

Comprehensive Analysis of Taxation of Fees for Technical Services

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Section 9 of The Income Tax Act, 1961

Section 9(1)(vii): Fees for Technical Services Income

The following Income shall be deemed to accrue or arise in India:

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 is payable in respect of services utilised for the purposes of 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 is payable in respect of services utilised for the purposes of 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 :

Exception in sub-clause(b) of section 9(1)(vii) - Source of Income outside India

- **CIT v. Havells India Ltd. (352 ITR 376)(Delhi)**

The High Court held that the real question is whether the export sales proceeds received from goods manufacture and exported from India constitute a source inside or outside India. To decide the same we have to take pragmatic and a practical view and not approach the question from a theoretical perspective. We are making a distinction between the source of the income and the source of receipt of the monies. In order to fall within the second exception provided in section 9(1)(vii)(b) [similar to section 9(1)(vi)(b)] of the Act, the source of the income and not the receipt should be situated outside India.

- **Lufthansa Cargo India Pvt Ltd. V. DCIT (92 TTJ 837) (Delhi-ITAT)**

The payments for repair of aircrafts abroad which were acquired for operating on international routes only was held to fall under the exclusion clause of 9(1)(vii)(b)[similar to 9(1)(vi)(b)]

Exception in sub-clause(b) of section 9(1)(vii) - Source of Income outside India

- **Titan Industries Ltd. V. ITO (11 SOT 206)(Bangalore-ITAT)**

The ITAT held that the assessee company which was engaged in manufacture and sale of watches under the patent name 'TITAN' having an associate company incorporated in Singapore for promoting sales of watches in APAC region and got its patent registered in Hong Kong could claim the exception clause u/s 9(1)(vii)(b) for the fees paid to register the patent

Section 9 of The Income Tax Act, 1961

- Section 9(1)(vii): Fees for Technical Services Income
Fees for technical services Income shall be deemed to accrue or arise in India if:

PAYER	CONDITIONS
Indian Government	No conditions
Resident in India	All cases, Except where the fees is payable in respect of services utilised for the purposes of 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
Non-Resident in India	Only where the fees is payable in respect of services utilised for the purposes of 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

Explanation 2 to Section 9(1)(vii)

"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"

FTS Provisions-Model Tax Conventions

Article 12A(1)- Resident Taxation Clause

OECD MODEL	UN MODEL	US MODEL
1. No Article of FTS	<p>1. Fees for technical services arising in a Contracting to a resident of the other Contracting State may be taxed in that other State.</p> <p>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 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 ____ per cent of the gross amount of the fees. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation</p>	1. No Article of FTS

FTS Provisions-Model Tax Conventions

Article 12A(3)- Fees for Technical Service Definition Clause

OECD MODEL	UN MODEL	US MODEL
No Article of FTS	<p data-bbox="479 405 1418 796">3.The term “Fees for Technical Service” 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:</p> <ul data-bbox="479 862 1418 1253" style="list-style-type: none"><li data-bbox="479 862 1418 968">(a)to an employee of the person making the payment;<li data-bbox="479 976 1418 1139">(b)for teaching in an educational institution or for teaching by an educational institution; or<li data-bbox="479 1148 1418 1253">(c)by an individual for services for the personal use of an individual.	No Article of FTS

Definition of Technical, Managerial & Consultancy services

- **[2012] 26 taxmann.com 267 (Bom) Zuari Agro Chemicals Ltd. V. CIT**

'Technical services' is a composite phrase involving several activities, including rendering advice and suggestions as well as undertaking the actual physical tasks. **Rendering technical services may involve one or more or all such activities.** Each case must be considered on its facts to ascertain whether the real purpose was the rendition of technical services. **However, technical services in most cases at least would be rendered only by the input of technical personnel. Without them, there would be no start to rendering technical services.**

Definition of Technical, Managerial & Consultancy services

- **[2015] 378 ITR 205 (Delhi) CIT v. Grup Ism (P) Ltd.**
'Consultancy services' would mean something **akin to advisory services** provided by the non-resident, pursuant to deliberation between parties. Ordinarily, it would **not involve** instances where the **non-resident is acting as a link between the resident and another party**, facilitating the transaction between them, or where the non-resident is directly soliciting business for the resident and generating income out of such solicitation.

