TECHNICAL GUIDE ON ROYALTY AND FEES FOR TECHNICAL SERVICES

Committee on International Taxation
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword to the Fourth Edition

Technologically innovative means of rendering technical service around the globe has, over the period of time, expanded the scope of taxation of "Royalty and fees for technical services". Its multi-dimensional character has led to conflicts of opinion between the revenue and the taxpayer leading to numerous litigations.

Considering the need to equip our members with the recent updates in respect of this important topic, the Committee on International taxation of ICAI has been updating this publication on periodical basis. I am happy to mention that this year also the Committee has undertaken this project.

I sincerely appreciate the efforts of Committee on International Taxation, particularly of CA. Sanjiv K. Chaudhary, Chairman and CA. N.C.Hegde, Vice-Chairman, Committee on International taxation, not only for initiating the task of revision of this publication, but also for the efforts taken up by them in imparting knowledge to the members in the promising area of International Taxation.

I am sure that this fourth revised edition of the technical guide on Royalty and Fees for Technical services will be of immense use to the members.

Best Wishes

Date: 3rd February, 2018
Place: New Delhi

CA. Nilesh Vikamsey
President, ICAI

Preface to the Fourth Edition

Over the period of time, intangible property mainly, royalty and fees for technical services (FTS), has assumed enormous significance. Rapidly increasing global transactions in a technological advanced environment has made the revenue and the taxpayer both cautious about the related tax outflow.

Since 2012 there have been changes in the taxation of royalty and FTS either in the scope or in the tax rates. There have been important judicial developments also in this area. Thus, the Committee on International Taxation of ICAI felt the need to revise the publication for its members.

I extend by sincere thanks to CA. Nilesh S. Vikamsey, President and CA. M. Naveen N.D.Gupta, Vice President of the Institute of Chartered Accountants of India who have been supportive in the Committee's initiative.

I appreciate the effective efforts of Vice-Chairman CA. N. C. Hegde, who not only piloted the first edition of this publication project but also had revised the publication time and again, whenever a request was made to him. This fourth revised edition is also a result of his untiring efforts in supporting the initiatives of the Committee.

CA. N.C Hegde has been supported by CA. Rajesh Patel, CA. Urvi Shah and CA. Pravali Potekar. Our sincere appreciation of the effective contribution made by each of them.

I express my gratitude to other Committee members CA. Prafulla Premsukh Chhajed; CA. Tarun Jamnadas Ghia; CA. Nihar Niranjan Jambusaria; CA. Dhinal Ashvinbhai Shah; CA. Madhukar Narayan Hiregange; CA. G. Sekar; CA. Goyal Sushil Kumar; CA. Mukesh Singh Kushwah; CA. Sanjay Agarwal; CA. Atul Kumar Gupta; Shri Sunil Kanoria; Dr. Ravi Gupta; CA. Dharini Shah; CA. Pinky Mehta; CA.Mahesh P. Sarda; CA G. Karthikeyan; CA. Gopal Choudhury and also the special invitees CA. Parul Jolly; CA. T G Suresh; CA. Surabhi Agarwal; CA. Arun Gupta and CA. Vipin Verma who have contributed by giving valuable inputs in revising this technical guide.

I also appreciate the efforts made by CA. Mukta Kathuria Verma, Secretary to the Committee for providing administrative and technical support in the publication of this fourth revised edition of the Technical guide.

I am hopeful that this fourth edition will also will be immensely useful for the readers like the third edition.

Date: 3rd February, 2018
Place: New Delhi

CA. Sanjiv K. Chaudhary
Chairman,
Committee on International Taxation, ICAI

Foreword to the Third Edition

Numerous and frequent changes in technology, time and again presents its own challenges ensuing in conflicts between the taxpayers and tax authorities due to form and multi-dimensional character of intellectual property rights or technical services. These conflicts have in the recent past led to retrospective amendments in the law. Since the interplay between the Act and DTAA plays an important role in taxation of royalties and fees for technical services, there is a need to equip our chartered accountants with updated knowledge on this area of crucial importance.

I am pleased that Committee on International Taxation of the Institute of Chartered Accountants of India (ICAI) has done a splendid work and have come out with the third edition of "Techincal guide on Royalty and Fees for technical Services".

I earnestly appreciate the efforts of Committee on International taxation, particularly of CA. Nihar N. Jambusaria, Chairman and CA. Sanjiv Chaudhary, Vice-Chairman, Committee on International taxation for responsibly undertaking this revision.

I am sure that this guide will be immensely useful to the readers.

Best Wishes

Date: 5th August, 2015
Place: New Delhi

CA. Manoj Fadnis
President, ICAI

Preface to the Third Edition

The need for awareness regarding tax implications on income derived from the use of intangible property has significantly increased over time. With the evolution of technology and the rapidly growing volume of commercial transactions between multinational enterprises, the tax authorities have become more cautious about the transactions relating to intangible assets, which possibly may fall under the tax net. The intangible property particularly royalty and fees for technical services have assumed enormous importance over the period of time.

Finance Act, 2012 made substantial changes in the definition of Royalty with retrospective effect. Subsequently, Finance Act, 2013 increased the rate of taxation on Royalty and FTS from 10% to 25%. The Finance Act, 2015 once again reduced the rate to 10% from 25%. Therefore, the Committee on International Taxation felt the need to update the publication for its members.

I am extremely thankful to CA. Manoj Fadnis, President and CA. M. Devaraja Reddy, Vice President of the Institute of Chartered Accountants of India who have been the guiding force behind the revision of this publication.

I have no words to effectively appreciate the untiring efforts of CA. N. C. Hegde, who not even piloted the project of the first edition but also had revised the publication in a timely manner as and when requested by the Committee. The revised edition would not have seen light of the day without his untiring efforts.

CA. N. C. Hegde has been actively supported by CA. Rajesh Patil and CA. Urvi Shah. I place on record our sincere appreciation of the contribution made by each of them.

I am also thankful to CA. Rajan Vora for vetting the draft and for giving valuable inputs.

I express my gratitude to CA. Sanjiv Kumar Chaudhary, Vice-Chairman of the Committee and also other Committee members CA. Dhinal Ashvinbhai Shah, CA. Nilesh Shivji Vikamsey, CA. Tarun Jamnadas Ghia, CA. V. Murali, CA. G. Sekar, CA. Subodh Kumar Agrawal, CA. Vijay Garg, CA. Anuj Goyal, CA. Naveen N.D. Gupta, CA. Vijay Kumar Gupta, CA. Charanjot Singh Nanda, Dr. Bhaskar Chatterjee, Shri Sidharth K. Birla, Shri Sunil Kanoria, CA. N. Sukumar, CA. C.S. Subrahamanyam, CA. Yashodhan Pradhan,

CA. Subodh Shah, CA. Vineet Aggarwal, CA. Rajkumar S. Adukia, CA. T.P. Ostwal, CA. (Dr.) Girish Ahuja, CA. Kapil Goel and CA. Praveen Surana who have contributed by giving valuable inputs in revising this technical guide.

I also appreciate the efforts made by CA. Mukta Kathuria Verma, Secretary to the Committee for her assistance in bringing out this revised version of the Technical guide.

I am sure that this third edition also will be of immense use to the members who are involved in rendering services in this area.

Place: New Delhi
Date: August, 2015

CA. Nihar N. Jambusaria
Chairman,
Committee on International Taxation,
ICAI

Foreword to the Second Edition

In the present environment of globalization and fierce competition, the Intellectual Property (IP) and its protection has become very crucial and significant. In this era of innovation, IP facilitates business organizations for building and sustaining their competitive advantage and achieving superior performance. It plays an important role in almost every sector be it pharma, information technology and has become a key factor for success of many companies.

The issues of generation, protection and exploitation of IP have gained significance all over the world. In India, there are lot of challenges that are being faced by this sector.

I am pleased that Committee on International Taxation of the Institute of Chartered Accountants of India (ICAI) has done a splendid work and have come out with the second edition of "Royalty and Fees for technical Services". I express my appreciation to CA. Dhinal A. Shah, Chairman Committee on International Taxation of ICAI for the initiative taken to revise the publication.

I am sure that the book will be immensely useful to the readers.

Best Wishes

Date: February 7, 2014
Place: New Delhi

CA. Subodh K. Agrawal
President, ICAI

Preface to the Second Edition

Income derived from the use of intangible property has significantly increased over time with the evolution of technology and the rapidly growing volume of commercial transactions between multinational enterprises. Rapid changes in science and technology, coupled with expansion of legal protection, have created a new type of valuable intangible corporate asset. That asset is intellectual property, which includes patents, trade secrets, copyrights, and trademarks.

Finance Act, 2012 made substantial Changes in the definition of Royalty with retrospective effect. Subsequently Finance Act, 2013 increased the rate of taxation on Royalty and FTS from 10% to 25%. The law both enacted law as well as judge made law had undergone substantial changes. Therefore, urgent need to update the publication was widely felt.

I am happy to state that CA. N. C. Hegde who piloted the project of the first edition readily accepted our request to revise the edition. The revised edition would not have seen light of the day without his untiring efforts. I do not think his efforts can be effectively appreciated through the medium of words.

CA. N. C. Hegde has been actively supported by CA. Ramya Nayak and CA. Sandeep Dasgupta. I place on record our sincere appreciation of the contribution made by each of them.

I am also thankful to CA. Geeta Jani for vetting the draft and for giving valuable inputs.

I express my gratitude to CA. Subodh Kumar Agrawal, President and CA. K. Raghu, Vice-President for their motivation and guidance. I thank CA. Sanjiv Kumar Chaudhary Vice-Chairman, CA. Jay Ajit Chhaira, CA. Tarun Jamnadas Ghia, CA. Nihar Niranjan Jambusaria, CA. Sanjeev Maheshwari, CA. Shiwaji Bhikaji Zaware, CA. S. Santhana Krishnan, CA. G. Sekar, CA. J. Venkateswarlu, CA. Manoj Fadnis, CA. Sanjay Agarwal, CA. Naveen N.D. Gupta, CA. Vijay Kumar Gupta, Shri Manoj Kumar, Shri Bhaskar Chatterjee, CA. T.P. Ostwal, CA. Gurunath Kanathur, CA. Mahesh P. Sarda, CA. Vivek Newatia, CA. Kuntal Dave, CA. Rajneesh Agarwal, CA. Sachin Vasudeva and CA. (Dr.) Girish Ahuja who have contributed by giving valuable inputs in revising this technical guide.

I appreciate the efforts made by Mr. Ashish Bhansali, Secretary, Committee on International Taxation for co-ordination and Mr. Govind Agarwal for rendering secretarial assistance.

Date: 05.02.2014
Place: New Delhi

CA. Dhinal A. Shah
Chairman,
Committee on International Taxation,
ICAI

Foreword to the First Edition

Taxation is a dynamic area which moves in tandem with economic development. The economic policies framed by the Government from time to time have a great impact on taxation. Consequential changes are constantly being made in the taxation laws to cope with the rapid developments in the economy.

The globalization of the Indian economy has resulted in considerable increase in foreign institutional investments, a huge expansion in the production and service base and also a multiplicity of international transactions. As a result of this development international taxation is assuming great importance. The subject of international taxation covers a wide spectrum like cross border transactions, e-commerce, Double Taxation Avoidance Agreement, transfer pricing, royalty and fees for technical services etc.

