

# Walker Chandiook & Co LLP

## Recent developments and controversial issues in taxation of non-residents

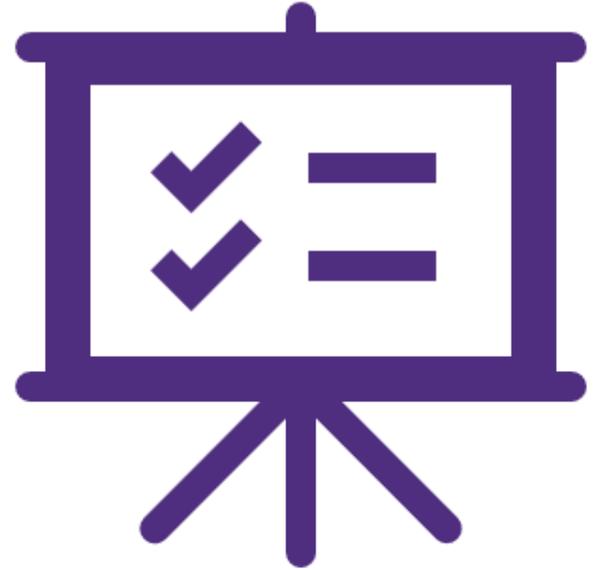
### Royalty and Fees for Technical Services

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2. Software taxation
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## Definitions and Broad Framework

# Royalty: Domestic Law

## Explanation 2 to 9(1)(vi)

- The transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property
- The imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property
- The use of any patent, invention, model, design, secret formula or process or trade mark or similar property
- The imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill
- The use or right to use any industrial, commercial or scientific equipment
- The transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films

# Royalty: Domestic Law

## Explanation 4, 5 and 6 to 9(1)(vi)

The scope of 'royalty' was enhanced under the Domestic Law by the Finance Act 2012 with retrospective effect from June 1, 1976:

- The transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred
- Royalty includes and has always included consideration in respect of any right, property or information, whether or not—
  - (a) the possession or control of such right, property or information is with the payer;
  - (b) such right, property or information is used directly by the payer;
  - (c) the location of such right, property or information is in India.
- The expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret

# Fees for technical service: Domestic Law

## Explanation 2 to 9(1)(vii)

*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"*

It does not make a difference, if

- the non-resident has a residence or place of business or business connection in India, or
- the non-resident has rendered services in India a residence or place of business

# Meaning of term 'managerial'

The term managerial services, ordinarily means handling management and its affairs. As per the concise oxford dictionary, the term managerial services means rendering of services which involves controlling, directing, managing or administering a business or part of a business or any other thing

- *Endemol South Africa (Proprietary) Ltd. v DCIT (2018) 98 taxmann.com 227 (Mum Trib.)*

# Meaning of term 'technical'

Technical services' like 'Managerial and Consultancy service' would denote seeking of services to cater to the special needs of the consumer/user, as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered

- [CIT v Kotak Securities Ltd. \(2016\) 383 ITR 1 \(SC\)](#)

The words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services

- [CIT v Bharti Cellular Ltd. \(2011\) 330 ITR 239 \(SC\)](#)

# Meaning of term 'consultancy'

Appellant had intended and desired to utilize expert services of qualified and experience professional who could prepare a scheme for raising requisite finances and tie-up loans for the power projects. NRC had 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 service rendered by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service'

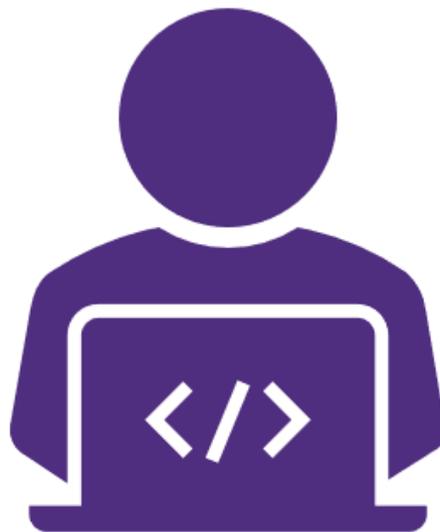
- GVK Industries Ltd. v ITO (2015) 371 ITR 453 (SC)

