



Mumbai and Bangalore bench of Tribunal upheld the concept of ‘make available’ in two different cases and held that the specified services were not in the nature of Fees for included/technical services

Recently, the Mumbai and the Bangalore bench of the Income-tax Appellate Tribunal (the Tribunal) dealt with the taxability of the Fees for Technical Services (FTS) provided by the foreign companies.

In the case of Scientific Atlanta Inc.¹ the Mumbai bench of the Tribunal held that since the taxpayer did not make available any technical knowledge, experience or skill while rendering services, the amount received by the taxpayer was not taxable under article 12 of the India – USA tax treaty. Further, the Tribunal also held that only those business profits which are attributable to the Permanent Establishment (PE) in India will be taxable under article 7 of the India – USA tax treaty.

In the case of Cepha Imaging Pvt. Ltd.², Recently, the Bangalore bench of the Tribunal held that since the technical knowledge, technical plan/design transferred to the taxpayer were not ‘made available’ to the taxpayer for the future use, the payments made by the taxpayer to the UK based firm was not taxable in terms of article 13(4)(c) of the India – UK tax treaty.

Scientific Atlanta Inc.

Facts of the case

A tax resident of USA entered into a VSAT Agreement with Telstra Videsh Communication Limited (TVCL). As per the agreement, the taxpayer was to provide Satellite Network Communication System and

¹ DDIT v. Scientific Atlanta Inc [2009-TIOL-585-ITAT-MUM]

² ITO v. Cepha Imaging Pvt. Ltd. [2009-TIOL-558-ITAT-BANG]

certain installation and commissioning services associated with the initial installation and communications thereof. Various services provided by the taxpayer to TVCL were offered to tax except for the services like Factory Acceptance Test, Project Management and Engineering Support, (FAT and PMES) etc.

The AO observed that the FAT and PMES services performed by the taxpayer were “hybrid services” to provide a Satellite Network Communication System and other services to the TVCL. Further, AO also noted that the FAT and PMES services consisted of the development and transfer of a technical plan or technical design. Therefore, the services were also ‘make available’ to TVCL. Accordingly, the AO held that the FAT and PMES were in the nature of Fees for Included Services (FIS) which were taxable at the rate of 15 percent as per the article 12 of the India – USA tax treaty.

The Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer did not make available technology, skill or experience etc. Accordingly, as per article 12 of the India – USA tax treaty the FAT and PMES services provided to the TVCL were not in the nature of FIS. The CIT(A) also observed that since FAT and PMES, were not in the nature of FIS, the nature of such income would become ‘business income’ and only that part of the services which was relatable to the PE of the taxpayer in India will be taxable. Further, since such services were not attributable to PE in India as services were performed outside India, the amounts received by the taxpayer on account of FAT and PMES were not taxable in India.

Issue before the Tribunal

- Whether the services like FAT and PMES provided by the taxpayer to the TVCL were taxable as FIS (FIS) included under the article 12 of the India – USA tax treaty or not?

Contentions of the tax department

- Article 7 of India – USA tax treaty dealing with “business profit” which is relatable to the PE was clearly attracted due to the presence of the PE in India and hence it was taxable in India.
- The taxpayer had not provided the details of the services rendered by it as a result of which the AO had no occasion to verify the real nature of services for which the consideration was received. Further, it was not clear from the record whether any technical knowledge, etc. was made available to TVCL or not.

Contentions of the taxpayer

- The taxpayer had provided complete details to the AO about the nature of services provided by it and hence there was no question that the nature of services was not examined.
- A clear distinction between the services rendered in India and outside India was made by the taxpayer in the chart submitted to AO showing the details about the services rendered and amount received against such services. Further, the schedule showing the date of start

and finish of each activity up to the date of shipment was also submitted. It was contended that the FAT and PMES services were in the nature of FTS as per the India – USA tax treaty but since the technical knowledge was not ‘made available’ to TVCL, it was not taxable.

- Though the taxpayer had PE in India by virtue of rendering installation services but the revenue earned from rendering FAT and PMES services were not attributable to such PE since the services were not performed in India.