Definition of Technical, Managerial & Consultancy services

- **[2013] 21 ITR(T) 697 (Delhi-ITAT) Adidas Sourcing Ltd. V. ADIT(IT)**

The term 'managerial', 'technical', 'consultancy' do not find a definition in the Income Tax Act, 1961 and it is a settled law that they need to be interpreted based on their understanding in common parlance. The Delhi High Court in the case of JK (Bombay) Ltd. V. CBDT [1979] 118 ITR 312 referred to an article on 'management sciences' in encyclopaedia 747, wherein it is stated that the management in organisations includes at least the following:

(a) Discovering, developing, defining and evaluating the goals of the organisation and the alternative policies that will lead towards the goals. (b) getting the organisation to adopt the policies. (c) scrutinizing the effectiveness of the policies that are adopted and (d) initiating steps to change policies when they are judged to be less effective than they ought to be management thus prevades all organisations.

In the case of Skycell Communications Ltd. V. DCIT [2001] 251 ITR 53 the High Court has held that the popular meaning associated with the word 'Technical' is 'Involving or concerning applied and industrial sciences'. Consultancy is generally understood to mean an advisory services. Further, it may be fair to state that not all kind of advisory could qualify as technical services. For any consultancy to be treated as a 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.

Definition of Technical, Managerial & Consultancy services

- **[2015] 371 ITR 453 (SC) GVK Industries Ltd. V. ITO**

The expression, **managerial, technical or consultancy service**, are to be appreciated. The said expressions have not been defined in the Act, and, therefore, it is obligatory to examine how the said **expression are use and understood by the person engaged in business. The general and common usage of the said words has to be understood at common parlance.**

As the factual matrix in the case at hand would exposit that the Non-resident has acted as a consultant. **It had the skill, acumen and knowledge in the specialized field** i.e. Preparation of a scheme for required finances and to tie-up required loans. The nature of services rendered by the non resident, can be said with certainty would come within the ambit and sweep of the term '**consultancy services**' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head '**fee for technical services**'

Deviation from UN Model Convention

- **Germany (Article 12)**

The term "fees for technical services" as used in this Article means payments of any amount in consideration for the services of managerial, technical or consultancy nature, **including the provision of services by technical or other personnel, but does not include payments for services mentioned in Article 15 of this Agreement.**

- **UAE**

No specific article for FTS, it is to be treated as business profits.

Deviation from UN Model Convention

Netherlands (Article 12)

For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any **managerial, 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 4 of this Article 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.*

Deviation from UN Model Convention

Netherlands (Article 12)

6. Notwithstanding paragraph 5, "fees for technical 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;*
- (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 payment; or*
- (e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 14 (Independent Personal Services) of this Convention.*

Deviation from UN Model Convention

USA

For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any **managerial, 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.*

Deviation from UN Model Convention

USA

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).*

Deviation from UN Model Convention

Singapore (Article 12)

The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature **(including the provision of such services through 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, which enables the person acquiring the services to apply the technology contained therein ; or*
- (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.*

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

Deviation from UN Model Convention

Singapore (Article 12)

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments :

- (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 payment;*
- (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 14 ;*
- (f) *for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5 ;*
- (g) *for services referred to in paragraphs 4 and 5 of Article 5.*

Taxability of Educational Service

- **[2016] 387 ITR 385(AAR - New Delhi)**
- **UC Berkeley Center for Executive Education, USA, In re.**

The applicant received payments from an Indian Co. for providing programmes for business executives which in turn were provided to the end users by the Indian Co.

The incomes do fall in the ambit of 'fees for technical services' u/s 9(1)(vii) however as per **Article 12(5)(c)** of the India-USA DTAA there is a special exemption for services provided by educational institute.

Hence, the incomes of the application are not liable to tax in India and the provisions of TDS u/s 195 are not attracted.

Taxability of Educational Service

- **[2016] 387 ITR 398(AAR- New Delhi)**
- **Regents of the University of California UCLA Anderson School of Management Executive Education, USA, In re.**

The applicant is a US based non-profit public benefit corporation formed for the purposes of providing education it entered into an agreement with an Indian Co. to launch a management programme for senior executives in India.

The programme fees received by the applicant from the Indian Co. fall in the exemption provided in the **Article 12(5)(C) of the India-USA DTAA.**

Hence, these incomes are not liable to tax in India as 'fees for technical services' and no tax needs to be deducted.

Taxability of Educational Service

- **[2013] 262 CTR 113(AAR-New Delhi)**
- **Eruditus Education (P.) Ltd., In re.**

The applicant is an Indian company engaged in the business of providing high quality executive education programmes to Indian corporate and other participants.

