

# TAX FLASH NEWS

27 February 2019

## Supply of certain engineering technical design/drawings/plans is not taxable as FTS because it does not satisfy 'make available' test under the India–UK tax treaty

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Buro Happold Limited<sup>1</sup> (the taxpayer) held that the amount received by the taxpayer from its affiliate towards consulting engineering services is not taxable as Fees for Technical Services (FTS) under Article 13(4)(c) of India-U.K. tax treaty (tax treaty) since the taxpayer did not 'make available' technical knowledge, experience, skill, know-how, process to the service recipient, through the development and supply of a technical plan or a technical design. The amount received by the taxpayer was business profits and in the absence of a Permanent Establishment (PE) in India, it could not be taxed in India.

### Background

The taxpayer is a company registered in the U.K. and it is also a tax resident of the U.K. It is engaged in the business of providing engineering design and consultancy services. As a part of such services, the taxpayer provides structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. During the Assessment Year (AY) 2012-13, the taxpayer has earned income from the provision of consulting engineering services to its Indian affiliate.

The taxpayer contended that since it had not made available any technical knowledge or skill to its affiliate for enabling it to apply them independently, such amount would not qualify as FTS and has to be characterised as business income under the tax treaty. Such business income was not taxable in India in the absence of a PE in India.

The Assessing Officer (AO) observed that as per Article 13(4)(c) of the India-U.K. tax treaty, payment received for development and transfer of a technical plan or technical design would be in the nature of FTS, irrespective of the fact, whether it also 'makes available' technical knowledge, experience, skill, know-how, etc. The AO observed that the words 'make available' go with technical knowledge, experience, skill, know-how, etc., but do not go with 'the development and transfer of a technical plan or a technical design'. The AO observed the second limb of clause (c) of Article 13(4) of India-U.K. tax treaty can be invoked when the amount is paid in consideration for rendering of any technical and consultancy services consisting of development and transfer of a technical plan or technical design.

### Tribunal's decision

On a careful reading of Article 13(4)(c) of the tax treaty, it has been observed that the words 'or consists of the development and transfer of a technical plan or technical design', appearing in the second limb has to be read in conjunction with 'make available technical knowledge, experience, skill, know-how or processes'. As per the rule of *ejusdem generis*, the words 'or consists of the development and transfer of a technical plan or technical design' will take colour from 'make available technical knowledge, experience, skill, know-how or processes'.

As per the settled principle of law, the technology is considered to have been made available when the recipient of such technology is competent and authorised to apply the technology contained therein independently as an owner without depending upon the service provider in future.

<sup>1</sup> Buro Happold Limited v. DCIT (ITA No. 1296/Mum/2017) – Taxsutra.com

The technical design/drawings/plans supplied by the taxpayer to the Indian entity are project specific, hence, cannot be used by the Indian entity in any other project in the future. Therefore, the claim of the taxpayer that it has not made available any technical knowledge, experience, skill, know-how or processes while developing and supplying the technical drawings/designs/plans has to be accepted.

The Tribunal relied on the decision of Pune Tribunal in the case of Gera Developments Pvt Ltd<sup>2</sup> where it was held that mere passing off project specific architectural, drawings and designs with measurements does not amount to making available technical knowledge, experience, skill, know-how or processes. Unless there is a transfer of technical expertise skill or knowledge along with drawings and designs and if the taxpayer cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as FTS.

Accordingly, the Tribunal held that the amount received by the taxpayer from its affiliate towards consulting engineering services is not FTS under the tax treaty since the taxpayer did not 'make available' technical knowledge, experience skill, know-how, process to the service recipient, through the development and supply of a technical plan or a technical design. Such amount has to be treated as business profits and in the absence of a PE in India, it cannot be taxed in India.

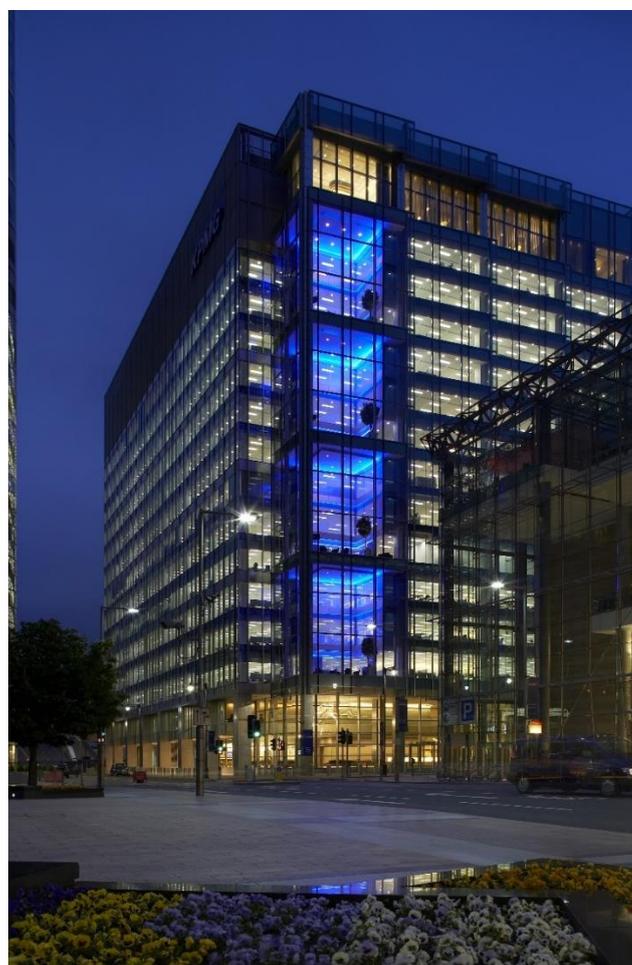
## Our comments

The issue with respect to taxability of FTS vis-à-vis applicability of make available clause has been a matter of debate before the Courts/Tribunal. The Karnataka High Court in the case of De Beers India Minerals (P.) Ltd.<sup>3</sup> dealt with this issue and held that though services rendered were technical in nature, it would not be taxable under the tax treaty because the services did not make available the technical knowledge, skill, experience, etc. The services shall be treated as make available only if the technical knowledge or skills of the provider were imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without recourse to the provider.

Whether 'make available' test is applicable to the 'development and transfer of a technical plan or technical design' is also a debatable issue. The Mumbai Tribunal in the case of Sargent & Lundy LLC, USA<sup>4</sup> dealt with the issue of whether the provision of blueprints i.e., technical designs and plans, satisfies the test of 'make available' and, accordingly, taxable as fees for included services (FIS) under the India–U.S. tax treaty. The Tribunal

held that the services rendered by the taxpayer was technical in nature, in the shape of technical plans, designs, etc. which enabled the payer to use the same in the future without recourse to the taxpayer. As the payer is enabled to use the blueprints on its own without any recourse to the taxpayer, the services satisfy the test of 'make available' as stipulated under the tax treaty and, thus, taxable in India. The Tribunal in this case had examined the test of 'make available' with respect to 'technical design and plans'.

Similarly, in this instant case the Mumbai Tribunal applied the 'make available' test to 'development and transfer of technical plan or design' and held that the test not only applies to technical knowledge, experience, skill, know-how, but also applies to the development and transfer of a technical plan or a technical design.



<sup>2</sup> Gera Developments Pvt Ltd v. DCIT [2016] 160 ITD 439 (Pune)

<sup>3</sup> CIT v. De Beers India Minerals (P.) Ltd. [2012] 346 ITR 467 (Kar)

<sup>4</sup> Sargent & Lundy LLC, USA v. ADIT [2013] 37 taxmann.com 134 (Mum)

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