Ruling of the Tribunal

Taxability of services as FIS

- The Tribunal observed that the taxpayer had submitted the proper details to the AO and part of which has been extracted in the assessment order of the AO itself, which states clearly that services were rendered from overseas to facilitate the timely execution of the project and the AO did not demand any further clarification from the taxpayer.
- Further, as per article 12(4)(b) of the India – USA tax treaty the services must result into making available the technical knowledge, experience or skill, etc. so as to be covered within the scope of FIS and mere providing of such services was not sufficient to become taxable FIS.
- The Tribunal while interpreting the term ‘make available’ relied on the decisions of the AAR and the special bench of the Mumbai Tribunal in the case of Intertek Testing Services P. Ltd.³ and Mahindra & Mahindra limited⁴ and held that the since the taxpayer did not make available any technical knowledge, experience or skill to TVCL by way of rendering FAT and PMES services, the amount received by the taxpayer was not taxable under article 12 of the India – USA tax treaty.

Taxability of services as Business profits

- The Tribunal while discussing the taxability of services provided by the taxpayer as business profits, observed on the applicability of the Supreme Court’s decision in the case of Ishikawajma Harima Heavy Industries Ltd⁵. Accordingly, the Tribunal observed that though the Supreme Court has held that only the business profits resulting from the activities of the PE can be brought to tax, but it is important to note that the said finding has been rendered in the context of the tax treaty between India and Japan. It is not a universally applicable ratio which will apply to the tax treaties between India and all other countries. Therefore, if the language of the relevant tax treaty

³ Intertek Testing Services P. Ltd. [2008] 307 ITR 418 (AAR)

⁴ Mahindra & Mahindra limited v. DCIT [2009] ITR 263 (AT) (Mum) (SB)

⁵ Ishikawajma Harima Heavy Industries Ltd⁵. Vs. Director of Income Tax [(2007) 288 ITR 408 (SC)]

matches with that of the tax treaty with Japan, then the proposition of decision provided by the Supreme Court will apply.

- The Tribunal observed that as per article 7(1)(a) of the India – USA tax treaty, the business profits can be taxed in India only to such extent which are attributable to the PE in India. Therefore, if there is no PE in India then the business profits of the non-resident cannot be taxed in India. Further, even if there is PE but if no part of the business profits is attributable to such PE, then no taxability arises under article 7 of the India – USA tax treaty.
- Accordingly, the Tribunal held that no portion of the revenue earned by the taxpayer will be subject to tax in India.

Cepha Imaging Pvt. Ltd.

Facts of the case

- The taxpayer was a 100 percent export-oriented unit, exporting services to USA and UK. The taxpayer company was engaged in the business of providing customised publishing-related solutions which includes editing, typesetting, layout design and other services. The taxpayer entered into a Master Services Agreement (MSA) with M/s. Keyword Group Ltd. (KGL) of UK. As per the MSA, KGL was to rearrange its client relationship and systems to promote publishing related services in the UK market. The services included managing client relationship and providing catalytic support for deliverables to the clients of the taxpayer.
- The Assessing Officer (AO) held that the taxpayer was receiving technical knowledge, experience and skill in the field of publishing and it was also getting consultations and advises as to how to proceed in the American and English markets. Thus, the services received by the taxpayer were technical as well as consultancy services.
- Further, there was no clarification available as to the meaning of the term 'make available'. Therefore, the ordinarily understood meaning of the term is to be applied rather than importing the meaning provided under the India – UK tax treaty.
- Accordingly, the AO held that the taxpayer was liable to withhold tax under section 195 of the Income-tax Act, 1961 (the Act) on the payments made to KGL under the MSA as the payments made were in the nature of fees for technical services which were 'made available' to the taxpayer under article 13(4)(c) of the India – UK tax treaty as well as under section 9(1)(vii) of the Act.
- The Commissioner of Income-tax (Appeals) held that the services provided by the KGL were not technical, managerial or consultancy services. Therefore, the question of making available technical skill or know how would not arise. Further, even if one were to accept the AO's contentions that the non-resident company was rendering technical or managerial services, there is nothing on record to show

that technical skill or know how was 'made available' to the taxpayer.

Contentions of the taxpayer

- The taxpayer contended that the services rendered to it by KGL cannot partake the meaning of the term 'make available' since such services do not enable the use, the skill or experience independently in future.
- The taxpayer relied on the decisions of the Bangalore and Mumbai bench of the Tribunal in the case of De Beers India Minerals P. Ltd.⁶ and Raymond Ltd.⁷ respectively where it was held that the technical services cannot be held to be 'made available' unless the person utilising the service is able to make use of such technical knowledge etc., by himself in his business or for his own benefit and without recourse to the performer by the services,
- The taxpayer also relied on the decisions in the case of Azadi Bachao Andolan⁸, Boston Consulting Group Pte Ltd.⁹ and Tekniskil (Sendirian) Berhad¹⁰ where it was held that in interpreting the language of a treaty, reliance can be placed on other tax treaties where identical language is used.

