Navigating the Labyrinth of 'Make Available' in Context of Global Cost Allocation.....

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Globally, business groups have a model in terms of which one of the group entities would incur cost in respect of certain items or activities for and on behalf of the entire group and allocate the costs to each of the group constituents. Variations include cost allocation for support provided by one entity to the group in fields such as finance, marketing, human resources, systems, etc.

Explanation-II to Section 9(1)(vii) of the Income Tax Act defines 'fees for technical services' (FTS) to mean 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) and there are certain statutory exclusions. There is no definition of 'included services' in the Act.

India-US DTAA

Article 12(4) of the Indo-US DTAA defines 'fees for included services' (FIS) to mean payment of any kind to any person for the rendering of any 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 para 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 design*.

Concept of 'make available'

Several interpretations have been made with regards to the definition of 'make available'; consensus however has built on the most reliable definition translating as, 'the recipient of the service being enabled to carry out such technical activity independently'. Thus, to determine if there has been a transfer of 'technical services' for consideration, it is necessary only to determine if the recipient, would be able to autonomously carry out such activity, after such transfer has been made.

In the Indian context, if for example the Indian subsidiary has made payments to its US parent and the payment is for technical services which do not involve the US Company making available any technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or design, the Treaty benefit would be available and there would not be any taxability in India.

Recent decision of the Delhi ITAT

In the case of ***H.J Heinz Co Vs. DCIT*** [1], H.J Heinz Co, USA (US Co) contended that the receipt of Rs.1.88 crores from Heinz India (ICo.) constituted reimbursement of expenses and not taxable as FTS under the Income Tax Act. It was contended that the activities were broadly in the area of HR, strategic planning, marketing and information system and the costs incurred in terms of time and effort of the employees for carrying out the activities was shared amongst the various affiliates on a uniform and consistent basis using appropriate allocation factors as set out in the Agreement. It was contended that the cost contribution / payment made by ICo. merely represented reimbursement of costs and there is no mark-up in such recovery.

Contentions of the Assessee

The assessee relied upon a number of decisions on reimbursements and contended that the US Co. does not 'make available' technical services to ICo. and hence it should not be taxed under FIS in terms of the Indo-US

DTAA. It was further argued that the fact that the assessee performs such activities on a year on year basis supports the contention that no technical knowledge was made available. Reliance was placed on 20 decisions on 'make available' including the decision of the Delhi High Court in the case of ***Guy Carpenter & Co***.[2] 6 decisions were relied upon to contend that managerial services are not covered under FIS in terms of the Indo-US DTAA. With reference to support services, the assessee relied upon the decisions of ***Exxon Mobil Co. India Pvt. Ltd***.[3]; ***Bombardier Transportation India Pvt. Ltd*** .[4] and ***Outotec Oyj***[5] to contend that support services rendered year on year do not satisfy the 'make available' test.

Contentions of the Revenue

The Revenue contended that the services are clearly ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is paid and hence covered under Article 12(4)(a) of the Treaty.

The Revenue further contended that the services received by the licensee are not only related to the enjoyment of rights conferred under TTLA but the predominant purpose for the payment was to facilitate the effective application and enjoyment of such right. It was therefore argued that all the five tests laid in the memorandum are met namely facilitation, provision of services in the ordinary course of business, significant amount, related contracts and same parties being involved.

This contention was disputed by the assessee through a rejoinder wherein it was argued that the services under the SA are not linked to TTLA since the TTLA related solely to the use of the products marks in the manufacturing process whereas the SA related to centrally managed operation and administrative support functions. The amount paid under the SA is approximately 6 times the amount paid under TTLA and therefore the payment cannot be ancillary or subsidiary to the royalty payment. It was again contended that the cost contribution / payments merely represent a reimbursement of costs and even as per the agreement there was zero mark-up.