# Broad Framework

- Tax Treaties contain definition of royalty and FTS
- Withholding tax rate in Tax Treaties:10-15%
- Provisions of Act or Tax Treaty whichever is more beneficial to apply - Section 90(2)
- Requirement of Tax Residency Certificate (TRC) - Section 90(4)
- Gross Basis v. Net Basis

## Whether section 206AA overrides beneficial provisions of Tax Treaty?

- Danisco India (P.) Ltd. v UOI [2018] 90 taxmann.com 295 (Delhi)
- Emmsons International Ltd. v DCIT [2018] 93 taxmann.com 487 (Delhi - Trib.)
- DDIT v Serum Institute of India Ltd. [2015] 56 taxmann.com 1 Pune



# Software Taxation

# Controversies

- Copyright v copyrighted article
- Software embedded in hardware
- Transfer of partial rights in underlying copyright
- Transfer of complete rights in underlying copyright
- Need to make a copy in order to operate software

## **Tata Consultancy Services (271 ITR 401) (SC)**

Intellectual property, once it is put on to a media, whether it be in the form of books or canvas (In case of painting) or computer discs or cassettes, and marketed would become "goods"

# The debate on Copyright v. copyrighted article

Motorola Inc. v DCIT (2005) 96 TTJ 1 (Delhi SB)

The Special Bench distinguished between payments for a 'copyrighted article' and payment for a 'copyright right' and observed as under:

- Merely because the terminology of the Agreement is a 'license', it cannot be said that the payment should be categorized as royalty.
- Under the Copyright Act, 1957, 'copyright' is an exclusive right granted to the holder thereof; whereas in this case, a **non-exclusive license to use the software** has been given.
- To constitute a copyright right, the taxpayer should have had one or more of the rights mentioned in clause (a)/(b) of Section 14 of the Copyright Act, 1957 (such as reproduce or make copies of the work); whereas it was clear that the taxpayer has not been given any of the rights mentioned in the section and therefore the taxpayer has not acquired any copyright but only a copyrighted article.

*Upheld by the Delhi High Court in the case of DIT v. Ericsson A.B. (2012) 343 ITR 470 (Delhi)*

# The debate on Copyright v. copyrighted article

CIT v Samsung Electronics Co. Ltd (2012) 345 ITR 494 (Kar HC)

Copyright is an umbrella of many rights, and the license was granted for making use of the copyright in respect of the software.

- The right to make a copy of the software and use it for internal business by making copy of the same and storing the same on the hard disk of the designated computer and taking back up copy would itself amount to copyright work under Section 14(1) of the Copyright Act, 1957 (Copyright Act).
- It is clear from the provisions of the Copyright Act that the right to copyright work would also constitute exclusive right of the copyright holder and any violation of the said right would amount to infringement under section 51 of the Copyright Act. Therefore, the contention of the taxpayer that there is no transfer of any part of copyright or copyright under the impugned agreements or licenses cannot be accepted.

# Domestic Law v. DTAA

DIT v New Skies Satellite B.V. (2016) 382 ITR 114 (Delhi HC)

*No amendment to the Act, **whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty.** In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, indefensible.*

ADIT v First Advantage (P.) Ltd [2017] 77 taxmann.com 195 (Mum - Trib.)

# Recent rulings

Payment made by assessee to US company for use of software owned by US company, when assessee would use software only for internal business operations and would not sub-license or modify same, could not be considered as royalty within meaning of article 12(4) of Tax Treaty

- [ADIT v First Advantage \(P.\) Ltd \[2017\] 77 taxmann.com 195 \(Mum - Trib.\)](#)

Payments made by assessee were for purchase of software as a copyrighted article and not for purchase of copyright in said article/software; therefore, consideration paid could not be considered as 'royalty' for use or right to use software under section 9(1)(vi)

- [John Deere India \(P.\) Ltd v DDIT \[2019\] 102 taxmann.com 267 \(Pune - Trib.\)](#)