Ruling of the Tribunal

- The Tribunal after relying on the decision of the Kolkata Tribunal in the case of ITC Ltd. held that the AO was not right in taking the meaning of the term 'make available' as ordinarily understood meaning rather than importing the meaning under the India – UK tax treaty.
- The Tribunal further relied on the decisions of the Mahindra and Mahindra Ltd. and Raymond Ltd. and observed that the technical knowledge, experience or skill, etc. must be 'made available' to the taxpayer and mere providing of such services without making them available to the taxpayer will not serve the purpose and hence will be outside the ambit of article 13(4)(c) of the India – UK tax treaty.
- Accordingly, the Tribunal held that the since no technical knowledge, expertise, skill, know how or process consisting of the development and transfer of technical plan or technical design has been transferred to the taxpayer so that the taxpayer could use them in the future. Therefore, the payments made to KGL by the taxpayer is not taxable in terms of article 13(4)(c) of the India – UK tax treaty.

⁶ ITO v. De Beers India Minerals P. Ltd. (2007) 297 ITR (AT) 176 (Bang)

⁷ Raymond Ltd., v. DCIT (2003) 80 TTJ 120 (Mum)

⁸ UOI v. Azadi Bachao Andolan (2003) 132 Taxman 373 (SC)

⁹ DCIT v. Boston Consulting Group Pte Ltd [2005] 93 TTJ 293 (Mum)

¹⁰ Tekniskil (Sendirian) Berhad v. CIT [2002] 222 ITR 551 (AAR)

Our Comments

The above decisions are in line with various judicial pronouncements where the concept of ‘make available’ has been upheld and applied by the courts to conclude that respective services are not taxable as FTS/FIS.

The Memorandum of Understanding (MOU) attached to the India-USA tax treaty provides the meaning of term ‘make available’ as follows:

- Technology will be considered as ‘made available’ only when the person acquiring the service is enabled to apply the technology.
- Provision of requiring technical input by the person providing the services does not per se means that technical knowledge, skills, etc. are made available.
- Use of a product which embodies technology shall not per se be considered to make the technology available.

The concept of ‘make available’ under the FTS clause is available under the Indian tax treaties with Australia, USA, UK, Canada, Cyprus, Netherlands, Singapore, etc. Further, the concept is also available indirectly applied under the Most Favoured Nations (MFN) clause under the tax treaties with Belgium, France, Spain, Sweden, etc.

It is interesting to note that under the India - Australia tax treaty the definition of ‘Royalty’ also provides for ‘make available’ concept.

We would like to bring to your attention various judicial pronouncements where certain services were held to be not ‘made available’ under respective tax treaties:

Sr. No.	Services which do not ‘make available’ knowledge, skill, know-how, etc.	Decisions / Tax Treaty
1.	Market study for updating outlook for domestic oil refining capacity.	Bharat Petroleum Corp. Ltd. v. JDIT. [2007] 14 SOT 307 (Mum)
2.	Assessment surveillance for the purpose of ISO certification.	NQA Quality Systems Registrar Ltd. v. DCIT [2004] 92 TTJ 946 (Del)
3.	Services rendered in connection with GDR issue.	Raymond Ltd. v. DCIT [2003] 86 ITD 791 (Mum) Wockhardt Life Science Ltd. v. DCIT [2005] ITA Bo. 3625/Mum/2000 (Mum) Gujarat Ambuja Cement Ltd. v. DCIT [2005] 2 SOT 784 (Mum)

		Mahindra and Mahindra Ltd. v. DCIT [2009] 313 ITR 263 (AT) (Mumbai) (SB)
4.	Reviewing and opining of a project (rather than designing and directing the project) and in the case of any risks or issues which are required to be corrected or mitigated, suggesting alternative solutions.	CESC Ltd. v. DCIT [2003] 80 TTJ 806 (Kol)
5.	Preparation of material safety data sheets.	National Organic Chemical Industries Ltd. v. DCIT [2005] 96 TTJ 765 (Mum)
6.	Provision of bandwidth for uplinking / downlinking.	Wipro Ltd. v. ITO [2004] 80 TTJ 191 (Bang) Software Technology Parks of India v. ITO [2005] 3 SOT 529 (Bang)
7.	Specialised data processing by use of computers	Kotak Mahindra Primus Ltd. v. DDIT [2006] 105 TTJ 861 (Del)
8.	Provision of transponder capacity by a satellite company to TV Channels / broadcasters.	DCIT v. PanAmsat International System Inc. [2006] 103 TTJ 861 (Del)

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