All the above developments have a great impact on taxation of the transactions arising out of such activities. Thus, international taxation is gradually becoming a major area of professional interest. However, the concepts and issues concerning international taxation are of a complex nature.

Realizing the importance of the subject, Committee on International Taxation of ICAI and Taxation Committee of WIRC has taken an initiative to come out with a Technical Guide on "Royalty & Fees for Technical Services" which provides a detailed study on the taxation of royalties and fees for technical services in a simple language.

I record my appreciation for the initiatives taken by CA. Mahesh P. Sarda, Chairman, Committee on International Taxation of ICAI. I would also like to put on record the contribution of CA N.C.Hegde for excellent effort in bringing out this Technical Guide. I also appreciate CA Shriniwas Y. Joshi, Chairman WIRC of ICAI for his coordination of the project.

I am sure that the readers will make optimum use of the Technical Guide

Date: 1st July, 2011
Place: New Delhi

CA. G. Ramaswamy
President, *ICAI*

Preface to First Edition

The advent of economic reforms in the form of globalization and liberalization in our country has resulted in the rapid growth of the Indian economy in general and cross border transactions in particular. The process of globalization is set to gain further impetus with the good performance of the economy in recent past. There has been manifold increase in the cross border activities of multinational corporations and other non-residents in the manufacturing and service sectors of the economy. The movement of technology is also part of the entire process. The reward for technology is in the form of Royalty / Fees for Technical Services. There are tax implications of royalty / fees for technical services.

Looking to the importance of the subject of tax implications of Royalty & Fees for Technical Services, the Committee on International of ICAI in collaboration with WIRC of ICAI undertook project to come out with a study covering all the relevant issues relating to Royalty and Fees for Technical Services. Accordingly, CA. N. C. Hegde FCA, Mumbai (Regional Council Member of WIRC) was requested to pilot the project. I am extremely thankful to CA. Shriniwas Joshi, Chairman of the Western India Regional Council and CA. N. C. Hegde for their efforts in bringing out this publication. I place my appreciation on record for the valuable contributions made by CA. Surojit Ray, CA. Shivali Valecha and CA. Heta Mathuria.

I wish to thank Hon'ble CA. G. Ramaswamy, President, ICAI and Hon'ble CA. Jaydeep N. Shah, Vice President, ICAI for their continuous support and encouragement to the initiatives of the Committee.

I am sure that this study will help the members in understanding the issues involved in Royalty and Fees for Technical Services.

Date: 1st July, 2011
Place: New Delhi

CA. Mahesh P. Sarda
Chairman
Committee on International Taxation
ICAI

Preface to First Edition

Since the opening up of the Indian economy in 1991, India has seen a huge inflow of both, capital in the form of foreign investment as well as foreign technology. With each passing year, the Government has taken further steps to ensure that India integrates with the global economy.

Currently, most payments for intellectual property rights and fees for all services are freely allowed which will give a further boost to Indian entrepreneurs who would like access to the latest technologies and developments.

However, whilst on hand there is greater operational freedom for residents to make payments towards royalties and technical services, the tax treatment of such payments has often been a vexed issue.

This is mainly because of the source rule that India has employed to justify taxation of such sums. This has frequently been criticized as being one sided and archaic given that the law was enacted at a time when the country was a net importer of technology.

Tax treaties that India has entered into have no doubt provided respite but one still is left dealing with increasing the overall costs of the technology given that collaborators would want the Indian importer of services and intellectual property rights to bear the cost of the taxes levied.

It is in this background that the book on “Royalty & Fees for Technical Services” provides a detailed study on the taxation of royalties and technical services in extremely simple language. The study also gives detailed references to judicial precedents which are given separately to help a reader probe in the subject in case of need.

I wish to thank the Taxation Committee of WIRC and CA N.C.Hegde to take this important project so as to provide all information related to the subject in a concise form.

I would also like to thank my professional colleagues, CA Surojit Ray, CA Shivali Valecha, and CA Heta Mathuria for having spared the time from their busy schedule to bring out this excellent booklet.

I am confident that the book will be immensely useful for members in understanding the subject as well as help them in discharging their responsibilities while certifying payments as required under the Income tax Act.

CA Shriniwas Y. Joshi
Chairman, WIRC

Abbreviations

AAR	Authority for Advance Rulings
ACIT	Assistant Commissioner of Income Tax
Addl. CIT	Additional Commissioner of Income Tax
ADIT	Assistant Director of Income Tax
Act	Income-tax Act, 1961
BOLT	BSE On-line Trading
CBDT	Central Board of Direct Taxes
CD	Compact Disc
CIT	Commissioner of Income Tax
CIT(A)	Commissioner of Income Tax (Appeals)
CPU	Central Processing Unit
DCIT	Deputy Commissioner of Income Tax
DDIT	Deputy Director of Income Tax
Demat	Dematerialization
DIT	Director of Income Tax
DTAAs	Double Tax Avoidance Agreements
FIS	Fees for Included Services
FTS	Fees for Technical Services
GDR	Global Depository Receipts
HC	High Court
IAC	Inspecting Assistant Commissioner
IT	Information Technology
ITAT	Income-tax Appellate Tribunal
ITO	Income Tax Officer
JDIT	Joint Director of Income Tax

MOU	Memorandum of Understanding
OECD	Organization for Economic Co-operation and Development
PAN	Permanent Account Number
PE	Permanent Establishment
R&D	Research & Development
RBI	Reserve Bank of India
SC	Supreme Court
UAE	United Arab Emirates
UAR	United Arab Republic
UK	United Kingdom
UN	United Nations
UOI	Union of India
US	United States of America
VSAT	Very Small Aperture Terminal

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Chapter 1
Broad Scheme of Taxation in India

Taxability as per provisions of the Act

1.1 Every person[1] is liable to pay income tax in respect of his total income, in accordance with the provisions of the Act.

1.2 For determination of taxability, the Act in general, follows a combination of the "source"[2] and "residence"[3] rules. Accordingly, as a starting point, it is essential to examine the residential status of the assessee. The scheme for determination of the same is provided in section 6 of the Act.

1.3 There are different tests laid down for determining the residential status of individuals, companies, etc. The same would largely depend on factors such as duration of stay in India (for individuals), country of incorporation coupled with existence of "control and management" of the affairs in India or place of effective management (for companies), etc. As per provisions of section 5 of the Act, "income"[4] would be liable to tax in India if it is –

- Received or deemed to be received in India; or
- Accrues or arises in India; or
- Is deemed to accrue or arise in India; or
- Accrues or arises outside India (the same would be taxable only in the hands of a "resident" assessee[5]).

1.4 Further, the Act contains certain deeming provisions[6] which lay down the circumstances under which income shall be "deemed to accrue or arise" in India, and hence taxable in India.

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[1] "Person" includes an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals (whether incorporated or not), a local authority and every artificial juridical person not falling within the above categories.

[2] Whereby "source" of the income determines its taxability in the hands of the assessee (regardless of other factors such as the assessee's residential status).

[3] Whereby "residential status" of the assessee determines the taxability of income.

[4] Defined in section 2(24) of the Act.

[5] In the case of an individual who is "resident but not ordinarily resident" in India, such income would not be liable to tax in India unless it is derived from a business controlled in or profession set up in India.

[6] Section 9 of the Act.

Taxability as per provisions of the DTAA

1.5 The Central Government of India has entered into agreements with the governments of various countries in order to grant relief of tax or avoid double taxation in case of tax payers to whom such agreement applies. Such agreements are termed as DTAA, being contracts of taxing rights between contracting states. It must be noted that devoid of enabling provisions under the domestic laws of the contracting states, the residents of the contracting states do not get the right to access the beneficial provisions of the treaty, as they are not parties to the said sovereign contracts. As per section 90(2) of the Act , a person resident of a particular country with whom India has entered into a DTAA can claim the beneficial provisions of such DTAA in relation to transactions which are taxable under the Income-tax Act, 1961. Accordingly, as per section 90(2) of the Act, the provisions of DTAA would override the provisions of the Act and in the event of conflict between the provisions of DTAA and the Act, the more beneficial one would prevail. The interplay between the provisions of the DTAA and the Act as explained by the Indian judiciary has been explained in greater detail in Annexure F. Contextually, it may be noted that Indian domestic law currently allowing the tax treaty law to over-ride the domestic tax law is unique unlike most sovereign states, viz. the United States of America, which expressly provide that their domestic tax law or the tax treaty law whichever is later in time shall prevail.

1.6 However, in India, a person has to be eligible to claim the beneficial provisions of such DTAA. As per section 90(4) of the Act, a person would be eligible to claim the beneficial provisions of the DTAA if he has obtained a Tax Residency Certificate from the government of the country of which he is a resident. Further, as per subsection (5) of section 90 read with Rule 21AB of the Income-tax Rules, 1962, the tax payer also has to provide a self-declaration in Form 10F.

1.7 India has entered into comprehensive DTAAs with more than 80 countries for the avoidance of double taxation.

1.8 Accordingly, while examining taxability under the provisions of the Act, it is also necessary to examine taxability under the provisions of the applicable DTAA. This facilitates optimization of the overall tax position in India.

Chapter 2
Applicability of Deeming Provisions

2.1 Section 9 of the Act, which is an unambiguous extension of source rule, deals with the 'incomes which are deemed to accrue or arise in India'. Clearly, therefore, an income, in order to be taxed in India under section 9, need not accrue or arise in India[7].

2.2 As per generally accepted principles, the deeming provisions governing the scope of total income (i.e., “deemed to accrue or arise” in India) should be examined only if the income is not actually “accruing” or “arising” in India.

2.3 This is based on the premise that a fiction is not needed to create a situation which exists in reality[8].

2.4 Royalty and FTS are two specific streams of income which are liable to tax in India under the deeming fiction, regardless of whether the performance of the income generating activity has been carried out in India or not.

[7] Qualcomm Incorporated v. ADIT [2015] 56 taxmann.com 179 (Delhi ITAT)
[8] CIT vs. Oriental Co. Ltd [1981] (137 ITR 777) (Calcutta HC).

Chapter 3
Royalty – Scope of the Term

Generally understood meanings of the term "royalty"

Encyclopedia Britannica 1972 Edition[9]

3.1 "The payment made to the owners of certain types of rights by those who are permitted by the owners to exercise the rights. The rights concerned are literary, musical and artistic copyright, rights in inventions and designs, and right in mineral deposits including oil and natural gas. As to inventions, a royalty may be said to be compensation paid under a licence granted by the owner of a patent (the licensor) to another person (the licensee) who wishes to make use of the invention, the subject of the patent. The patent remains the property of the licensor. A licence may be exclusive, in which case the patent owner precludes himself from granting licences to third parties, or non-exclusive, in which case the patent owner may grant licences to as may persons as he wishes".

Wharton's Law Lexicon

3.2 "Payment to a patentee by agreement on every article made according to the patent; or to an author by a publisher on every copy of the book sold; or to the owner of mineral for the right of working the same on every ton or other weight raised".

Law Lexicon by Ramanatha Aiyer

3.3 "Royalty would mean — (a) percentages or dues payable to landowners for mining rights; (b) sums paid for the use of a patent; (c) percentages paid to an author by a publisher on the sales of a book."