It entered into a Programme Partnership Agreement (PPA) with INSEAD, a Singaporean company which is in the business of providing various management education programmes globally.

It is true that the payment for the services falls under the broad definition of **'Fees for Technical Services' both under the Indian Income-tax Act and under the India-Singapore DTAA**. However, the case of the applicant will fall in the exclusive clause of **Article 12(5)(c)** of the DTAA. There is no dispute that INSEAD is an educational institute.

Hence, income of INSEAD was not liable to tax in India & the provisions of TDS u/s 195 are not attracted.

Taxability of Testing Charges

[2013] 22 ITR 224(Delhi-ITAT)

Romer Labs Singapore Pte. Ltd. vs. ADIT (IT).

The assessee is a Singapore Co. provided **testing services of dog food** and other related items to its Indian customers. The payments do not fall in the definition of 'fees for technical services' as per Article 12(4) of the India-Singapore DTAA as ***no technology or technical plan & design has been 'made available'*** by the assessee to its Indian customer. Such receipts are business profits and not taxable in India.

[2013] 152 TTJ 689(Mumbai-ITAT)

Siemens Limited vs. CIT(A)

The assessee Co. made payments to a foreign laboratory for **testing of circuit breakers**, so to match them with international standards. The services were performed **without any human intervention**. The ITAT held that ***human intervention is important for rendering technical services and such payments do not fall in the ambit of 'fees for technical services'*** and no tax needs to be deducted by the assessee.

Taxability of Testing Charges

- **[2019] 108 taxmann.com 417 (Mum.-ITAT)**
- **EOS Power India (P) Ltd vs. DCIT**

The assessee is an Indian tax resident engaged in the business of manufacturing switch mode power supplies and other computer peripherals. The products of the assessee were mainly exported to the USA and the Europe. As per the US and European regulations it was required that the products meet the quality standards for which the assessee obtained testing and certification services from authorized agencies in US. The **certification agencies did not have any PE in India**. Testing and certification services do **not involve any transfer of technical knowledge or skill** that can be independently used by the service recipient in the future. Further, **the services were provided outside India** and as the certification agencies did not have a PE in India no income could be attributed to accruing or arising in India. The Hon'ble ITAT held that testing and certification services were not in nature of fees for technical services and hence not taxable in India due to absence of a PE

Taxability of Testing Charges

- **[1996] 222 ITR 354 (Kerala HC)**
- **Cochin Refineries Ltd. vs. CIT**

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. The tests were carried out in USA. The total payment made for these tests included two payments which were in the nature of reimbursement of the payments made to the personnel of Foster Wheeler Energy Corporation.

The Hon'ble High Court upheld the decision of the ITAT whereby the ITAT concluded that in respect payment made towards reimbursement of employees of the consultant that they were inextricably linked to the process of advice rendered by the consultant and was technical in character.

Hence, the payment made towards reimbursement was towards technical services as per explanation to section 9(1)(vii).

Taxability of Market Study

- **[2015] 378 ITR 0465 (AAR)**
- **Guangzhou Usha International Ltd., IN RE vs. IN RE.**

The applicant company was registered in china and was a wholly owned subsidiary of an Indian company. It was providing, import/export services and also to provide services relating to business of household electrical appliances and equipments, household goods and accessories(mainly: New suppliers development, New Products development, Market research), to Indian company. All these services were performed in China. As per Article 12(4) of the India-China DTAA fees or technical service includes the "provision of services of technical nature". ***The AAR held that the term 'provision of services' will cover the services even when these are not rendered in the other contracting state (India) as long as these services are used in the other contracting state (India). Hence, the payment made are fees for technical services and tax needs to be deducted.***

Taxability of Market Study

- **[2018] 30 CCH 0731(Bang-ITAT) Crane Software International Ltd. vs. DCIT.**

The assessee Co. Made payments to a German Co. for **rendering market support** for positioning software products and branding those products for assessee **in European market**. The payments were in the nature of 'fees for technical services', the German Co. didn't have PE in India, **payment for such services were made outside India & the services were also rendered outside India**. Hence, the **income was generated outside India** in hands of the German Co. and **not taxable in India**.