# Recent rulings

- Provisions of section 9(1)(vi) dealing with and defining 'Royalty' cannot be made applicable to a situation of outright purchase and sale of a product.
- Courts have consistently noted the difference between a transaction of sale of a 'copyrighted article' and one of 'copyright' itself
- The provisions of section 9(1)(vi) as a whole, would stand attracted in the case of the latter and not the former.
- Explanations 4 and .. relied by the authorities would thus have to be read and understood only in that context and cannot be expanded to bring within its fold transaction beyond the realm of the provision
  - [CIT v Vinzas Solutions India \(P.\) Ltd. \[2017\] 77 taxmann.com 279 \(Mad\)](#)

# Software embedded in hardware

- Sale of software is inextricably linked to the sale of equipment
- Without software the hardware component cannot function
- Software does not have any independent use and merely facilitates the functioning of the equipment
  - Agfa Healthcare N.V. v DCIT [2018] 97 taxmann.com 463 (Mum – Trib)
  - ADIT v Nortel Networks Singapore (P.) Ltd. [2018] 93 taxmann.com 401 (Del - Trib.)
  - HITT Holland Institute of Traffic Technology B.V. v DDIT[2017] 78 taxmann.com 101 (Kol - Trib.)
  - CIT v ZTE Corporation [2017] 77 taxmann.com 304 (Del)

**Does it make a difference if amount paid for software is separately available or regular updates of software are provided?**



**E-commerce**

# E-Commerce

## Background and Controversies

- Electronic commerce, commonly known as e-commerce, is buying and selling of products or services over electronic systems such as the Internet and other computer networks
- E-commerce is a method of transacting business and is not a transaction by itself
- Tax Controversies
  - New Business Models
  - Characterizing the nature of payment
  - Establishing a nexus between a taxable transaction and a taxing jurisdiction
  - Difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes

### E - commerce Models

- B2C
- B2B
- C2C

# E-Commerce

## The debate

The High-Powered Committee on ‘Electronic Commerce and Taxation’ constituted by CBDT in its report in 2001 noted that –

*“The Committee is of the view that applying the existing principles and rules to e-commerce does not ensure certainty of tax burden and maintenance of the existing equilibrium in sharing of tax revenues between countries of residence and source.*

*The Committee is also firmly of the view that there is **no possible liberal interpretation of the existing rules, which can take care of these issues**, as suggested by some countries.*

*The Committee, therefore, supports the view that **the concept of PE should be abandoned** and a serious attempt should be made within OECD or the UN to find an **alternative to the concept of PE.**”*

# The Debate

## ITO v. Right Florists Pvt Ltd [2013] 143 ITD 445 (Kol - Trib.)

- Online advertising fees paid to foreign search engine company is not fees for technical services as there is no human intervention, it is a completely automated process
- Search engine's presence by way of a website does not have any form of physical presence and would not create a PE unless the server on which website is hosted is also located in the same jurisdiction.
- Reliance placed on the report of The High-Powered Committee and commentary on OECD Model Convention to conclude that conventional PE test fails in virtual world

***“...the traditional concept of PE, which was conceived at a point of time when internet and ecommerce was not even on the radar, does not really fit into the modern day world in which virtual presence through internet, in certain respects, is as effective as physical presence for carrying on businesses...”***

***Clearly, conventional PE tests fails in this virtual world even when a reasonable level of commercial activity is crossed by foreign enterprise.”***

# Database Subscription Fees

American Chemical Society v DCIT [2019] 106 taxmann.com 253 (Mum - Trib.)

- US company collected publicly disclosed chemistry related scientific information into a database and research works of scientists worldwide into research journals
- customers get only the right to search, view and display information (whether online or by taking a print) and reproducing/exploiting the same in any manner; and its use for purposes other than personal use is strictly prohibited
- information is clearly not undivulged; it is an information which is available in the public domain; experience of various scientists, researchers and various other persons and not that of the assessee
- information resides on servers outside India, to which the customers have no right or access, nor do they possess control or dominion over the servers
- mere access to that work or permission to use the work cannot imply that the payer is paying for use or right to use the copyright
- income earned by assessee by way of subscription fees is not 'royalty'

# Database Subscription Fees

Elsevier Information Systems GmbH v. DCIT [2019] 106 taxmann.com 401 (Mum - Trib.)