Wikipedia

3.4 "Royalties (sometimes, running royalties, or private sector taxes) are usage- based payments made by one party (the "licensee") and another (the "licensor") for ongoing use of an asset, sometimes an intellectual property. Royalties are typically agreed upon as a percentage of gross or net revenues derived from the use of an asset or a fixed price per unit sold of an item of such, but there are also other modes and metrics of compensation"

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[9] N.V. Philips vs. CIT [1987] (172 ITR 521) (Calcutta HC)

Royalty – Scope of the Term

Dictionary.com

3.5 "A percentage of the revenue from the sale of a book, performance of a theatrical work, use of a patented invention or of land, etc., paid to the author, inventor, or proprietor".

Provisions of the Act

3.6 At the outset, it is pertinent to understand that royalty income is taxed as per the source rule[10]. In case of GVK Industries Ltd[11]., the Supreme Court observed that the source rule is in consonance with the nexus theory i.e. right of a country to tax the income earned from a source located in the said State, irrespective of the country of the residence of the recipient, and does not fall foul of the said doctrine on the ground of extraterritorial operations.

3.7 The Supreme Court observed that the two principles, namely, "Situs of residence" and "Situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives primacy to the country of the residency of the assessee. This principle postulates taxation of world-wide income and worldwide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. Source rule would apply where business activity is wholly or partly performed in a source State. As a logical corollary, the State concept would also justifiably include the country where the commercial need for the product originated, that is, for example, where the consultancy is utilized. It is well settled that the source based taxation is accepted and applied in international taxation law.

Section 9(1)(vi) of the Act

3.8 Explanation 2 to section 9(1)(vi) characterizes certain payments as "royalty".

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[10] The source rule for taxation of "royalty" / "FTS" was introduced vide Circular No. 202 dated 7th May, 1976 – refer to Annexure A.

[11] GVK Industries Ltd [2015] 371 ITR 453 (SC)

3.9 The definition of the term "royalty" as provided in Explanation 2 to section 9(1)(vi) of the Act is as follows –

"Royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "capital gains") for -

(i) *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;*

(ii) *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;*

(iii) *the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;*

(iv) *the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;*

(iva) *the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB*[11a]

(v) *the transfer of all or any rights (including the granting of a licence) in respect of any copyright*[12]*, literary, artistic or scientific work*[13] *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; or*

(vi) *the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)."*

[11a] Atos Information Technology HK Ltd the Mumbai ITAT held that as this clause never existed as on April 1, 1976, this could not be held retrospective from 1st April 1976.

[12] In absence of meaning of 'copyright' under the Act or DTAA reliance needs to be placed upon the Indian Copyright Act, 1957 for the limited purpose of finding out the true meaning and context for usage of expression 'copyright' - Agence France Presse vs. ADIT [2014] 66 SOT 183 (Delhi ITAT), Gracemac Corporation v/s ADIT [2010] 42 SOT 550 (Delhi)

[13] Held that the provision would be more meaningful if the word 'in' is read by implication in between the words 'copyright' and 'literary' - CIT v. Delhi Race Club (1940) Ltd. [2015] 273 CTR 503 (Delhi HC)

3.10 In other words, **royalty means –**

- With respect to patent[14], invention, model, design, secret formula or process or trade mark or similar property, payments for –
  - — Use[15];
  - — transfer of all or any rights;
  - — granting of a licence;
  - — imparting any information concerning their working or use.
- With respect to technical, industrial, commercial or scientific knowledge, experience or skill, payments for –
  - — Imparting of any information.

  It is relevant to note that every case imparting of any information concerning technical, commercial, industrial or scientific knowledge, expertise of skill by itself has not been brought into the definition of royalty. For instance, in a contract for supply of equipment, giving information so as to guide the buyer to install the equipment at site and thereafter to use it would not be royalty.[16]

  Similarly providing any information in the course of advisory services from own knowhow and experience will also not amount to imparting of any information in context of royalty.[17]
- With respect to any industrial, commercial or scientific equipment (excluding where section 44BB of the Act is applicable), payments for

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[14] The taxation of royalty in respect of patents can be broken down in the following segments:

1. consideration for rights, wholly or in part, in respect of transfer of any right in a patent;
2. consideration for a licence, which by implication includes a sub licence as well, in respect of a patent;
3. consideration for imparting of any information concerning the working of a patent; and
4. consideration for imparting of any information concerning the use of a patent. - Qualcomm Incorporated v. ADIT [2015] 56 taxmann.com 179 (Delhi ITAT)

[15] Taxation of royalties is taxation of income of the person owning the patents and it is taxation in the jurisdiction of end use of patents - Qualcomm Incorporated v. ADIT [2015] 56 taxmann.com 179 (Delhi ITAT) .

[16] DIT v. Haldor Topsoe [2014] (369 ITR 453) (Bombay HC)

[17] ACIT v. Sundaram Asset Management Co. Ltd. [2015] 67 SOT 67 (Chennai - Trib.) (URO), GECF Asia Ltd. V. DDIT [2014] (165 TTJ 696) (Mumbai ITAT)

- — Use;
- — right to use.

- With respect to 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 **(not including consideration for the sale, distribution or exhibition of cinematographic films),** payments for –
  - — Transfer of all or any rights;
  - — granting of a licence.
- Payments for rendering services in connection with any of the above activities.

3.11 Broadly, the following conditions need to be satisfied for a payment to be characterized as "royalty" –

The amount must not be in the nature of capital gains;

- The recipient must be the owner/licence holder of the underlying asset in connection with which the royalty is received;
- The transaction must not be that of an outright sale[18].

3.12 In case payment is made for acquisition of a partial right in the intangible property or know-how without the transferor fully alienating as the ownership rights, the payment received would be treated as 'royalty'. Where, however, full ownership rights are alienated as intellectual property of the transferee, the payment made is not royalty, but sale consideration paid for acquisition of the intangible rights.[19]

3.13 Based on judicial precedents, the following aspects would have to be cumulatively kept in perspective, while examining characterization of income as "royalty" –

- Ownership/possession of licence rights to the underlying asset with respect to which the payment is made and retention of ownership/ licence rights therein;
- Purpose for which the payment is made;

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[18] CIT vs. Davy Ashmore India Ltd [1990] (190 ITR 626) (Calcutta HC), Pro-quip Corporation vs. CIT [2001] (255 ITR 354) (AAR), CIT vs. Klayman Porcelains Ltd [1997] (229 ITR 735) (Andhra Pradesh HC), etc.

[19] HCL Ltd vs. CIT [2015] 54 taxmann.com 231 (Delhi HC)

- Facts of the case;
- Substance of the arrangement;
- Classification of the payment under the Import Policy[20];
- Characterization of the payment in the RBI approval[21], if any;
- Characterization of the payment in the Government approval[21], if any.

3.14 Further, the following aspects may not be solely determinative while characterizing any income as "royalty" –

- Periodic payments vs. lump sum consideration;
- Nomenclature used by the parties to describe the payment;
- One time use vs. repetitive use;
- Registration of the underlying asset with the regulatory authorities.

3.15 Payment can be a consideration for the use or right to use of the defined property only when such property is in existence at the time of use. If a property does not pre-exist or is likely to come into existence because of the given payment, the same cannot qualify as `royalties' because it would, in such circumstances, lack the condition of `use or right to use'[22]

When is royalty "deemed to accrue or arise" in India?

3.16 As per section 9(1)(vi) of the Act, royalty income is deemed to accrue or arise in India in the following situations –

- Where the royalty is payable by the government to the non-resident recipient;
- Where the royalty is payable by a resident to the non-resident recipient, except -
  - — where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person (i.e., the payer) outside India; or

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[20] CIT vs. Davy Ashmore India Ltd [1990] (190 ITR 626) (Calcutta HC).
[21] ACIT vs. Hewlett Packard Ltd [2001] (75 TTJ 786) (Delhi ITAT).
[22] DDIT v. Marriott International Licensing Company BV [2013] 144 ITD 333 (Mumbai ITAT.)

- — for the purpose of making or earning any income from any source outside India[23]

- Where the royalty is payable by a non-resident to the non-resident recipient, **only if -**
  - — the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in India[24],[25]; or
  - — for the purpose of making or earning any income from any source in India.[25]

3.17 The Delhi Tribunal[26] has held that the taxation of royalties for use of a technology is the situs where the technology is used. Accordingly, when the royalty is for use of a technology in manufacturing, it is to be taxed at the situs of manufacturing the product, and, when the royalty is for use of technology in functioning of the product so manufactured, it is to be taxed at the situs of use.

3.18 In case royalty is paid by a non-resident having a PE in India, there should be an economic link between the payments made and the PE, for the royalty to be taxable in India.[27] In other words, royalty paid by a non-resident would arise in India if it is incurred in connection with and borne by the PE in India.

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[23] Held that the "source" (i.e., for the payer) was outside India - CIT vs. Aktiengesellschaft Kuhnle Kopp and Kausch W. Germany by BHEL [2002] (262 ITR 513) (Madras HC). See also Qualcomm Inc v ADIT (2013) 153 TTJ 513 (Del ITAT). Contra Held that the "source" (i.e., for the payer) was in India - Dell International Services India (P.) Ltd [2008] (308 ITR 37) (AAR). CIT v Havells India (2012)(352 ITR 376) (Delhi HC), Metro & Metro v ACIT [2014] 29 ITR(T) 772 (Agra - Trib.)

[24] Held that the service is utilized for the purposes of a business or profession carried on by the payer in India, or (by the payer) for the purpose of making or earning any income from any source in India - New Skies Satellites N. V. & Others v/s ADIT [2009] (319 ITR 269) (Delhi ITAT).

[25] The first clause covers cases where the right property or information has been by the non resident payer itself and is so used in a business carried on by the non resident payer in India. whereas the second clause covers a situation where the right, property or information has not been used by the non resident payer itself in the business carried on by it, but it has been dealt with in such a manner as would result in the earning or making income from a source in India.- Qualcomm Inc v ADIT (2013) 153 TTJ 513 (Del ITAT).

[26] Qualcomm Incorporated v. ADIT [2015] 56 taxmann.com 179 (Delhi ITAT)

[27] DIT v. Set Satellite (Singapore) Pte. Ltd. [2014] 269 CTR 197 (Bombay HC)

3.19 The following payments are excluded from the above deeming provisions and therefore not taxable in India –

- Royalty payable under an agreement approved by the Central Government[28], if –
  - — the agreement is made before 1st April, 1976
  - — for the transfer outside India of, or the imparting of information outside India
  - — in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property and
  - — the royalty payable is a lump sum consideration.
- Royalty payable in respect of computer software, if[29] –
  - — lump sum payment is made by a resident
  - — for transfer of all or any rights[30] relating to computer software supplied along with a computer or computer-based equipment
  - — by a non-resident manufacturer
  - — under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.

3.20 *The term "computer software" for this purpose mean "any computer programme recorded on any disc / tape / perforated media / other information storage device (and includes any such programme or any customized electronic data)".*

3.21 If a person acquires a copy of a computer programme but does not acquire any of the four below listed copyright rights, he gets only a copyrighted article but no copyright:

(i) The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease, or lending.

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[28] Proviso 1 to section 9(1)(vi) of the Act.
[29] Proviso 2 to section 9(1)(vi) of the Act.
[30] Including the granting of a licence.

(ii) The right to prepare derivative computer programmes based upon the copyrighted computer programme

(iii) The right to make a public performance of the computer programme.

(iv) The right to publically display the computer programme.