The assessee Co. had entered into an agreement with, Wallingford (tax resident of UK) for morphological studies, sedimentation assessment, navigation and mooring assessment. The payments were made to **receive reports on the existing conditions**. As per Article 13 of the India-UK DTAA such payments do not fall in the ambit of 'fees for technical services' **as no technical knowledge is being 'made available' to the assessee. Hence, the provisions of sec 195 are not attracted**

Taxability of Finance Markets Charges

- **[2016] 383 ITR 0001 (SC) CIT v. Kotak Securities Ltd.**

The Hon'ble Supreme Court was of the view that the **transaction charges paid to the BSE or NSE** are not in nature of "fees for Technical Services", they are in nature of payments for facilities provided by the stock exchange. Further the transaction in question fails to satisfy the test of specialized, exclusive and individual requirement of the user

The 2nd issue relates to the payments made for the **BSE Online Trading (BOLT) System** provided by the BSE to its members. The Hon'ble Supreme Court was of the view that these are the **charges that all the members of the stock exchange have to pay** in order to trade through BSE, there is **no exclusivity** to the services rendered by the Stock Exchange and each and every member has to necessarily avail such services in the normal course of trading in securities in the Stock Exchange.

Taxability of Arranger Fees

- **[2013] 96 DTR 261(Mumbai-ITAT) Credit Lyonnais vs. ADIT (IT).**

The assessee was acting as an **arranger** in the IMD programme of SBI, it was responsible for **mobilizing deposits from eligible depositors & it was paid on commission basis on the amounts mobilized by it.** The assessee further appointed a NR sub-arranger to solicit customers for the IMD, the amounts paid to sub-arranger were in the **nature of commission/brokerage/incentives** and not 'Fees for technical services' (FTS) u/s 9(1)(vii). The assessee was under no obligation to deduct tax at source from the payments made to sub-arranger, no disallowance u/s 40(a)(i).

- **[2015] 41 ITR 338(Mumbai-ITAT) Idea Cellular Ltd. vs. ACIT (IT).**

The assessee Co. Paid '**arranger fees**' to HSBC, Hong Kong for acting as an arranger in the process of **raising finance from Finnish Export Credit Ltd.** The ITAT held that such fees cannot be constituted as 'interest' u/s 2(28A) and also **not as 'fees for technical services'** as services by HSBC are **not in nature of managerial or consultancy and there was no element of advice or counselling.** Hence, such income is not taxable in India and no tax needs to be deducted.

Taxability of Derivative Consultancy

- **[2012] 148 TTJ 382(KOL-ITAT) DCIT vs. Andaman Sea Food Pvt. Ltd.** The assessee Co. engaged the services of GMPL a Singapore based CO. GMPL rendered **consultancy regarding the forex derivatives** and received commission for the same. As per Article 12 of the India-Singapore DTAA the payments made are not covered in the scope of 'fees for technical services' **as no technology or technical plan/design has been 'made available' to the assessee**. Such payments are business profits as per **Article 7** of the DTAA & in the absence of PE in India are taxable only in Singapore.

Taxability on Intra-group Services

- **[2019] 198 TTJ 0130(Del-ITAT) DCIT vs. Adidas Sourcing Ltd.**

The assessee Co. a resident of Hong Kong rendered **buying agency services to its related Co.** AIMPL & other unrelated parties. The ITAT held that the consideration received for such services do not fall in the ambit of 'fees for technical services' as per section 9(1)(vii) **as there is no technical or managerial element involved** and hence, such income of assessee is not liable to tax India.

- **[2013] 214 TAXMAN 0317 (Bombay) DIT(IT) vs. WNS Global Services (UK) Ltd.**

The assessee company was a resident of UK, it received a payment for **marketing and management services to be rendered outside India** from WNS India. The Hon'ble HC upheld the decision of ITAT that such **receipt does not relates to the PE in India** and does not fall in the ambit of 'fees for technical service'. Hence, it cannot be subject to tax in India.

Taxability on Intra-group Services

- **[2018] 196 TTJ 0594(Mumbai-ITAT) Endemol South Africa (Proprietary) Ltd. vs. DCIT (IT).**

The assessee rendered **Line Production Services in South Africa** to its group concern Endemol India, as per the agreement the purview of services included **arranging for location crew, producer, transportation, paper work for various stunts to be performed, etc.** The ITAT held that as per Article 12 of the India-South Africa DTAA the services rendered by the assessee ***are purely administrative in nature and cannot brought within the sweep of 'fees for technical service'***. Hence, such receipts of assessee are not liable to tax in India.

