6]'s case, the Hon' Delhi HC while reversing AAR's ruling, held that restrictive scope in India's DTAA with other contracting states would also apply to its DTAA with France by virtue of Clause 7 of Protocol to India-France DTAA (commonly known as MFN clause) and no separate notification by the Government was needed to make the restrictive scope applicable. It was further held that Protocol too was an integral part of the DTAA.

Reason for restricted scope being allowed in relation to India – France Treaty Protocol

Clause 7 of the Protocol to India – France DTAA provides that in respect of Articles 11, 12 *and 13 (Royalties, FTS and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-09-1989, between India and a third state which is a member of OECD, India limits its taxation at source on items as mentioned in Articles 11, 12 and 13 of the DTAA to a rate lower or a scope more restricted than the rate of scope provided for in the Convention, Agreement or Protocol on the said items of income, than the same rates or a restricted scope would also apply under this Convention (India – France DTAA) with effect from a date on which the present Convention or the relevant Indian Convention, Agreement or Protocol, enters into force, whichever enters into force later*.

(Emphasis supplied)

Hence, as per the Protocol to India – France DTAA, no separate notification/negotiations by representatives of the contracting states are required for the purpose of giving effect to the restricted scope of DTAAs entered into third countries having a lower tax rate/restrictive scope.

2. **Import of restricted scope of 'Make Available' not allowed**

In **'Torrent Pharmaceuticals Ltd.'**[7]s case, payments were made by assessee to a Switzerland based company which were considered as FTS by the Hon' Ahmedabad Tribunal. The Tribunal, while rejecting the assessee's stand that by virtue of India-Swiss treaty protocol, the restrictive provision in a subsequent DTAA between India and other OECD country should be read into the India – Swiss DTAA, hence the 'make available' clause though not present in the DTAA, but contained in India – Portuguese DTAA can be invoked as no technical knowhow was made available. ITAT clarified that protocol only allows for re-negotiation of the clauses in India-Switzerland DTAA in case of a more liberal subsequent agreement with other OECD country, unless it was actually re-negotiated and approved, 'make available' limitation in India – Portuguese DTAA could not apply to Swiss remittances.

Reason for restricted scope not being allowed in relation to India – Swiss Confederation Treaty Protocol

As per the Protocol to India – Swiss Confederation DTAA, *if after the date of signature this Amending Protocol, India under any Convention, Agreement or Protocol with a third state which is a member of the OECD, restricts the scope in respect of royalties or fees for technical services than the scope for these items of income provided for in Article 12 of this Agreement, then Switzerland and India shall enter into negotiations without undue delay in order to provide the same treatment to Switzerland as that provided to the third State*.

(Emphasis supplied)

Hence, as per the Protocol to India – Swiss Confederation DTAA, the protocol only allows for re-negotiation of the clauses in India – Swiss Confederation treaty in case a more liberal interpretation post

a subsequent agreement with a third country is required to be provided to this DTAA. Therefore, without re-negotiations, beneficial provisions of the DTAAs entered into with third countries cannot be read into India – Swiss Confederation DTAA.

Thus, to conclude whether restrictive scope of definition of FTS as prevalent in certain DTAA's that India has entered into with (US, UK, Canada, etc.) would also apply to countries with which India has entered into a DTAA containing MFN clause (for e.g., France, the Netherlands, Switzerland, etc.), the Protocol also needs to be checked to find out if the same allows for automatic updation of the DTAA in cases where scope is restricted or rates are lower subsequent to signing of the treaties having MFN clauses. In case treaties are required to be re-negotiated for bringing in the changes as required by the Protocol to a treaty, and after such re-negotiations have been done to bring in the changes, it can be concluded that the restrictive definition can be imported as per the MFN clause.

5. TAXABILITY IN CASE 'MAKE AVAILABLE' CLAUSE IS NOT PRESENT IN DTAA

Having discussed the 'make available' criteria above for considering whether a payment would qualify as FTS, now it is discussed why the satisfaction of 'make available' criteria is so important – perhaps only for one reason - for the payment not to be considered as FTS and charged to tax. As per section 90(2) of the Act, in cases where resident of other contracting state is eligible to claim treaty benefits, provisions of the Act or DTAA, whichever are more beneficial, will apply to it. Therefore, in cases where resident of other contracting state satisfies the 'make available' criteria, such payment would not be considered as FTS and hence not taxable in India as such, unless such contracting state has a MFN clause in its DTAA with India and such restricted scope can be imported in the DTAA by virtue of the Protocol.