3.22 The question whether there was a transfer of a copyright right or only of a copyrighted article must be determined taking into account all the facts and circumstances of the case and the benefits and burden of ownership which have been transferred.[31]

3.23 The Finance Act 2012, made series of retrospective amendments to nullify various rulings involving interpretations pertaining to the definition of royalty. It has now been clarified that[32] that irrespective of the medium through which the transfer of all or any right for the use or right to use computer software (including granting of license) would take place, the same would be treated as royalty.

3.24 The law has been amended similarly to provide that the term "process" would include[33] and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, and optic fibre or by any other similar technology, whether or not such process is secret

3.25 Further, it has been clarified by an amendment that the term royalty includes and has always included consideration in respect of any right, property or information, whether or not[34]

(i) The possession or control of such right, property or information is with the payer;

(ii) Such right, property or information is used directly by the payer;

(iii) The location of such right, property or information is in India.

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[31] ADIT vs. Bartronics India Ltd. [2014] 62 SOT 141 (Hyderabad ITAT)

[32] Explanation 4 to Section 9(1)(vi), inserted by Finance Act 2012 with retrospective effect from 1-6-1976

[33] Explanation 6 to Section 9(1)(vi), inserted by Finance Act 2012 with retrospective effect from 1-6-1976

[34] Explanation 5 to Section 9(1)(vi), inserted by Finance Act 2012 with retrospective effect from 1-6-1976

3.26 Further, as per Explanation[35] to section 9 of the Act, royalty income will be deemed to accrue or arise in India, whether or not –

- the non-resident recipient has a residence/place of business/ business connection in India; or
- the non-resident recipient has rendered services in India.

Implications arising out insertion of Explanation 4, 5 and 6 by Finance Act, 2012 to Section 9(1) in a treaty situation;

3.27 Controversy revolving around the taxability of software payments, was sought to be resolved by amendment to section 9(1)(vi) of the Act. The Finance Act 2012 has inserted Explanation 4, Explanation 5 and Explanation 6 to the section 9(1)(vi) **with retrospective effect** from 1st June 1976. The definition of royalty in Explanation 2 is sought to be expanded by these explanations.

3.28 Explanation 4 *clarifies that the transfer of all or any rights in respect*

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[35] As per explanation in section 9 of the Act.
The said explanation was inserted by Finance Act, 2007 with retrospective effect from 1st June 1976. The explanation earlier read as follows –
"For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India".
Prior to the above insertion, there were certain interpretational issues owing to which a few judicial precedents *(Ishikawajma-Harima Heavy Industries Ltd vs. DIT* [2007] (288 ITR 408) {SC}) had held that for FTS to be taxable in India, the underlying services have to be "rendered" and "utilized" in India. With a view to overcoming this dichotomy, the above explanation was inserted into the Act. However, even post the above insertion, there were judicial precedents *(Jindal Thermal Power Company Ltd. vs. DCIT* [2009] (225 CTR 220) (Karnataka HC), *Clifford Chance vs. DCIT* [2008] (318 ITR 237) (Bombay HC), *M/s Bovis Lend Lease (India) Pvt Ltd vs. ITO* [2009] (127 TTJ 25) (Bangalore ITAT), etc.) which continued to follow the ruling in the case of Ishikawajma-Harima Heavy Industries Ltd. This was more since the explanation was not clearly spelling out the intention of the legislature. With a view to conclusively plugging this anomaly, the explanation was amended vide Finance Act, 2010 with retrospective effect from 1st June, 1976. Post this amendment, it is now a settled position that as per provisions of the Act, FTS would be liable to tax in India regardless of whether the services are actually rendered in India or not.

of any right, property or information includes 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.

Implications of Explanation 4

3.29 By insertion of Explanation 4 to section 9(1)(vi) controversy surrounding taxability of software payments by characterizing it as royalty has sought to be put at rest. The main issue would be whether by inserting Explanation and expanding the scope of the definition "royalty" by way of clarificatory retrospective amendment, can a payment for software be brought to tax?

3.30 The dispute was whether by making a payment for software, the licensee gets rights in the "copyright" of the software. It appears that it is felt by the law makers that by specifically inserting payment for software itself in the definition of royalty, this purpose could be achieved.

3.31 However, considering the fact that a non-resident assessee can opt to be governed by the Act or the DTAA whichever, is beneficial as explained at para 3.40 below, the dispute still continues. The Supreme Court[36] in the context of Sales tax had held that software embedded on a CD is a "good" and is liable to sales tax. Further clarity may be expected considering that the Supreme Court has admitted the Special Leave Petition against the decision of Delhi High Court[37] in case of Halliburton Export Inc. to examine the difference between "copyrights on goods" and "copyrighted goods".

3.32 *Further,* ***Explanation 5*** *clarifies that royalty includes consideration in respect of any right, property or information whether or not the payer has the possession or control of it, the payer is using it directly or such right etc are located outside India.*

Implications of Explanation 5

3.33 Explanation 5 seeks to clarify that once a right, property or information is deemed to be covered under Explanation 2 read with Explanation 4 to the Section 9(1)(vi), the interpretation would continue to remain so irrespective of possession or control of the right, property or information, direct or indirect use of the right, property or information or location of the right, property or information.

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[36] Tata Consultancy Services v. State of Andhra Pradesh [2004] 271 ITR 401 (SC)
[37] ITA 363/2016 dated 11 July 2016

3.34 *Further **Explanation 6** also clarifies that the expression "process" includes transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology regardless of whether such process being secret or not.*

3.35 While the above Explanation does away with the requirement of the process being secret, it may be relevant to consider the decision of the Calcutta High Court[38] which held that, once specialized knowledge becomes public; the person loses the exclusivity in respect of such special knowledge and hence, loses the right to receive any royalty in respect of the same. Thus, for a payment to be classified as royalty, 'exclusivity' of the subject matter is of crucial relevance.

3.36 Recently the Delhi Tribunal[39] held that Explanation 6 does not do away with the requirement of successful exclusivity of the right in respect of process.

Income Computation and Disclosure Standards (ICDS)

3.37 The Central Board of Direct Taxes has notified[40] the ICDS applicable from assessment year 2017-18. The ICDS IV relating to revenue recognition deals with the basis for recognition of revenue arising in the course of the ordinary activities of a person from the use by others of the person's resources yielding royalties. The ICDS provides that Royalties shall accrue in accordance with the terms of the relevant agreement and shall be recognised on that basis unless, having regard to the substance of the transaction, it is more appropriate to recognise revenue on some other systematic and rational basis.

3.38 The CBDT further vide Circular No. 10/2017 dated 23 March 2017 clarified that the provisions of ICDS shall also be applicable for computation of income on gross basis (e.g. interest, royalty, fees for technical services under section 115A of the Act) for arriving at the amount chargeable to tax. The CBDT also clarified that in case of subsequent non-recovery of royalty can be claimed as a deduction.

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[38] MV Philips v. CIT [1988] 172 ITR 521 (Cal HC)

[39] Bharati Airtel Ltd v ITO) ITA Nos. 3593 TO 3596/Del/2012

[40] Notification No. SO 3079(E) [NO.87/2016 (F.NO.133/23/2015-TPL)], dated 29-9-2016

Existence of beneficial treaty provisions

3.39 As mentioned above, the payment for the sale or license of software, would now get covered u/s 9(1)(vi), if provisions of the Act are to be applied. However, if the provisions of the treaty are beneficial than provisions of section 9(1)(vi), it will still be possible to contend that payment for software as per the provisions of the treaty is not liable to tax in India. Payment for software is covered as part of royalty in only 5 treaties namely Morocco, Russia, Turkmenistan, Malaysia and Tobago. Therefore, it will still be a good case to argue that in case of, off the shelf or standardized software, are not chargeable to tax in India, except where as per treaty it is specifically covered.

3.40 It is, therefore, important to note here that the taxpayers who are entitled to claim benefit of tax treaty, will still be able to take shelter under the beneficial treaty provisions as the scope of provisions (generally Article 12) under the treaty if it is more beneficial than under the Act.

Provisions of the DTAA

3.41 The UN Model Convention defines "royalty" as follows–

"Royalty means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic, or scientific work, including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience".

3.42 Further, the OECD Model Convention defines "royalty" as under –

"Royalty means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic, or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience".

3.43 Accordingly, as can be observed above, the definition of "royalty" under the OECD Model Convention is narrower when compared with the UN Model Convention. In view of the retrospective amendments made to section 9(1)(vi) by the Finance Act 2012 with regard to royalty, widening the scope thereof, the narrower definition as contained in the tax treaties could come to the rescue of the taxpayer.

3.44 It may be noted that the term "royalty", in general, relates to payments for rights or property constituting the different forms of literary and artistic property, the elements of intellectual property and information concerning industrial, commercial or scientific experience. The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required to be, registered in a public register and covers both payments made under a licence and compensation for fraudulently copying or infringing the said right. Various payments throws open a considerable scope for debate with regard to whether such payments constitute royalty under Article 12 of the tax treaty or service payments giving rise to business profits within the meaning of Article 7of the tax treaty.

3.45 In the context of tax treaties, it must be additionally noted that, if a tax payer has a business presence in India in the form of a fixed place permanent establishment, a service permanent establishment, dependent agent permanence establishment, etc. as per Article 5 of the DTAA then in such as case, the taxability of the tax payer would be governed by Article 7 relating to Business Profits provided the right or property towards which the royalty is paid is effectively connected with such permanent establishment.

3.46 The phrase 'effectively connected with' has neither been defined under the Act nor the DTAA. The words "effectively connected" are akin to "really connected." In the context of royalties, it is in the nature of something more than the mere possession of the property or right by the PE but equal to or a little less than the legal ownership of such property or right. A remote connection between the PE and property or right cannot be categorized as effectively connected.[41]

3.47 As per Article 7 of the DTAA, profits attributable to the permanent establishment in India would be taxable as business income. Accordingly, Article 7 would prevail over Article 12 which is more specific only in a situation where the royalty is effectively connected with the permanent establishment. This is also known as the "PE Proviso".

3.48 Where a taxpayer has a PE in India at the material time when taxable services (royalty/FTS/FIS) are being rendered by it which are attributable to

[41] DDIT vs. JC Bamford Excavators Ltd. [2014] 43 taxmann.com 343 (Delhi ITAT)

the PE, the same would have to be considered as business profits and taxed accordingly.[42]

3.49 It is very important that the permanent establishment should be situated in a contracting state and not in a third state for Article 7 to apply. In all other cases, Article 12 would overrule Article 5 read with Article 7 of the DTAA. Similar would be the treatment in case of Fees for technical services. The proviso runs in near -identical language in all the above articles in OECD and UN Model Convention (with minor differences), as under :--

"The provisions of paragraphs 1 and 2 shall not apply, if the beneficial owner of the dividends/interest/royalties, being a resident of a Contracting State, carries on business in the other Contracting State, of/in which the company paying the dividend is a resident /the interest arises/ the royalties arise, through a permanent establishment situated therein or performs independent personal services from a fixed base situated therein and the holding in respect of which the dividends are paid/debt-claim in respect of which interest is paid/the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 or 14, as the case may be, shall apply."