Taxability on Intra-group Services (MFN)

- **[2015] 70 SOT 551(Pune-ITAT) Sandvik AB vs. DDIT (IT).**

The assessee a tax resident of Sweden received '**Management Service Fee**' from Indian AEs for direction or **guidance relating to business strategy and its group policies**. As per **Article 12** of the India-Sweden DTAA '**managerial services**' fall in the sweep of '**fees for technical services**'. However in the **Protocol of the DTAA** there is a clause based on the principle of '**Most Favoured Nation**' which allows to take **benefit from the DTAA between India & any other OECD nation**. Hence, ITAT held that **as per the Article 12 of the India-Portugal DTAA 'managerial services'** do not fall in the sweep of 'fees for technical services' and ***such benefit will also be available to the assessee in view of the MFN clause in the Protocol*** and such receipts are not taxable in India.

Taxability of Consultancy Services rendered outside India

- **[2015] 378 ITR 205 (Delhi) CIT vs. Grup Ism P. Ltd.**

The assessee company made payments to two UAE based companies (CGS & Marble) for services received. As regards to 'Marble', the services included **identification and selection of UAE national as a partner** for the assessee in connection with supply of marble & as regards to 'CGS', the services included **soliciting business for the assessee** in various parts of the **world except India**, identifying, introducing and providing details of industries, companies, individuals and investors.

The above payments made does not come within the purview of 'fees for technical service' as defined under explanation 2 to section 9(1)(vii).

Moreover, the said services are also outside the purview of Article 14 (Independent Personal Services) or 22 (Other Income) of the India-UAE DTAA. Hence, no tax to be deducted.

Taxability of Consultancy Services rendered outside India

- **[2016] 177 TTJ 0708(Mumbai-ITAT) KPMG vs. ACIT.**

The assessee had made payments for **professional services** to entities in USA and UK. As per Article 12/13 respectively of India-USA & India-UK DTAA, while providing such professional services ***no technical knowledge, experience, skill, know-how or process was 'made available'***. Such payments do not fall in the ambit of 'fees for technical services' and **due to absence on PE in India such receipts cannot be taxed as 'business profits' also**. Hence such income was not taxable in India and no requirement to deduct tax by the assessee.

Taxability of General Services

- **[2020] 119 taxmann.com 398 (Delhi-ITAT) Sabic Innovative Plastics US, LLC vs. DDIT**

Assessee, a US company received payment from its Indian AE in respect of **management services** provided by it to the AE. The main issue here was to determine whether **management services be considered as FTS/ FIS**. The services provided by the assessee were in the nature of finance, legal, EHS, quality review, HR services. **Also, the category 'management services' is missing from the definition of FIS as per the India-USA DTAA**. Further, the make available condition was also not satisfied. Hence the Hon'ble ITAT held that these **management services do not constitute to be FTA/FIS**.

Taxability of General Services

- **[2019] 109 taxmann.com 264 (Mum.-ITAT) Nielsen Company vs. DCIT**
Assessee was a tax resident of USA and had AE in India. During the year assessee had received consideration from the Indian AE for providing services under a General Service Agreement (GSA) . The services were in nature of development and determination of business strategy, management, HR related , legal, IT support and other like services. **All the services referred to in the GSA were such which did not require any transfer of technology or skill to the recipient company.** The concept of 'make available' elaborated to mean that **services provided should aim at transferring knowledge and skill so that the recipient of service can obtain enduring benefits by utilizing such knowledge and skill on its own in future** without the aid from the service provider. The Hon'ble ITAT held that the services provided under the GSA could not be considered as FIS

Taxability of Inspection/Survey Charges

- **[2012] 346 ITR 0467(Karnataka) CIT vs. De Beers India Minerals (P.) Ltd.**

The assessee company entered into a contract with M/s Fugro Elbocon B.V. a resident of Netherlands, the latter was to **carry out a geographical survey** which includes providing high quality, high resolution & geophysical data suitable for selecting probable kimberlite targets. Fugro have given the data, photographs and maps, ***but they have not made available technical expertise, skill or knowledge in respect of such collection or processing of data to the assessee.*** Services provided by Fugro fall in the ambit of 'fees for technical services' as per explanation 2 of Sec. 9(1)(vii) of the Act, **however as per the article 12 of the India-Netherland DTAA it does not 'make available'** the technical expertise and hence it does not qualify to be 'fees for technical services'. The liability to tax is not attracted.

Taxability of Inspection/Survey Charges

- **[2019] 179 ITD 388(Indore-ITAT) M/S. Hind Energy & Coal Benefication (India) Ltd. vs. ITO (IT&TP).**

The assessee Co. Availed the **inspection services** from its AE on the **Indonesia port** at the time of shipment of coal. The inspection report was to be **provided to shipping agent at the time of shipment**, the services were **not in the nature of 'fees for technical services'** but were charges for inspecting the vessel. ***Moreover, such services were rendered outside India.*** The provisions of TDS u/s 195 are not attracted in this case.