- Assessee company received subscription fee from customers for access to on-line database containing copyright material pertaining to chemical information
- Payment received by assessee was received for use of copyrighted article rather than for use of or right to use of copyright, payment received by assessee could not be treated as royalty
- Assessee had neither employed any technical/skilled person to provide any managerial or technical service nor was there any direct interaction between customer/user of database and employees of assessee
- While providing access to database there was no human intervention
- Subscription fee received by assessee could not be considered as a fee for technical services

# Web hosting charges

EPRSS Prepaid Recharge Services India (P.) Ltd v ITO [2018] 100 taxmann.com 52 (Pune - Trib.)

- Web hosting charges paid to US based company for using its servers not in the nature of Royalty since assessee did not possess or have any control over server or server space being deployed by said company while providing services
- Retrospective amendment has changed the definition of 'royalty' from the year 2012 under Act but the position of Tax Treaty has not been effected

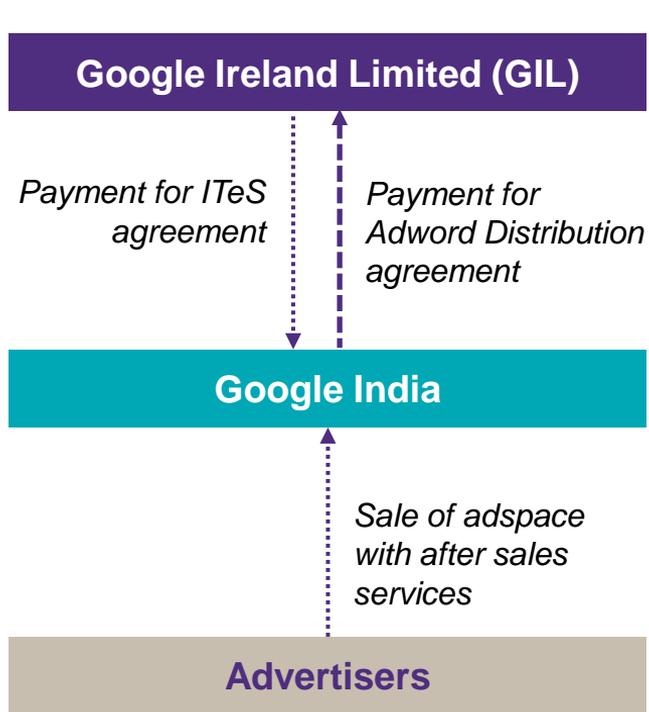
# Domain Registration Fees

Godaddy.com LLC v ACIT [2018] 193 TTJ 137 (Del - Trib.)

- Godaddy was a company located USA, but not a tax resident of USA. It was engaged in the business as accredited domain name registrar authorised by Internet Corporation for Assigned Names and Numbers ('ICANN').
- The taxpayer filed its tax return declaring income from web hosting services as income from royalty and claimed that income from domain registration fees not taxable in India.
- The Assessing Officer assessed domain registration fees as royalty.
- Rendering of services for domain registration is rendering of services in connection with the use of an intangible property which is similar to trademark. Therefore, the charges received by the taxpayer for services rendered in respect of domain name is royalty.
- Relied on Apex Court in the case of Satyam Infoway which had held that the domain name is a valuable commercial right and it has all the characteristics of a trademark and that the domain names are subject to legal norms applicable to trademark

# Online advertisement space

Google India (P.) Ltd v JDIT [2018] 93 taxmann.com 183 (Bang Trib.)