3.50 The OECD Commentary on Model Tax Convention explains as follows:--

"Paragraph 3 is not based on a conception which is sometimes referred to as "the force of attraction of the permanent establishment". It does not stipulate that royalties arising to a resident of a Contracting State from a source situated in the other State must, by kind of a legal presumption, or fiction even, be related to a permanent establishment which that resident may have in the latter State, so that the said State would not be obliged to limit its taxation in such a case. The paragraph merely provides that in the State of source the dividends, interest or royalties are taxable as part of the profits of the permanent establishment, there owned by the beneficiary, which is a resident of the other State, if they are paid in respect of shares, debt claims or right or property forming part of the assets of the permanent establishment or otherwise effectively connected with that establishment. In that case, the paragraph relieves the State of source of the dividends, interest or royalty from any limitations under the Article. The foregoing explanations accord with those in the Commentary on Article 7."

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[42] Linde AG, Linde Engineering Division v/s DDIT [2014] (365 ITR1), Booz & Company (Australia) (P.) Ltd., In re, [2014] 362 ITR 134 (AAR - New Delhi)

3.51 Paragraph 1 of Article 12 presupposes that the copyright, literary work, technical know-how etc. are owned by the non-resident. The State of source is granted a limited and secondary right of taxation of the payments to the non-resident because of the passive income generated from the asset arises in the contracting state where the owner of such asset is resident (the State of Residence). In this case it is not possible to resort to net income taxation, as in the case of a permanent establishment, because the asset has been held abroad and it is not possible to identify the expenses incurred in connection with acquisition and exploitation of the assets. Therefore the residence and source states agree on presumptive taxation at a stipulated percentage of the gross income. However where the asset is owned by the permanent establishment in the state of source, and it has been acquired and exploited in the state of source by the permanent establishment so that the income is exclusively connected with the permanent establishment, Article 7(1) would find application and the state of source can tax income arising out of such exploitation on net basis, as a part of the income attributable to the permanent establishment. In such a case there will be no difficulty in computation of net income as all expenses as well as all incomes arise in the State of source.

3.52 A diagrammatic summary guiding the characterization of income into royalty and FTS vis-à-vis business profits is presented in page 46 of this guide.

3.53 Most DTAAs which India has entered into, are based on the UN model convention. Each specific DTAA would have its own definition of the term "royalty".

Some peculiarities in relation to the DTAAs' which India has entered into

- The DTAAs with countries such as Turkmenistan, Russia, Romania, Morocco and Trinidad and Tobago specifically include payments for "use of or right to use computer software" within the definition of the term "royalty".
- In some DTAAs (such as those with Belgium, Israel, Netherlands and Sweden), the definition of the term "royalty" does not contain the provision for "use or right to use industrial, commercial or scientific equipment".
- In some DTAAs (such as those with Greece and United Arab Republic (Egypt)), the right to tax the "royalty" income has been conferred only to the source state. In most other DTAAs, both, the source state as

well as the state of residence of the recipient have the right to tax such "royalty" income.

3.54 Accordingly, for examining the applicability and scope of "royalty" taxation in a particular situation, it would be critical to examine how the term has been defined in the relevant DTAA.

3.55 Illustrative examples of payments in the nature of "Royalty" (in specified circumstances)

- Licence to reproduce software and distribute it to the public;
- Access to a portal located outside India in specified circumstances[43];
- Use or right to use customized software[44];
- Use of an internet based software hosted on the server of a foreign company[45] in specified circumstances;
- Use or right to use a design, secret formula, patent, trademark, invention, etc.;
- Payment for time charter[46] or bareboat charter[47] of a ship;
- Payment for sharing of standard operating procedures developed over a period of time.

3.56 Illustrative examples of payments not in the nature of "Royalty" (in specified circumstances)

- Sale of off the shelf software[48];
- Use of leased capacity of a transponder[49];

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[43] Cargo Community Network Pte Ltd [2007] (289 ITR 355) (AAR).
[44] Airports Authority of India [2010] (323 ITR 211) (AAR).
[45] IMT Labs (India) Pvt. Ltd [2006] (287 ITR 450) (AAR).
[46] Poompuhar Shipping Corporation Ltd vs. ITO [2013 (360 ITR 257) (Madras HC), Mathewsons Exports & Imports (P.) Ltd. vs. ACIT - [2014] 50 taxmann.com 378 (Cochin ITAT)
[47] West Asia Maritime Ltd vs. ITO [2013] .2629 to 2630 of 2006 (Madras HCt)
[48] Motorola Inc. vs. DCIT [2005] (95 ITD 269) (Delhi ITAT), Geoquest Systems B.V. [2010] (234 CTR 73) (AAR), M/s Velankani Mauritius Limited & Others vs. DDIT [2010] (132 TTJ 124) (Bangalore ITAT), etc.
[49] DCIT vs. Panamsat International Systems Inc. [2006] (103 TTJ 861) (Delhi ITAT), ISRO Satellite Centre (Isac) [2008] (307 ITR 59) (AAR) and Asia Satellite Telecommunication Co. Ltd. vs. DIT [2011] (Delhi HC) (unreported), B4U

- Outright sale of engineering designs, calculations, etc.[50];
- Transmission of voice and data through telecom bandwidth[51];
- Access to data in a copyrighted web based database[52].
- Sale of business information reports[53];
- Sale of industry information[54];
- Access to a web-based journal containing views, opinions and news[55];
- Providing grading and certification reports[56];
- Data processing services in cases where it is a standard facility[57];
- Assignment of rights in a contract[58];
- Cost contribution towards basic R&D activities[59].
- Data storage space charges[60]

3.57 Please refer to *Annexure D* for a synopsis of these rulings and other rulings on the concept of "royalty".

International Holdings Ltd vs. DCIT, Bombay High Court (ITA No. 1274 of 2013), contrary ruling in Viacom 18 Media (P.) Ltd. vs. ADIT [2014] 66 SOT 18 (Mumbai ITAT).

[50] CIT vs. Davy Ashmore India Ltd [1990] (190 ITR 626) (Calcutta HC), Pro-quip Corporation vs. CIT [2001] (255 ITR 354) (AAR), CIT vs. Klayman Porcelains Ltd [1997] (229 ITR 735) (Andhra Pradesh HC), etc.

[51] Dell International Services India (P.) Ltd [2008] (308 ITR 37) (AAR), CIT vs. Estel Communications P. Ltd [2008] (318 ITR 185) (Delhi HC), etc Contra Verizon Communications Singapore Pte Ltd. v. ITO [2013] 39 taxmann.com 70 (Madras

[52] Factset Research Systems Inc. vs. DIT [2009] (317 ITR 169) (AAR).

[53] Dun & Bradstreet Espana S A [2004] (272 ITR 99) (AAR) and Abc Ltd. (Xyz Ltd.) [2005] (284 ITR 1) (AAR)

[54] CIT vs. HEG Ltd [2003] (263 ITR 230) (Madhya Pradesh HC).

[55] Factset Research Systems Inc v DIT (2009) (317 ITR 169) AAR contra CIT v Wipro (2011) (355 ITR 284)(Karnataka HC) .

[56] Diamond Services International (P.) Ltd vs. UOI [2007] (304 ITR 201) (Bombay HC).

[57] Standard Chartered Bank (Mumbai ITAT) (unreported). Credit Agricole Indosuez v DDIT(IT) [2013] ITA NO 4295 and 4965 OF 2005 (Mumbai ITAT)

[58] Abc Ltd. [2006] (289 ITR 438) (AAR).

[59] Abb Ltd [2010] (322 ITR 564) (AAR).

[60] Vishwak Solutions (P.) Ltd. 2015] 56 taxmann.com 158 (Chennai ITAT)

Chapter 4
FTS – Scope of the Term

Provisions of the Act

4.1 At the outset, it is pertinent to understand that FTS income is taxed as per the source rule.

Section 9(1)(vii) of the Act

4.2 Explanation 2 to section 9(1)(vii) characterizes certain payments to be "fees for technical services"

4.3 Explanation 2 to section 9(1)(vii) of the Act defines the term "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) 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'".*

4.4 In other words, FTS is the consideration payable for **rendition**[61] of **managerial, technical or consultancy services –**

- **including** provision of services of technical or other personnel but
- **does not include** consideration for construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient under the head "salaries".

4.5 The terms "managerial", "technical" and "consultancy" appearing in the definition of the phrase "FTS" have not been specifically defined in the Act. The Supreme Court in case of GVK[62] has held that general and common usage of the said words has to be understood at common parlance while interpreting the ambit of the term "FTS". Black's Law Dictionary, Eighth Edition defines 'consultation' as an act of asking the advice or opinion of someone (such as a lawyer). Based on the definition the Supreme Court

[61] Standby annual maintenance charges are not FTS as there is no actual rendering of services - Flag Telecom Group Ltd. vs. DCIT [2015] 54 taxmann.com 154 (Mumbai ITAT)

[62] GVK Industries Ltd [2015] 371 ITR 453 (SC)

observed that consultation means a meeting in which a party consults or confers and eventually it results in human interaction that leads to rendering of advice.

4.6 The Supreme Court has also referred to the observation of Delhi High Court[63] that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Service of consultancy necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

4.7 On the issue of human intervention, it may be worthwhile to take note of the decision of the Mumbai Tribunal[64], wherein it has been held that human intervention for monitoring and repairing the hardware and software used for providing data processing services will not result in the data processing services to qualify as technical services, when there is no human intervention in the data processing services itself.

4.8 In another case[65], the Supreme Court has categorically held that use of facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all. In this case the issue before the Court was whether fully automated services are available to all members of the Stock Exchange in respect of every transaction that is entered into were 'Technical services". The Court observed that there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer.

4.9 The Delhi Tribunal[66] has held that not all kinds of advisory qualify as technical services. For any consultancy to be treated as technical services, it would be necessary that a technical element is involved in such advisory.

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[63] CIT v. Bharti Cellular Ltd. [2009] 319 ITR 139. The SC has also ruled on this matter, [2011] 330 ITR 239

[64] Atos Information Technology HK Ltd. v. DCIT [2017] 79 taxmann.com 26

[65] CIT v. Kotak Securities Ltd [2016] 383 ITR 1

[66] Le Passage to India Tours & Travel (P.) Ltd. [2014] 369 ITR 109 (Delhi ITAT)

Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such advisory.

4.10 Further, the concepts "managerial", "technical" and "consultancy" have been examined in detail in certain other judicial precedents as well.[67]

4.11 Moreover, the definition of the phrase "FTS" as provided under the Act is subject to certain exclusions (i.e., consideration for construction, assembly, mining or like project or consideration which would be income of the recipient under the head "salaries").

4.12 From the expression 'or like project' it is evident that the exclusion clause definition is illustrative, rather than exhaustive. Therefore, even though this exclusion clause does not make a categorical mention about 'installation, commissioning or erection' of plant and equipment, belonging to the same genus as 'assembly' and are also covered by this exclusion clause.[68]

4.13 The above needs to be kept in perspective, while interpreting the phrase "Fees for Technical services" for the purposes of the Act.

4.14 *Some judicial precedents on these exclusions*

- Income from services rendered in connection with seismic surveys cannot be regarded as FTS[69] since this fits within the scope of the term "mining".
- For constructing a hotel, an Indian company entered into a contract with a foreign contractor. The foreign company was also to provide various managerial and technical services. The consideration paid for managerial and technical services was characterized as "FTS" since the exclusion dealt with consideration payable in relation *to construction of a project and not with services rendered in this regard*[70]*.*

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[67] UPS SCS (Asia) Ltd vs. ADIT (Intl tax) [2012] 18 taxmann.com 302 (Mum. Tri) Refer Annexure D

[68] Birla Corporation vs. ACIT [2015] 53 taxmann.com 1 (Jabalpur ITAT)

[69] GeoFizyka Torun Sp. ZO. O. [2009] (186 Taxman 213) (AAR), Seabird Exploration FZ LLC [2009] (228 CTR 69) (AAR), M/s Wavefield Inseis Asa [2009] (320 ITR 290) (AAR), M/s Wavefield Inseis Asa [2010] (322 ITR 645) (AAR), OHM Limited vs. DIT (AAR No. 935 of 2010) affirmed by Delhi HC in 212 Taxman 440 (2013).