Taxability of Inspection/Survey Charges

- **[2018] 92 taxmann.com 407 (Del hi-ITAT) ACIT vs. Petronet**

Assessee is an Indian tax resident, made payments to USA enterprises for rendering services in connection with review of the alternative vaporization process for the LNG terminal and recommend a suitable process to the assessee. The scope involved study of the benefits of the various schemes for generating power through the utilization of LNG. ***The main issue here was to determine whether payment for rendering of service involving technical knowledge will be considered as FIS/FTS.***

The India- USA treaty provides for a restrictive meaning of fee for included services vis-a-vis the meaning of fee for technical services as per the Act. The India-US ADTAA read with the MOU to the treaty clarifies that **technology will be considered to be 'made available' when the person acquiring the service is able to apply such technology on his own.** However, with the scope of services provided to the assessee it was **not possible for the assessee to carry out such activities on its own without a recourse to the service provider.** The Hon'ble ITAT held that as no technology, skill etc was transferred to the assessee, the payment did not qualify to be 'fees for included services'

Taxability of Reimbursement of Expenses

- **[2019]108 taxmann.com 473 (Delhi-ITAT) H.J Heinz Company vs. ADIT**

Assessee is a US company and had an independent subsidiary in India. During the year under appeal the US Co. had **allocated cost without any mark-up** to its **Indian subsidiary** which were reimbursed by the Indian Co. Nature of activities, the cost of which were allocated by the US co. were, HR, strategic planning and marketing, finance and information systems. The **underlying objective** of the agreement entered into by the US company with its Indian affiliate was to achieve **consistency of approach and economies of scale**. As per the **make available** criteria of Article 12 of the India-USA DTAA, to qualify as '**fees for included services**' the fruits of the service should remain available to the service recipient in some concrete shape such as technical knowledge, experience, skill etc. The Hon'ble ITAT held that as the **benefit of the services provided by the assessee remained with the Indian affiliate and the same was treated as "fees of included services"**.

Taxability of Reimbursement of Expenses

- **[2018] 92 taxmann.com 225 (Chennai-ITAT) Hospira Healthcare India (P) Ltd vs. DCIT**

The assessee is an Indian tax resident engaged in the business of manufacturing, research and development of pharmaceutical drugs. It made payments to a US enterprise for providing support for design and construction management for installation of production lines in its new manufacturing unit. Further, the US enterprise raised bills for reimbursement of expenditure relating to the expenses incurred by its employees towards room rent, air fare, car rentals etc while providing the above services to the assessee. **Separate bills were raised for the technical service and the reimbursement of expenses**, so the **reimbursement cannot take the character of income chargeable to tax**. The Hon'ble ITAT held that reimbursement of expenses could not be treated at par with fees for included services and therefore, no tax could be deducted from such payments

Taxability of Reimbursement of Expenses

- **[2017] 88 taxmann.com 21 (Kolkata trib.) ADIT (IT) vs. Timken Company**

The assessee is a US tax resident and had an Indian subsidiary company. It had paid for certain expenses in nature of legal expenses, inspection and survey expenses, lodging and car rental expenses etc incurred by the subsidiary company's employees while in the USA. ***These expenses were later reimbursed by the subsidiary company without any mark-up on the bills raised by the third parties.*** The payments received by the assessee were **purely in the nature of reimbursement of expenses** and it was also **not the ultimate beneficiary of the sums incurred** nor did the assessee render any services to the Indian subsidiary. **The payments cannot fall in the scope of fees for technical services/fees for included services.** The Hon'ble ITAT held that the payments were in the nature of reimbursement and not that of fees for included services and hence, are not chargeable to tax in India.

Taxability of Management and Consultancy services

- **[2018] 97 taxmann.com 642 (Kerala HC) US Technology Resources (P) Ltd. vs. CIT**

The assessee being an Indian tax resident availed **management, financial and legal, public relations, treasury and risk management advice services from a US enterprise**. The scope of services **fall in the definition of 'technical and consultancy'** services under the **explanation 2 to the section 9(1)(vii)** of the Act. However, as per the **Article 12 (4)** of the India-USA DTAA read with the MOU that was entered as a part of the DTAA explains that for the purpose of clause 4(b) of Article 12, the expression '**make available**' means when the **technology enables the recipient of service to use it independently**. The mere fact that the provision of a service may require technical input by the service provider does not per se mean that the technical knowledge, skills, etc. are made available to the person availing such services. The Hon'ble High Court held that the payments made by the assessee cannot be considered as fees for included services.