Now a question may arise in the minds of the reader that what would be the taxability if 'make available' clause in certain DTAAs that India has entered into with does not exist. In such cases, the payments will be taxable as FTS even if they do not make available technical knowledge, skill, know-how, etc. to the recipient. However, resident of the other contracting state may take recourse to beneficial tax rates in cases where the same are lower than those mentioned in the Act.

6. JURISPRUDENCE ON FTS AND MAKE AVAILABLE CLAUSE

1. In ***Hindustan Aeronautics Ltd***.[8]***'s case,*** the Bangalore Bench of ITAT, relying on the Karnataka High Court judgment in ***De Beers India Minerals Pvt. Ltd. (supra)***, held that mere rendering of services would not be taxable unless the person receiving the services is enabled to utilize the services on its own in the future without having recourse to the person providing the service. In this case, the meaning of the 'Make Available' clause was imported into the India – France DTAA read with India – Portugal DTAA.
2. In ***Perfetti Van Melle ICT & BV***[9]***'s case***, the Delhi Bench of ITAT, by reading the make available clause into India – Netherlands DTAA from India – Portugal DTAA by invoking the MFN clause, held that fees for providing Information and Communication Technology service to Indian subsidiary was not FTS.
3. In ***IRunway India Private Limited***[10]***'s case***, the Bangalore Bench of ITAT, while deleting disallowance u/s 40(a)(i) of the Act on payment of outsourcing charges (pertaining to services related to patent registration, patent litigation, etc.) made by Indian company engaged in providing technology, consulting and litigation support services in IP and patent domain to its USA wholly owned subsidiary holding the same as FTS, held that the Revenue failed to distinguish between 'make available' and 'make use' and since no technology was being made available by foreign subsidiary to its Indian parent, the same was not taxable as FTS. Further, owing to the legal restrictions in USA (i.e., protective order and undertaking thereon), no technical knowledge could be passed by the subsidiary to the assessee and hence the same could not be taxed as FTS as no technology was made available as per the India – USA DTAA.
4. In ***DTZ Debenham Tie Leung Ltd***.[11]***'s case***, the applicant, a UK based company, was engaged in providing advisory and consultancy services in the field of real estate in UK. It entered into a service agreement with its wholly owned subsidiary in India for provision of certain services. The AAR, in its ruling held that even though UK parent was rendering services by utilizing its technical and consultancy expertise, the same were not passed on and made available to the recipient. Hence, since the services did not satisfy the make available criteria, the same were not taxable as FTS.

5. In ***HSBC Bank Plc vs. DCIT***, International Taxation[12]'s case, the Assessing Officer brought to tax certain amount received by the assessee as protection fee for guaranteed portfolio performance from its group concern in India as FTS. However, as per Article 13 of the India – UK DTAA, since the assessee did not make available any technical knowledge, skill, know-how or processes to group concern within meaning of Article 13 of India – UK DTAA, amount received would not qualify as FTS as per the DTAA.

7. CONCLUSION:

Whether or not a certain payment satisfies the make available criteria or not depends on the facts and circumstances of each and every case and has to be decided accordingly. While taking a stand, assessee (resident of other contracting state) should satisfy himself that the services provided by him to recipient in India would not lead to recipient being able to perform such services on its own in the future. Further, in absence of 'make available' clause in DTAA, it needs to be confirmed whether DTAA's do not have the MFN clause and in case they do, Protocol to the treaties further needs to be checked.

This aspect (of 'making available' technical knowledge, skill, etc.) is often prone to heavy litigation and hence appropriate documentation, opinions of subject experts, etc. may be taken to come to a conclusion that the 'make available' criteria is not satisfied and hence payments are not taxable as FTS as per the provisions of the relevant DTAAs.

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[1] [TS-6095-HC-2008(DELHI)-O]

[2] [TS-5028-SC-2010-O]

[3] [TS-312-HC-2012(KAR)]

[4] [TS-237-HC-2014(DEL)]

[5] [TS-178-HC-2017(BOM)]

[6] [TS-416-HC-2016(DEL)]

[7] [TS-609-ITAT-2016(Ahd)]

[8] [TS-173-ITAT-2022(Bang)]

[9] [TS-145-ITAT-2022(DEL)]

[10] [TS-331-ITAT-2022(Bang)]

[11] [TS-5005-AAR-2019-O]

[12] [TS-6830-ITAT-2019(MUMBAI)-O]