[70] Hotel Scopevista Ltd vs. ACIT [2007] (18 SOT 183) (Delhi ITAT).

4.15 Services relating to design and engineering inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and forming an integral part of the said supplies, would not be amenable to tax under Section 9(1)(vii) of the Act as FTS. In order to fall outside the scope of Section 9(1)(vii) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies.[71]

When is FTS "deemed to accrue or arise" in India?

4.16 As per section 9(1)(vii) of the Act, FTS income is deemed to accrue or arise in India in the following situations –

- Where the FTS is payable by the government to the non-resident recipient;
- Where the FTS is payable by a resident to the non-resident recipient, **except -**
  - — where the FTS is payable in respect of services utilized in a business or profession carried on by such person **(i.e., the payer)** outside India[72]; or
  - — for the purpose of making or earning any income from any source outside India[73].
- Where the FTS is payable by a non-resident to the non-resident recipient, **only if -**
  - — the FTS is payable in respect of services utilized in a business or profession carried on by such person in India; or
  - — for the purpose of making or earning any income from any source in India.

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[71] Linde AG, Linde Engineering Division v/s DDIT [2014] (365 ITR 1) (Delhi HC)

[72] Held that the services are utilized in a business or profession carried on by the payer in India / the "source for the payer is in India - G.V.K Industries Ltd & Another vs. ITO & Another [1997] (228 ITR 564) (Andhra Pradesh HC), Steffen, Robertson & Kirsten Consulting Engineers & Scientists [1998] (230 ITR 206) (AAR) and Wallace Pharmaceuticals P. Ltd. [2005] (278 ITR 97) (AAR).

[73] Held that the "source" (i.e. for the payer) is in India - Ranbaxy Laboratories Ltd. vs. DCIT [2002] (91 TTJ 831) (Delhi ITAT).). CIT v Havells India (352 ITR 376) (Delhi HC), Metro & Metro v ACIT (393/Agra/2012) (ITAT) Agra)

4.17 The following payment is excluded from the above deeming provisions and therefore not taxable in India –

- FTS payable under an agreement approved by the Central Government[74] if the agreement is made before 1st April, 1976[75].
- Further, FTS will be deemed to accrue or arise in India, whether or not–
- the non-resident recipient has a residence/place of business/ business connection in India; or
- the non-resident recipient has rendered services in India

ICDS

4.18 As per ICDS IV, revenue from service transactions (which may be in the nature of FTS) shall be recognised by the percentage completion method. When services are provided by an indeterminate number of acts over a specific period of time, revenue may be recognised on a straight line basis over the specific period. Further, in case of revenue from service contracts with duration of not more than ninety days, ICDS stipulates that the revenue may be recognised when the rendering of services under that contract is completed or substantially completed. The Finance Bill, 2018 has been introduced. The memorandum explaining the provisions of the Finance Bill provides that in order to bring certainty in the wake of recent judicial pronouncements on the issue of applicability ICDS, it is proposed to insert a new section 43CB in the Act to provide that profits arising from a construction contract or a contract of providing services shall be determined on the basis of percentage of completion method except profits and gains arising from contract for providing services

- With a duration of not more than ninety days shall be determined on the basis of project completion method;
- involving indeterminate number of acts over a specific period of time shall be determined on the basis of straight line method.

[74] Proviso 1 to section 9(1)(vii) of the Act.

[75] An agreement made on or after 1st April, 1976 shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date

It is further proposed to be provided that the contract revenue shall include retention money and contract cost shall not be reduced by incidental interest, dividend and capital gains.

4.19 The CBDT further vide Circular No. 10/2017 dated 23 March 2017 clarified that the provisions of ICDS shall also be applicable for computation of income on gross basis (e.g. interest, royalty, fees for technical services under section 115A of the Act) for arriving at the amount chargeable to tax.

Provisions of the DTAA

4.20 Each specific DTAA would have a definition of the term "FTS" / "FIS"[76] in most cases (barring a few exceptions – which are discussed later)[77].

4.21 *Some peculiarities of specific DTAAs' India has entered into*

- In many of DTAAs India has entered into, the term "FTS" /"FIS" has been defined to include any payment made in consideration for the provision of managerial, technical, or consultancy services, including the provision of services of technical or other personnel. This definition is similar to the definition of FTS under the Act.
- In some DTAAs (such as the one with Australia), there is no separate definition provided for the term "FTS" / "FIS". However, the same is included within the definition of the term "royalty".
- In some DTAAs (such as those with Bangladesh, Brazil, Greece, Indonesia, Mauritius, Myanmar, Nepal, Philippines, Namibia, Saudi Arabia, Sri Lanka, Syria, Tajikistan, UAE, UAR Egypt and Zambia) there is no separate definition provided for the term "FTS" / "FIS". Further, the FTS / FIS component is not covered within the "royalty" definition as well.
- Some DTAAs restrict the scope of "FTS"/"FIS" based on the "make available" criteria **(discussed later).**
- Some DTAAs (such as Canada, Finland, Netherlands, UK and US) restrict the scope of the term "FTS" to only technical and consultancy

[76] In some DTAAs such as the ones with Canada, Malta, Portuguese Republic and the US, the term "FIS" has been used instead of "FTS".

[77] Apart from the Article dealing with FTS / FIS, it would also be relevant to examine the Article dealing with "Independent Personal Services" separately, in cases where the non-resident is a non-corporate entity

services (i.e., managerial services are not included within the fold of the definition).

- Protocols to some of the DTAAs extend the restrictive definition (i.e., the "make available" criteria) of "FTS" / "FIS" pursuant to the ''Most Favoured Nation'' clause (discussed later).
- The India-Cyprus DTAA has a specific FIS clause (i.e., Article 12 – this provides a restricted definition to the term "FIS" and a tax rate of 15%) and also a separate article for technical fees (i.e., Article 13 – this provides a wide definition to the term "technical fees" and a tax rate of 10%).

DTAAs having a restrictive scope (i.e., "make available" criteria)

4.22 Some of the DTAAs which India has entered into (US, UK, Canada, Australia, Finland, Singapore, etc.) provide for a restrictive definition of the term "FTS"/"FIS".

4.23 Typically, two variations of the definition are observed in these DTAAs and the same are reproduced below –

Definition of "FIS" as per Article 12 of the India-US DTAA

4.24 *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) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3[78] 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.

4.25 Further, certain exclusions enlisted in the Article are as follows –

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)[78];

[78] Dealing with definition of the term "royalty".

(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).

Definition of "FTS" as per Article 13 of the India-UK DTAA

4.26 Payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a)[78] of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b)[79] of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

4.27 Further, certain exclusions enlisted in the Article are as follows –

Amounts paid –

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a)[78] of this Article;

(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;

[79] Dealing with the definition of the term "royalty" and pertaining to the use of any industrial, commercial or scientific equipment.

(d) for services for the private 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 15 (Independent personal services) of this Convention.

4.28 Some examples provided in the MOU to the India-US DTAA in the context of clause (a) of the above definition (i.e., ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received)

Facts

4.29 An Indian company purchases a computer from a US computer manufacturer. As part of the purchase agreement, the manufacturer agrees to assist the Indian company in setting up the computer and installing the operating system and to ensure that the staff of the Indian company is able to operate the computer. Also, as part of the purchase agreement, the seller agrees to provide, for a period of ten years, any updates to the operating system and any training necessary to apply the update. Both of these service elements to the contract would qualify under paragraph 4(b) as an included service. Would either or both be excluded from the category of included services, under paragraph 5(a), because they are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of the computer?[80]

Analysis

4.30 The installation assistance and initial training are ancillary and supplementary to the sale of the computer, and they are also inextricably and essentially linked to the sale. The computer would be of little value to the Indian purchaser without these services, which are most readily and usefully provided by the seller. The fees for installation assistance and initial training therefore are not FIS, since these services are not the predominant purpose of the arrangement.

4.31 The services of updating the operating system and providing associated training may well be ancillary and supplementary to the sale of the computer, but they are not inextricably and essentially linked to the sale. Without the upgrades, the computer will continue to operate as it did when purchased, and will continue to accomplish the same functions. Acquiring the updates

[80] Example 8, MOU to the India–US DTAA.

cannot, therefore, be said to be inextricably and essentially linked to the sale of the computer.

Let us consider yet another example –

Facts

4.32 An Indian hospital purchases an x-ray machine from a US manufacturer. As part of the purchase agreement, the manufacturer agrees to install the machine, to perform an initial inspection of the machine in India, to train hospital staff in the use of the machine and to service the machine periodically during the usual warranty period (2 years). Under an optional service contract purchased by the hospital, the manufacturer also agrees to perform certain other services throughout the life of the machine, including periodic inspections and repair services, advising the hospital about developments in x-ray film or techniques which could improve the effectiveness of the machine and training hospital staff in the application of those new developments. The cost of the initial installation, inspection, training and warranty service is relatively minor as compared with the cost of the x-ray machine. Is any of the services described here ancillary and subsidiary, as well as inextricably and essentially linked to the sale of the x-ray machine?[81]

Analysis

4.33 The initial installation, inspection and training services in India and the periodic service during the warranty period are ancillary and subsidiary, as well as inextricably and essentially linked to the sale of the x-ray machine because the usefulness of the machine to the hospital depends on the service. The manufacturer has full responsibility during this period and this cost of services is a relatively minor component of the contract. Therefore, under paragraph 5(a), these fees are not FIS, regardless of whether they otherwise would fall within paragraph 4(b).

4.34 Neither the post-warranty period inspection and repair services, nor the advisory and training services relating to new developments are "inextricably and essentially linked" to the initial purchase of the x-ray machine. Accordingly, fees for these services may be treated as FIS if they meet the tests of paragraph 4(b)[82].

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[81] Example 9, MOU to the India-US DTAA.

[82] Dealing with the aspect of "make available" criteria – discussed later.

4.35 Concept of "make available" — clause (b) of the above definition (i.e., make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design)

4.36 The MOU to the India-US DTAA lists down various illustrations in order to aid interpretation as to whether a particular service "makes available" technical knowledge, experience, skill, know-how or processes or not.

4.37 The AAR and ITAT have held[83] that the explanation as provided in the MOU to the India-US DTAA should be equally applicable to all other DTAAs India has entered into wherein the "make available" criteria is provided.

4.38 Simplistically understood, a mere rendition of services does not fall within the gamut of the term "make available" unless the recipient of services is enabled and empowered to make use of the technical knowledge by itself in its business or for its own benefit without recourse to the original service provider in the future.[84]

4.39 The condition of "make available" is satisfied when the recipient acquires a means to an end, i.e. he acquires the technical knowledge, experience, skills, know-how or processes from the provider which acts as a means and enables him to use the same for achieving a further end.[85] The condition of make available is not satisfied merely where the services itself serves as an end for the recipient and he does not acquire any technical knowledge, experience, skill, know-how, or processes from the service provider

4.40 Services are said to be "made available" if the recipient of services is at liberty to use the technical knowledge, skill, know-how and processes in his own right.[86]

4.41 For instance, if a US tax resident simply provides some consultancy services to an Indian tax resident, payment towards the same would not satisfy the "make available" criteria and hence, would not qualify as FIS as per Article 12 of the India-US DTAA.