Taxability of Management and Consultancy services

- **[2020] 115 taxmann.com 129 (Mum-ITAT) General Motors Overseas Corporation vs. ACIT (IT)**

Assessee was a US company engaged in providing management and consultancy services. During the year under appeal it had deputed two employees at an Indian company and the Indian company had reimbursed the cost of such employees to the assessee. One of the employees deputed was the VP-Manufacturing. The main issue here is that Could the amount reimbursed in respect of salary of such employee be considered 'fees for included services' in terms of Article 12 of the DTAA. **The experience of an expert lies in the mind of an expert** and if an expert having knowledge and expertise is transferred from one tax jurisdiction to the another tax jurisdiction, then it cannot be said that only the employees were per se is transferred and not the technology. Technology is made available by one entity situated in one tax jurisdiction to another entity situated in another tax Jurisdiction, through the transfer on deputation of its experienced/expert technical employees. The Hon'ble ITAT held that the amount reimbursed in respect of the salary of VP manufacturing was in nature of fees for included services.

Taxability of Recruitment Services

- **[2016] 67 taxmann.com 225 (Mumbai-ITAT) ACIT vs. Lehman Brothers & Advisors (P.) Ltd.**

Assessee is an Indian tax resident, and it entered into agreement with the foreign entities to undertake search process for recruiting employees on its behalf and reimbursed expenses incurred by them. The expenses were reimbursed at cost price without any mark-up. Services in nature of recruitment and placement services do not come under the purview of the term 'fees for included services'. Also, reimbursement of expense made without any mark up does not have any element of service embedded in it. The Hon'ble ITAT held that recruitment and placement services could not be taxed as 'fees for included services'

Taxability of Advertisement Services

- **[2016] 73 taxmann.com 114 (AAR - New Delhi)Dr. Reddy Laboratories Ltd., In re**

The applicant is a pharmaceutical company. In order to **promote its sales in Russia and develop a local brand plan for same**, it enters into a service agreement with its subsidiary, i.e., DRL Russia, **to avail of product promotion services**. In terms of agreement, DRL Russia has to render marketing services related to promotion of goods from producers to end-customer by way of meeting with medical and pharmaceutical experts, participation in pharmaceutical circles and distribution of promotional materials to medical and pharmaceuticals experts. It is noted that applicant has not utilised services rendered by DRL Russia for brand promotion and, thus, agreement **cannot be considered for providing consultancy services**. Further, **DRL Russia is not managing affairs** of applicant in Russia and thus agreement in question cannot be classified as **managerial services** either. On facts of the case service fee payable by applicant to DRL Russia under **agreement for promotion of goods cannot be regarded as fees for technical services under section 9(1)(vii) or under article 12 of India-Russia DTAA**.

Taxability of Advertisement Services

- **[2012] 20 taxmann.com 335 (Jaipur-ITAT) ACIT vs. Modern Insulator Ltd.**

The assessee had made payments to non-residents in foreign currency on account of '**sales commission**', '**subscription**', '**insulator testing**', '**technical consultancy**', '**advertising**', etc. The Assessing Officer held that all the payments were covered in section 9(1)(vii)(b). The Hon'ble ITAT held that the **sales commission was business profit** of the non-resident. In the **absence of a permanent establishment**, such sales commission was not chargeable and, therefore, there was no need for deducting the tax at source. Similarly, the payments in respect of subscription and advertisement could **not be considered to be covered under fees for technical services and therefore, no TDS was required to deducted.**

Taxability of Air Traffic Services

- **[2005] 143 TAXMAN 129 (AAR - N. DELHI) Airports Authority of India, In re**

Airports Authority of India entered into supply and service contracts with an American company 'RC' for Modernisation of Air Traffic Services (MATS) in Delhi and Mumbai. Pursuant to those contracts, 'RC' handed over equipment software, etc., and applicant had been operating and maintaining equipments on its own. However, since some assemblies subsequently failed, applicant felt that same needed regular repairs. So, it entered into two separate contracts with 'RC' for **(a) repair of hardware equipment of MATS system, and (b) modification and anomaly resolution of software of said system.** The contract showed that insofar as software and documentation were concerned, applicant acquired a right to use same subject to certain conditions but hardware and other equipment were subject-matter of outright sale in favour of applicant. **The payment received by 'RC' in respect of repair of hardware, did not fall within meaning of income from rendering of services as defined in article 12 of the India- USA DTAA.**