The Ruling

The Tribunal held that 'the assessing officer has observed that the services provided by the assessee are in the area of supply chain, HR, strategic planning, marketing, finance and information systems. The services have been utilized by the Indian Company as well. The concept of make available requires that the fruits of the services should remain available to the service recipient in some concrete shape such as technical knowledge, experience, skills, etc. which is met in the instant case as can be reflected from the nature and duration of the contract. The service recipient has to make use of such technical knowledge, skills, etc. by himself in his business and for his own benefit thus the short durability or permanent usage of the service envisages by the concept of make available services remains at the disposal of their service recipients. Thus, consideration qualifies as FTS'. All decisions relied upon including the decision in ***Guy Carpenter*** were considered as not applicable as the factual aspects were different.

Guy Carpenter[6] case

The Delhi High Court had held that the Tribunal had given the finding to the effect that no technical knowledge, experience, skill, know-how processes, had been made available by the assessee to the insurance company in India. It does not consist of the development and transfer of any technical plan or technical design. Thus, it was held that the re-insurance commission would not qualify as FTS. While it is true that every decision revolves around the set of facts and the ratio of the decision flows from the facts it is not clear as to how the Delhi ITAT distinguished the decision in the case of Outotec Oyj.

Outotec Oyj[7] case

The Kolkata ITAT had held that where the agreement is for an indefinite period and the services are provided on a recurring basis it cannot be said that know-how or skill is being made available. Services such as IT infrastructure, IT administration (IT support services) do not meet the 'make available' test. Supervisory services do not involve any transfer of technology.

It is interesting to note that the services covered under the Agreement in the case before the Kolkata ITAT covered marketing communication, finance and treasury, accounting, HR, IT support and other services.

Exxon Mobil Co. India Pvt. Ltd.[8]

The Mumbai ITAT had held that when payments were made to the Singapore Company for providing global support services which encompassed management consulting, functional advice, administrative, technical, professional and other support services, there is no FTS since the foreign company had not 'made available' any technical knowledge, experience, skill, know-how, or process which enabled assessee to apply

technology contained therein on its own.

Bombardier Transportation India Pvt. Ltd[9]

The Ahmedabad ITAT in the context of Article 12 of the Indo – Canada DTAA held payments on account of administration, marketing, procurement, HR services etc. are for services in the nature of management support and advisory services. In order to invoke Article 12(4)(a), it is necessary that such services should 'make available' technical knowledge, experience, skill, know-how or process or consist of development or transfer of a technical plan. The services were simply management support or consultancy services. The Tribunal relied upon non-jurisdictional Delhi High Court decision in the case of ***Guy Carpenter***.

US Technology Resources Pvt. Ltd.[10] case

The Kerala High Court has held that payment to the US Company for providing management, financial, legal, public relation and risk management services are not for included services. The Court referred to the Indo-US DTAA and specifically Article 12(4) and observed that technology would be considered 'made available' only when the person acquiring the service is enabled to apply the technology. When there was no technology transfer or transfer of plan or strategy relating to management, finance, legal, etc. it does not fall within the ambit of FIS. The non-resident company only assisted the Indian Company in making correct decisions on such aspects referred to in the agreement as and when such advice was required.

Perfetti Van Melle Holding BV[11]

The AAR in the context of the Indo – Netherlands DTAA ruled that any international transaction shall be considered with respect to the respective DTAA that would come into question; parallels cannot be drawn from DTAA's with other nations. In light of the above, the Authority maintained that 'operational and support' services cannot be characterized as such on the basis of interpretation of the 'make available' clause as in the US-India DTAA. Further, it ruled that the assessee would be liable to pay tax as the transfer was of 'technical services'; the AAR observed that '*When one party provides support to the other through provision of knowledge and experience and assists the employees of the other, then how can it be acceptable that the recipient will not apply this knowledge and skill, after the termination of the agreement*?' It was ruled that 'each service is in the nature of assistance to Indian subsidiary; these services aren't being carried out independently but are only to enable Perfetti India to be able to carry out such tasks on a daily basis.' It is pertinent to note that unlike the Indo – US DTAA, there is no 'make available' clause in the Indo – Netherlands DTAA.