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[83] C.E.S.C Ltd vs. DCIT [2003] (275 ITR 15) (Kolkata ITAT) and Intertek Testing Services India Pvt. Ltd., [2008] (175 Taxman 375) (AAR).

[84] CIT v De Beers India Minerals (P) Ltd 346 ITR 467(Karnataka HC) : Guy Carpenter &Co Ltd v ADIT (2012)(346 ITR 504)(Delhi HC)

[85] ITO v. Nokia India (P.) Ltd. [2015] 42 ITR(T) 708 (Delhi ITAT)

[86] NQA Quality Systems Registrar Ltd vs. DCIT [2004] (92 TTJ 946) (Delhi ITAT).

4.42 However, if in the above example, the US tax resident tutors the Indian tax resident in such a manner that the Indian tax resident is thereafter enabled to render the said consultancy services independently, the same would satisfy the "make available" criteria.

4.43 The fact that the provision of a service may require technical inputs from the person providing the service does not *per se* mean that technical knowledge, skills, etc., are being "made available" to the person purchasing the service[87].

4.44 Similarly the fact that the assessee immensely benefitted from the services, even resulting in value addition to the employees of the assessee, is irrelevant.[88]

Some examples provided in the MOU to the India-US DTAA (pertaining to the concept of "make available")

Facts

4.45 A US manufacturer has experience in the use of a process for manufacturing wallboard for interior walls of houses which is more durable than the standard products of its type. An Indian builder wishes to produce this product for its own use. It rents a plant and contracts with the US company to send experts to India to show engineers in the Indian company how to produce the extra-strong wallboard. The US contractors work with the technicians in the Indian firm for a few months. Are the payments to the US firm considered to be payments for "included services"?[89]

Analysis

4.46 The payments would be FIS. The services are of a technical or consultancy nature; in the example, they have elements of both types of services. The services make available to the Indian company technical knowledge, skill and processes.

Facts

4.47 A US manufacturer operates a wallboard fabrication plant outside India. An Indian builder hires the US company to produce wallboard at that plant for

[87] MOU to the India-US, DTAA.
[88] DCIT v. Bombardier Transportation India (P.) Ltd (2017) 162 ITD 586 (Ahmedabad ITAT)
[89] Example 3, MOU to the India-US DTAA.

a fee. The Indian company provides the raw materials and the US manufacturer fabricates the wallboard in its plant, using advanced technology. Are the fees in this example payments for included services?[90]

Analysis

4.48 The fees would not be for included services. Although the US company is clearly performing a technical service, no technical knowledge, skill, etc., are made available to the Indian company, nor is there any development and transfer of a technical plant or design. The US company is merely performing a contract manufacturing service.

Scope of the term "FTS"/"FIS" in view of the Most Favoured Nation Clause

4.49 The protocol to certain DTAAs which India has entered into (such as those with Belgium, France and Spain) provide that if under any DTAA between India and a third State (which enters into force after the date on which the present DTAA comes into force), India limits its taxation on royalties or FTS / FIS to a lower rate or a more restricted scope than the rate or scope provided for in the present DTAA on the said items of income, the same rate or scope as provided for in that DTAA on the said items of income shall also apply under the present DTAA (with effect from the date on which the present DTAA or the said DTAA is effective, whichever date is later).

4.50 For example – Let us assume that the DTAA between country X and India provides for a comprehensive definition of the term "FTS" and the protocol to this DTAA has the "most favoured nation" clause. India then enters into a DTAA with country Y wherein the term "FTS" is defined in a narrow manner (i.e., "make available" criteria). In such a case, the "make available" criteria would also start applying to the DTAA between India and country X by virtue of the "most favoured nation" clause.

4.51 The ITAT has observed that India-Sweden DTAA incorporates MFN clause, as per which, if under any DTAA, India limits its taxation at source on dividends, royalties or FTS to a rate lower or a scope more restricted than the rate or scope in India-Sweden DTAA, the same rate or scope shall apply under the India-Sweden DTAA also. India-Portugal DTAA provide restricted definition of FTS, wherein services can be regarded to fall within the scope of FTS only if the same make available technical knowledge, skill etc.[91]

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[90] Example 4, MOU to the India-US DTAA.

[91] Sandvik AB vs. DDIT [2014] 52 taxmann.com 211 (Pune - Trib.)

4.52 The AAR[92] has observed that a protocol is said to be a treaty by itself that amends or supports the existing treaty and rejected the stand of revenue authorities that the protocol cannot be relied on to understand the scope of taxation.

4.53 In a later ruling[93], the AAR held that a Protocol cannot be treated as the same with the provisions contained in the treaty itself, though it may be an integral part of the Treaty. It will be inappropriate to import words, phrases or clauses that aren't available into the Treaties between two Sovereign nations, on the basis of Treaties with another countries. Therefore, in absence of 'make available' clause in India-France DTAA, the payments for management services rendered would be FTS both under Act and Treaty. This view of the AAR has been overruled by the Delhi High Court[94]

4.54 Accordingly, while examining taxability of royalty or FTS / FIS under the provisions of the DTAA, apart from the relevant article of the DTAA, it would also be critical to examine whether the DTAA has a "most favoured nation" clause or not. If yes, the relevant provisions of the same would have to be duly factored into the analysis.

Specific clause for installation and assembly activities in PE clause

4.55 In most of the DTAA's, the definition of FTS is comprehensive and as stated above includes managerial, technical or consultancy services. Generally speaking, and without the restricted meanings assigned by 'make available' clause or exclusion clauses, installation or commission activities are a particular type of technical services.

4.56 Here it is relevant to note that the expression 'construction, installation or assembly project or supervisory activities in connection therewith' find a specific mention in the PE clauses in many of the DTAA's.

4.57 There is thus a general provision for rendering of technical services and a specific provision for rendering of technical services in the nature of construction, installation or project or supervisory services in connection therewith.

4.58 In most of DTAA when it comes to 'services PE', any services which can be covered by the FTS or FIS clause in the respective tax treaty are

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[92] Poonawalla Aviation (P.) Ltd., In re* [2012] 343 ITR 202 (AAR – NewDelhi)
[93] Steria (India) Ltd. [2014] 364 ITR 381 (AAR - New Delhi)
[94] Steria (India) Ltd v. CIT [2016] 386 ITR 390

specifically excluded as these clauses refer to "the furnishing of services, other than included services as defined in Article 12 (Royalties and fees for included services), within a Contracting State by an enterprise through employees or other personnel " and "the furnishing of services including managerial services, other than those taxable under Article 13 (Royalties and fees for technical services), within a Contracting State by an enterprise though employees or other personnel" respectively. There is no such exclusion clause in the PE article dealing with construction, installation and assembly activities, including supervision activities relating thereto.

4.59 Recently the Jabalpur Tribunal, appreciating the specific provisions in respect of the installation and assembly activities in the PE clause, has held that if the provisions for PE in a tax treaty have a specific clause with respect to activity for installation and commissioning of plant, the fees receivable by a foreign company for such activities cannot be FTS. Fees for such installation and assembly activities would be taxable only as business profits in the event that the assessee has a PE in India.[95]

Discussions on applicability of Article 12 vis-à-vis Article 23 and Interplay between Article 7 & Article 12 with help of practical examples

4.60 As per Article 12 of treaty, FTS means payments of any kind of received as 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 payments for services mentioned in Article 14 and 15 of treaty.

4.61 Article 5 of the treaty provides for definition of PE. The definition of PE in Article 5 applies for entirety of treaty. Article 12(1) of the DTAA triggers taxation in respect of FTS sourced from India. Article 12(4) of the DTAA shifts taxation to Article 7 only if there is a PE in India. Article 12(4) is attracted is following 2 conditions are satisified:

(a) There exist a PE as defined in Article 5; and

(b) Right, property or contract in respect of which FTS is received is effectively connected with the PE.

4.62 Article 7(6) of the DTAA makes it clear that items of income dealt with separately in order articles of the agreement donot get affected by presence

[95] Birla Corporation Ltd.v. ACIT, [2015] 53 taxmann.com 1 (Jabalpur - Trib.)

of Article 7. The AAR[96] has held that the technical services which were not integral to construction work which non-resident carried out in India, was covered by provision of FTS. The observation of AAR is as under:

4.63 "it may be pointed out that in view of para 7 of art. 7 of the Treaty, when an item of income is dealt with separately in other article of the Treaty, the provision of the other article, shall not be affected by art. 7. It is obvious that fee for technical services is specifically dealt with in art. 13/12 of the Treaties, therefore, it gets excluded from the scope of art. 7 of the Treaties. It would be apt to note that the same view is taken by the Authority in its ruling in Ishikawajima Harima Heavy Industries Co. Ltd., In re (2004) 192 CTR (AAR) 289 : (2004) 271 ITR 193 (AAR)."

4.64 Further, this view is supported by Mumbai Tribunal decision in case of Krupp Uhde GmbH[97], wherein Tribunal has held as under:

4.65 "Articles 12(1) and (2) provide that tax can be levied in both the States in respect of royalties and fees for technical services. Article 12(2) further provides that if the non-resident assessee is the beneficial owner of the same then rate of tax shall not exceed 10 per cent. Hence, the contention of the assessee's counsel that no tax shall be levied is without force. Further, art. 7 would apply only if the case of the assessee falls under art. 12(5). Article 12(5) applies only where the assessee has a PE in India. However, the grounds of appeal states that art. 7 would apply in the absence of PE in India. The ground raised is therefore, misconceived. On the other hand, if art. 7 applies then the rate of tax applicable would be that which is provided under art. 115A of the Act which is 30 per cent in the year under consideration. The learned CIT(A) has directed the AO to charge 10 per cent rate of tax where there is no PE in India. In our opinion, there is no infirmity in the order of the learned CIT(A) on this issue. The additional ground raised by the assessee, therefore, has to be dismissed."

4.66 Further, for characterisation of income between business income (Article 7) and FTS (Article 13), a reference can be made to decision of AAR[98] wherein for payment of execution of contract to lay down gas pipeline was held to be business income as the said amount cannot be constituted as FTS as it was out of its scope, as defined in Explanation 2 to Section 9(1)(vii) of the Act, which specifically excludes consideration for any construction,

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[96] Rotem Company, In re [2005] 279 ITR 165 (AAR)

[97] [2009] 124 TTJ 219

[98] Horizontal Drilling International S.A [1999[237 ITR 142 (AAR)

assembling, mining or like project. However, the AAR concluded that since the taxpayer did not have a PE in India, its business income is not taxable in India. Accordingly, a very important aspect to be kept in mind for taxation of payment under Article 7 is that the taxpayer should have a PE in India.

4.67 Also, Mumbai Tribunal[99] held that consideration for rendering erection services was held to be taxable as FTS on the reason that services are supervisory in nature. This was on account of following peculiar facts:

(a) Agreement for rendering services are independent to supply of machinery;

(b) 2 technicians by itself cannot erect machinery; and

(c) Explanation to Section 9(1)(vii) does-not use expression 'in connection with' and hence only services of assembly, supervisory are excluded and not services in connection with assembly, supervisory.