Taxability of Bio-Analytical Services

- **[2017] 77 taxmann.com 309 (Ahd-ITAT) ITO(IT) V. Cadila Healthcare Ltd.**

The assessee company made payments for services in nature of bio – analysis to non resident entities based in USA, Canada and UK. It was found that none of these service **'make available'** any technology to the service recipient. The Hon'ble ITAT held that services provided by the non resident did not involve any transfer of technology and it will not enable to use these services in future without recourse to service providers. Thus, the payments made to non resident would not be regarded as FTS/FIS.

- **[2018] 98 taxmann.com 458 (Delhi-ITAT) Ciena Communications India (P) Ltd. vs. ACIT**

Assessee is an Indian tax resident engaged in the business of providing AMC , installation and maintenance services in respect of equipments manufactured by its US tax resident AE's. The assessee has entered into an agreement with its US AE whereby **technical on-call advisory services are obtained from AE**, in case of problems of outrage, emergency, technical support or system compromised on the basis of priority of cases. As per the agreement the US AE was to **provide its services remotely and no on-site support services were provided to the customers of the assessee**. Also, **no technical knowledge or skill is transmitted to the assessee** when remote on-call services were provided directly to the customers of the assessee. The Hon'ble ITAT held that as no technical knowledge, skill etc was 'made available' to the assessee, the consideration paid to the US AE cannot be considered as fees for included services.

- **[2018] 96 taxmann.com 645 (Ahd.-ITAT) Seal for Life India (P) Ltd. vs. DCIT**

The Assessee company is a tax resident of India and had made various payments to its US based AE on account of MIS Services Cost Allocation, Corporate Allocation Charges and Legal Expenses. The 'make available' clause as stipulated by Article 12 of the India-USA DTAA is not being satisfied as no technology, know-how, skill have been transferred to the assessee in the said transaction. The Hon'ble ITAT held that the same cannot be taxed as 'fees for included service

- **[2019] 102 taxmann.com 256(Mum.-ITAT ACIT vs. Nathpa Jhakri Joint Venture**

The assessee is an Association of persons which is a project specific joint venture between an Indian company and an Italian company. The assessee had made payment to two US residents for making **independent testimonies** during the **course of arbitration** between the assessee and its AE. ***The services provided by the US residents was only in form of providing testimony during the course of arbitration proceedings which did not make available any technical skill, know-how etc to the assessee.*** The Hon''ble ITAT held that the services availed by the assessee were not in form of 'included services' as defined in Article 12 of the India-USA DTAA.

- **[2016] 72 taxmann.com 238 (Pune Trib.) Gera Developments (P) Ltd. vs. DCIT (IT)**

Assessee is an Indian tax resident and engaged in the business of land development and construction of buildings. It made a payment to a US enterprise for examination of data pertaining to site development, project goal, and providing designs and drawings. Designs, drawings, layouts of buildings does not fall within the ambit of transfer of technical know-how or technical designs. Mere passing of project specific architectural drawings & designs with measurements does not amount to 'making available' technical knowledge, know-how or process. The assessee cannot independently use the drawings & designs in any manner whatsoever for commercial purpose. Since, the drawings & designs were project specific, the assessee could not have used these designs for any of its other projects. The Hon'ble ITAT held that the payment is not in the nature of fees for technical services/ fees for included services.

- **[2016] 68 taxmann.com 133 (Mumbai-ITAT) Raytheon Ebasco Overseas Ltd. vs. DCIT**

Assessee is a US tax resident. It received a payment from an Indian entity towards rendering services in nature of engineering, design work, overall management and start-up in respect of a power plant. As per the contract technical work consisted of providing engineering and design work relating to the plant, providing specification regarding the material required, providing suppliers quotations and reviewing documents etc. The technical services or the start-up services provided by the assessee did not include any construction, assembly, mining or like projects. Though some of the employees of the assessee visited India, but there is no proof that there was any transfer of technology or technical know-how to the service recipient. It is possible that service providers may utilise their own technical knowledge in providing the services but that in itself would not render the services being treated as making them available to the service receiver. The Hon'ble ITAT held that as no technical know-how or skill was in fact transferred to the Indian service recipient, the services rendered by the assessee could not be treated as FIS.

THANK YOU

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