Briatrim UK Ltd.[12]

The Mumbai Bench of the ITAT held that where there is a 'Cost Reimbursement Agreement', the nature of payments that are made to and received by the Foreign assessee; noting that in instances wherein there is no 'mark-up' on the prices that is retained by the Assessee, and when there is no actual transfer of 'know-how', the payments are to be considered to be reimbursement, that is not liable to tax in India, the assessee lacking a permanent establishment. Further, it developed the interpretation of the words "make available" and deemed it to not only apply to technical knowledge, experience, skill, knowhow, but also apply to the latter part of the FTS Article which deals with the development and transfer of a technical plan or a technical design, by applying the principles of ejusdem generis.

UN Model

Article 12A of the UN Model Tax Treaty sets out the examples that would fall under the ambit of FTS. The Commentary to the UN Model tax treaty is to the effect that the definition is more holistic. Classification needs to be made based on the nature of services that are transferred with the ultimate purpose being 'independent implementation and commercial expediency'. The phrase 'make available' must therefore be understood and read consistently with the provision for taxation rather than in isolation.

The Debate Continues

Various decisions rely upon the same set of precedents but the conclusions differ based on the factual matrix; the nature of the agreements; applicability of 'make available' clause; and interpretation on whether there is a transfer or not.

The scope of the two terms namely, 'make available' and 'fees for technical services' and their interpretation linked with interplay continues to be in a state of constant flux with different decisions since it is not possible to find a single fit for all situations. "Make Available" is a phrase that has been subject to judicial scrutiny and is the subject matter of many pronouncements in India. A pattern can be identified, wherein the majority of the judicial precedents suggest that 'the recipient of the service' should be in a position to draw an

autonomous functionality from such transfer, and be able to utilize the knowledge or “knowhow” in the future, without recourse to the service provider.

Given the fact that there is a plethora of decisions on what constitutes ‘make available’ and many specific decisions in the context of Indo – US DTAA as well as decisions on identical cost allocation scenarios, it is surprising that the Delhi ITAT decided against the assessee. It is most likely that the matter would be contested further and all other decisions will come into play.

Impact of Multi-Lateral Instrument (MLI)

The Articles introduced through MLI have not suggested changes in the context FTS. US has not ratified the MLI and the agreement between India and US will continue as such unless bi-laterally amended. Countries which have a ‘make available’ clause and which have ratified MLI will open up a new terrain of debate in the context of treaty abuse provisions. To illustrate, assuming the Indian Company belongs to a group comprising of a UK Company, Singapore Company and Netherlands Company and through a cost sharing agreement, the UK Company incurs the cost for global support and allocates the cost to the other constituents through an agreed ratio, a question can arise as to why UK was chosen to incur the cost.

Article 7(1) of the MLI provides that the benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement. Thus, the Indian Company will have to demonstrate as to why UK was chosen to incur the cost in the first place as opposed to Netherlands. It will also be interesting to examine the existence of the ‘Most Favoured Nation’ clause to demonstrate that the benefit would have still been available.

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[1] TS-505-ITAT-2019 (DEL)

[2] 346-ITR-504 (DEL) / [TS-271-HC-2012(DELHI)-O] ;

[3] (2018) ;

[4] (2017) 162 ITD 586 / [TS-5053-ITAT-2017(AHMEDABAD)-O]

[5] (2017) 162 ITD 541 / [TS-6862-ITAT-2016(KOLKATA)-O]

[6] (2012) 346 ITR 504 (Delhi) / [TS-271-HC-2012(DELHI)-O]

[7] (2017) 162 ITD 541 / [TS-6862-ITAT-2016(KOLKATA)-O]

[8] (2018)

[9] (2017) 162 ITD 586 / [TS-5053-ITAT-2017(AHMEDABAD)-O]

[10](2018) 407 ITR 327 (Kerala) /[TS-473-HC-2018(KER)]

[11] [TS-723-AAR-2011]

[12] [TS-502-ITAT-2019-(Mum)]