- Assessee obtained the advertisement space under the AdWord Distribution Agreement and resold it to different advertisers along with on sale and after sale services.
- While discharging its obligation under the Google AdWord Programmes and Service Agreement the appellant has an access to the trademarks, IPRs, derivative works, brand features and the confidential information of the GIL
- Therefore, it cannot be called that whatever payment was made by the appellant to GIL was simpliciter payment towards the purchase of AdWord space from the GIL for its resale to advertise
- Payment made by the assessee to GIL is a payment of royalty

# Content Delivery Solutions

Akamai Technologies Inc., In re [2018] 93 taxmann.com 471 (AAR)

- Applicant is a technology company which addresses internet access issues by using its own network of hardware and proprietary software
- Even though the Solutions may be provided using tangible property such as servers, databases, etc, Akamai India/the Indian customers do not have possession and control over the Akamai EdgePlatform/website/server/any tangible property used in the provision of the Solutions
- the entire provisions of the Copyright Act do not apply to the applicant's transaction since by the said transaction the applicant does not act or provide rights to act in any 'work' which involves any computer or any copy of the computer software
- Reseller Agreement nowhere entails any grant nor a transfer of right in the 'process' nor is there any use of 'process' as is required under the India-US Tax Treaty. If at all there is a process which is 'used', it is by the applicant itself to render the outsourced infrastructure services to the end user.

# Content Delivery Solutions

Akamai Technologies Inc., In re [2018] 93 taxmann.com 471 (AAR)

- Solutions provided by the applicant are neither specialized nor exclusive and do not cater to individual requirements of the customer. A standard facility is provided to all who are willing to pay for it, then such standard facility cannot be termed as 'technical services'
- Solutions provided by the applicant without human intervention cannot be treated as provision of technical services.
- Make available clause is not satisfied as they do not provide the customers/end users with any technological knowledge, skill etc. which enable them to apply it on their own in future to enjoy faster content delivery without recourse to the applicant.
- The customer/ Reseller are not provided with any software either on a tangible medium like a CD nor any link through which the computer software is accessed/downloaded by the customer. The software of the applicant is always housed in its own network and the Reseller/customers do not get software/copy of software to apply it on their own in future to enjoy faster content delivery without recourse to the applicant.

# Transaction Processing Services

MasterCard Asia Pacific Pte. Ltd., In re. [2018] 94 taxmann.com 195 (AAR)

- MasterCard is a Singapore based company engaged in processing of electronic payment transactions
- Customers are provided with a MasterCard Interface Processor (MIP) that connects to MasterCard's Network and processing centers. Indian subsidiary owns and maintains MIPs placed at customers locations in India
- Applicant has a PE in India under provisions of Article 5 of India-Singapore Treaty in respect of services rendered/to be rendered with regard to use of a global network and infrastructure to process card payments for customers in India; there is fixed place PE, service PE and dependent agent PE
- Part of fees received/to be received by applicant from Indian customers (being processing fees, assessment fees and transaction related miscellaneous fees) would be classified as royalty as per article 12 of India-Singapore Treaty, and not as FTS; however, since it is effectively connected to PE, it would be taxed under article 7 and not under Article 12

# BEPS Action Plan 1

<b>Significant Economic Presence (SEP)</b>	Creation of a taxable presence in a country when a non-resident enterprise has a 'significant economic presence' on the basis of factors that evidence a purposeful and sustained interaction with the economy of that country via technology / automated tools
<b>Withholding tax on digital transactions</b>	Withholding tax on payments by residents and local PEs of a country for goods and services purchased online from non-resident providers could be considered
<b>Equalisation Levy</b>	An 'equalisation levy' could be considered as an alternative way to address the broader direct tax challenges of the digital economy.

**India has introduced Equalisation levy in 2016 and SEP in 2018 in the domestic law**

# Significant Economic Presence

## Finance Act 2018

Explanation 2A- **Significant Economic Presence** (SEP) of a non-resident in India shall constitute "business connection" in India

SEP means:

- (a) transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or
- (b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:

Only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

# Significant Economic Presence

## Finance Act 2018

Transactions or activities shall constitute SEP in India, whether or not:

- (i) the agreement for such transactions or activities is entered in India; or
- (ii) the non-resident has a residence or place of business in India; or
- (iii) the non-resident renders services in India:

# Equalisation Levy

## Background

- Chapter VIII of the Finance Act 2016
- Provides for an equalisation levy of 6% of the amount of consideration for specified services received/receivable by a non-resident not having PE in India, from a resident in India who carries on business or profession, or from non-resident having PE in India.
- Specified Services
  - online advertisement
  - any provision for digital advertising space or any other facility or service for the purpose of online advertisement
  - any other services as may be notified by the central government

# Equalisation Levy

## Non-applicability

Equalisation levy shall not be levied

- where the non-resident providing the specified services has a permanent establishment in India
- aggregate amount of consideration for specified service received or receivable during the previous year does not exceed INR 1 lakh
- where the payment for specified services is not for the purpose of carrying out business or profession

**Equalization levy v Withholding tax u/s.195**



**Make-available**

# Make-available clause

## Background and Controversies

- Not a part of Domestic Law
- Forms a part of few Tax Treaties
- Has been defined in the Memorandum to the India-USA Tax Treaty

*Generally speaking, technology will be considered "made available" **when the person acquiring the service is enabled to apply the technology.***
- Key controversies -
  - Application on MOU of India USA Tax Treaty to other Tax Treaties
  - Application of make available clause through MFN clause
  - Applicability to concept of make available to phrase “development and transfer of technical plan or technical design”
  - Technical knowledge acquired by observation or continuous use

# Make-available clause

## Recent rulings

### ONGC v ADIT

Services relating to well platform accident investigation, not FTS as make available test not satisfied, ONGC could not perform such activities independently in future: **(2019) 103 taxmann.com 165 (Del Trib.)**

### Nielsen Company (US) LLC v DCIT

Research services and retail management services, not FTS as make available test not satisfied. While undertaking services, assessee had not executed or contracted to make available any technical expertise so as to use those services independently by its group companies, all services undertaken by assessee were support services and were not such which would require transfer of technology or skill: **(2019) 108 taxmann.com 203 (Mum Trib.)**

# Make-available clause

## Recent rulings

**DCIT v Bio Tech  
Vision Care (P.)  
Ltd.**

MoU to the India-US Tax Treaty applied to interpret India-UK Tax Treaty , no FTS as “Make Available” condition not satisfied simply because the recipient of a technical consultancy services learns something with each consultancy: **(2018) 93 taxmann.com 20 (Ahm Trib.)**

**Soregam SA v  
DCIT**

Routine IT services rendered by assessee could not be taxed as FTS as per India Belgium DTAA read with India Portugal DTAA, which provides for taxation of FTS by laying down make-available condition. Availing such services in no manner had given any benefit to recipient with technical knowledge, skill or expertise to be able to apply it in future to perform functions independently: **[2019] 101 taxmann.com 94 (Del - Trib.)**

# Make-available clause

## Recent rulings

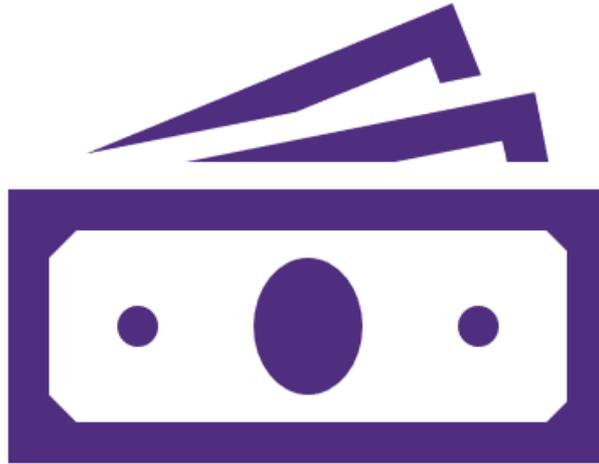
### Buro Happold v DCIT

Supply of designs /drawings / plans which cannot be used for any other project do not satisfy make available condition and not taxable as FTS: **(2019) 103 taxmann.com 344 (Mum Trib.)**

*Article 12(4) - For purposes of this Article, "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*

*(a) .....*

*(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*



## Reimbursements

# Reimbursements

## Controversies

- Term “reimbursement” not defined in the Act
- Controversies
  - Reimbursement of out of pocket expenses (air fare, lodging, boarding) by service provider – Taxable as FTS?
  - Payment to third parties routed through group entities
  - Cost sharing arrangements

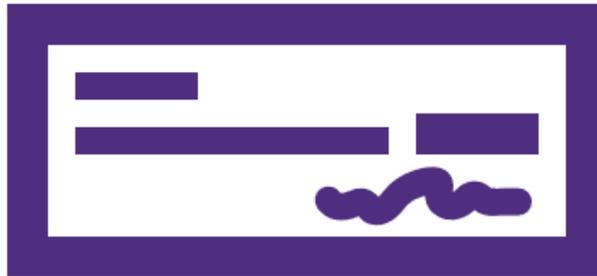
# Recent rulings

DIT v A.P. Moller Maersk A S [2017] 78 taxmann.com 287 (SC)

- Communication system provided to agents for business purpose to discharge their function effectively
- System comprised of booking and communication software, hardware and a data communications network
- Held to be in nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on the system and for maintaining the system
- No technical services are provided by the assessee to the agents.
- Assessee had given the calculations of the total costs and pro rata division thereof among the agents

# Recent rulings

- Payments made by assessee to Federation of International Hockey for arranging for provisional services connected with event of Hockey World Cup such as travel, hospitality and provision of food etc., merely represented reimbursement of expenses not liable to tax
- There was no privity of contract between the payer and service provider
  - [PCIT v Organizing Committee Hero Honda FIH World CUP \[2018\] 100 taxmann.com 441 \(SC\)](#)
- Amounts billed by parties specifically for reimbursement of expenditure, while rendering technical service, could not form part of gross amount of FIS.
- If the parties had raised a single bill for the technical fees, inclusive of expenditure reimbursement, assessee would have been obliged to deduct tax on the whole of the such amount
  - [Hospira Healthcare India \(P.\) Ltd v DCIT \[2018\] 92 taxmann.com 225 \(Chennai - Trib.\)](#)



## Commission

# Recent rulings

**CIT v  
Indusind Bank Ltd.**

**Commission paid in respect of GDR issue.** Services were rendered outside India for raising such funds outside India. These were of commercial nature. Cannot be included within the expression technical services in terms of Section 9(1)(vii)(b) read with *Explanation* to Section 9: **[2019] 106 taxmann.com 343 (Bombay)**

**DCIT v  
Welspun Corporation  
Ltd.**

Just because a product was highly technical, it would not change character of activity of agents because object of salesman was to sell and, thus, familiarity of agents with technical details of products was only towards end of selling: **[2017] 77 taxmann.com 165 (Ahd)**

**Evolv Clothing Co. (P.)  
Ltd. v ACIT**

Commission was paid to the foreign agents for (i) marketing the products (ii) to procure orders (iii) systematic market research with regard to the needs of the products. It was held that service of market survey only to ascertain demand for product in market is incidental to function of a commission agent of procuring orders and is, in any case, not managerial, technical or consultancy service and will not be charged to tax in India: **[2018] 94 taxmann.com 449 (Madras)**

# Key aspects

## Circular No 23 of 1969 dated July 23, 1969

- A foreign agent of Indian exporter operates in his own country and no part of his income arises in India.
- His commission is usually remitted directly to him and is, therefore, not received by him or on his behalf in India.
- Such an agent is **not liable** for income tax on this commission.

## Circular No 786 dated February 7, 2000

- The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India
- It had been clarified by Circular 23 (*supra*) that where the non-resident agent operates outside the country no part of his income arises in India.
- Such payments were therefore, held to be not taxable in India.

**Both these  
circulars were  
withdrawn by  
Circular No 7  
of 2009 dated  
October 22,  
2009**

# Recent case law after withdrawal of Circulars

Sections 5(2) and 9 not having undergone any change in cases which directly follow with situations covered by Circular Nos. 23, ...clarification in Circular No. 23 will prevail even after its withdrawal and, thus, export commission payable to a non-resident for services rendered outside India was not liable for withholding tax.

- [ACIT v Nuova Shoes \(2018\) 91 taxmann.com 354 \(Agra Trib.\)](#)

# Questions



# Thank You!