4.68 Consistent with the theory of applicability of specific provision in preference to general provision, the applicability of Article 12 vis-à-vis Article 7 depends on the case to case basis.

4.69 Illustrative examples of income qualifying as "FTS"/"FIS" (in specified circumstances)

- Advising on specific problems pertaining to production of pesticides and training technical personnel[100];
- Tests conducted to determine whether coke produced is suitable for the intended purpose[101];
- Preparation of designs, drawings and appraisal reports[102];
- Examining and improving fuel efficiency of engines[103];
- Impact tests on cars to check their quality[104];
- Services pertaining to registration and enforcement of intellectual

[99] Aditya Birla Nuvo (ITA 7674 and 7675/Mum/2007)
[100] Union Carbide Corporation vs. IAC [1993] (50 ITD 437) (Kolkata ITAT).
[101] Cochin Refineries vs. CIT [1996] (222 ITR 354) (Kerala HC).
[102] Central Mine, Planning & Design Institute Ltd vs. DCIT [1997] (67 ITD 195) (Patna ITAT).
[103] TVS Suzuki Ltd vs. ITO [1999] (73 ITD 91) (Chennai ITAT).
[104] Maruti Udyog Ltd vs. ADIT [2009] (130 TTJ 66) (Delhi ITAT).

property rights[105];

- Success fee for raising a loan[106];
- Engineering data and personnel services for establishing a furnace[107];
- Advertising, marketing promotion and other special services[108];
- Data processing services depending on the specific needs of the client[109].

4.70 Illustrative examples of income not qualifying as "FTS"/"FIS" (in specified circumstances)

- Assistance in making stray purchases[110];
- Standard cellular telephone service[111];
- Interconnect charges paid to telecom service providers[112;]
- Provision of bandwidth/internet facilities[113];
- VSAT charges, Demat charges, etc. paid by members to the stock exchange for use of facilities[114];
- Construction/assembly of a conveyor belt[115].
- Freight and logistics services, loading and unloading [116]
- Sourcing services in relation to goods [117]
- Line production services [118]

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[105] ADIT vs. Ess Vee Intellectual Property Bureau [2005] (7 SOT 38) (Mumbai ITAT).
[106] G.V.K Industries Ltd & Another vs. ITO & another [1997] (228 ITR 564) (Andhra Pradesh HC).
[107] Elkem Technology vs. DCIT [2001] (250 ITR 164) (Andhra Pradesh HC).
[108] International Hotel Licensing Company [2006] (288 ITR 534) (AAR).
[109] Dr. Hutarew & Partner (India) P. Ltd vs. ITO [2008] (123 TTJ 951) (Delhi ITAT).
[110] Linde A.G. vs. ITO [1997] (62 ITD 330) (Mumbai ITAT).
[111] Skycell Communications Ltd and Another vs. DCIT and Another [2001] (251 ITR 53) (Madras HC).
[112] Idea Cellular Ltd vs. DCIT [2008] (313 ITR 55) (Delhi ITAT).
[113] CIT vs. Estel Communications P. Ltd [2008] (318 ITR 185) (Delhi HC).
[114] DCIT vs. Angel Broking Ltd [2009] (35 SOT 457) (Mumbai ITAT).
[115] ITO vs. National Mineral Development Corporation Ltd [1992] (42 ITD 570) (Hyderabad ITAT).
[116] UPS SCS (Asia) Ltd vs ADIT (2012) 18 taxmann.com 302 (Mumbai ITAT)
[117] Adidas Sourcing Ltd. v. ADIT (IT) [2012] (55 SOT 245) (Delhi ITAT)

- Marketing and export sale support services[119]
- Lump sum consideration for execution of turnkey project for laying and installation of pipelines[120]

4.71 Illustrative examples of income qualifying as "FTS" / "FIS" (under the "make available" criteria in specified circumstances)

- Engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical and industrial engineering)[121];
- Architectural services[121];
- Computer software development[121];
- Bio-technical services[121];
- Food processing[121];
- Environmental and ecological services[121];
- Communication through satellite or otherwise[121];
- Energy conservation[121];
- Exploration or exploitation of mineral oil or natural gas[121];
- Geological surveys[121];
- Scientific services[121];
- Technical training[121];
- Consulting services in relation to review of hydrocarbons, analysis and review of data maps[122];
- Training in the use of simulators[123];
- Technical assistance and training to enable the recipient to manufacture aluminium foils[124];

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[118] Endemol India Private Limited(2013) (AAR no 1083 of 2011); Yashraj Films (2013) (ITA No.4856 of 2008)

[119] Rich Graviss Products (P.) Ltd. vs. Addl CIT [2014] 49 taxmann.com 531 (Mumbai ITAT)

[120] ADIT vs. Valentine Maritime (GULF) LLC [2014] 159 TTJ 706 (Mumbai ITAT)

[121] MOU to the India-US DTAA.

[122] No. P/6 of 1995 [1995] (234 ITR 371) (AAR).

[123] Sahara Airlines vs. DCIT [2002] (83 ITD 11) (Delhi ITAT)

[124] Hindalco Industries Ltd vs. ACIT [2005] (94 TTJ 944) (Mumbai ITAT).

- Technical plans, designs and information to enable the recipient to execute and install water features[125].

4.72 Illustrative examples of income not qualifying as "FTS" / "FIS" (under the "make available" criteria in specified circumstances)

- Services provided by overseas lead managers for managing a GDR issue[126];
- Standard telecom service[127];
- Quality assurance assessment and certification activities[128];
- Reviewing project documentation and providing expert opinion[129];
- Providing commercial and industrial information[130];
- Updation of a market study[131];
- Project monitoring services[132];
- Grading and certification reports[133];
- Referral services[134];
- Clinical or bio-analytical studies[135].
- Airborne survey and providing high resolution geophysical data [136]
- Services of reinsurance broking [137]

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[125] Gentex Merchants (P.) Ltd vs. DDIT [2005] (94 ITD 211) (Kolkata ITAT).
[126] Raymond Ltd vs. DCIT [2002] (86 ITD 791) (Mumbai ITAT).
[127] Wipro Ltd vs. ITO [2003] (80 TTJ 191) (Bangalore ITAT).
[128] NQA Quality Systems Registrar Ltd vs. DCIT [2004] (92 TTJ 946) (Delhi ITAT).
[129] C.E.S.C. Ltd vs. DCIT [2003] (275 ITR 15) (Kolkata ITAT).
[130] McKinsey & Co., Inc. & others vs. ADIT [2005] (99 ITD 549) (Mumbai ITAT).
[131] Bharat Petroleum Corporation Ltd vs. JDIT [2007] (14 SOT 307) (Mumbai ITAT)
[132] Worley Parsons Services Pty Ltd [2008] (301 ITR 54) (AAR).
[133] Diamond Services International (P.) Ltd vs. UOI [2007] (304 ITR 201) (Bombay HC).
[134] Cushman and Wakefield (S) Pte. Ltd [2008] (305 ITR 208) (AAR)
[135] Anapharm Inc. vs. DCIT [2008] (305 ITR 394) (AAR).
[136] CIT v De Beers India Minerals (P) Ltd 346 ITR 467 (Karnataka HC)
[137] Guy Carpenter &Co Ltd v ADIT (2012)(346 ITR 504)(Delhi HC)

- Project specific architectural drawings and designs with measurements[138]

Please refer to **Annexure E** for a synopsis of these rulings and other rulings on the concept of "FTS" / "FIS".

[138] Gera Developments (P.) Ltd. [2016] 160 ITD 439 (Pune Tribunal)

Chapter 5
Tax Treatment for Royalty and FTS as per Provisions of the Act[139]

5.1 The Act prescribes the methodology for computing income under the head "royalty" and "FTS". The same would vary depending on whether the non- resident has a PE[140] / fixed place of profession in India or not.

Section 115A of the Act

5.2 Applicability[141]

- Where the non-resident does not have a PE / fixed place of profession in India to which the royalty / FTS income is effectively connected.
- In such a scenario, the royalty / FTS would be taxable on gross basis

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[139] Provisions of section 206AA of the Act would apply (wherever the assessee does not have a PAN). Pursuant to the same, the withholding tax rate would be higher of the following –

- The rate specified in the relevant provision of the Act; or
- The rate or rates in force; or
- 20%

In case of Nagarjuna Fertilizers & Chemicals Ltd. 2017, 55 ITR(T) 1, the Special Bench of Hyderabad Tribunal held that the DTAA provisions which override the charging provisions of the Act by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of the DTAA.

Pursuant to the amendment in section 206AA(7), the CBDT, vide Notification No.53/2016, F.No. 370 142/16/2016-TPL], dated June 24, 2016, has prescribed certain conditions with regard to relaxation to be provided to non-residents, from deduction of tax at higher rate on payments to them, under section 206AA, in the absence of a PAN.

[140] Permanent establishment — please refer to Annexure B for a brief explanation on this concept.

[141] As per the generally accepted view, all royalty / FTS / FIS payments to non-residents are covered under the fold of these conditions provided they do not breach Indian regulatory laws – **ADIT vs. Kaiser Aluminium Technical Services Inc.** [2007] (20 SOT 226) (Mumbai ITAT).

(i.e., without allowing any deduction for expenses incurred). The applicable tax rates would be 10% plus applicable surcharge and cess.

- Once the payment is characterized as royalty or FTS it is irrelevant whether there is any profit element or not[142].

Section 44DA of the Act

5.3 Applicability

- Where the non-resident has a PE / fixed place of profession in India to which the royalty / FTS income is effectively connected.

  Royalty / FTS **received by a non-resident from the Government / Indian concern** under agreements entered after 31st March, 2003[143] and effectively connected to a PE / fixed place of profession in India would be computed under the head "business income". Accordingly, income would be arrived at after reducing permissible expenses[144] as per provisions of the Act.

- In computing this income, no deduction shall be allowed for –
  - — Expenditure which is not wholly and exclusively incurred for the business of the PE / fixed place of profession in India; or
  - — Amount paid by the PE to its head office / any of its other offices (other than actual reimbursement of expenses).
- Further, the non-resident would be required to compulsorily maintain books of accounts[145] and get the accounts audited.
- The tax rate applicable under section 44DA of the Act is 40% (plus applicable surcharge and education cess).

5.4 Further, if the royalty/FTS is received from a non-resident (i.e., not from the Government or an Indian concern), the applicable tax rate would be 40% (plus applicable surcharge and education cess). However, in such a scenario, the benefit of net basis of taxation would be available.

5.5 A general principle that must be kept in perspective is that provisions of sections 9(1)(vi) and 9(1) (vii) of the Act deal specifically with royalty and

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[142] Food World Supermarkets Ltd. [2015] 174 TTJ 859 (Bangalore ITAT)

[143] Please refer to section 44D of the Act for the tax treatment in relation to agreements entered on or up to 31st March, 2003.

[144] i.e. in accordance with section 28 to section 44C of the Act.

[145] In accordance with the provisions contained in section 44AA of the Act.

FTS, respectively. Accordingly, given that a specific provision would override a generic provision, section 9(1)(i) of the Act should not be applied in circumstances where a particular income qualifies as "royalty" or "FTS" but is not taxable by virtue of any specific exclusion. This view is duly supported by certain judicial precedents[146] as well.

[146] CIT vs. Copes Vulcan Inc. [1985] (167 ITR 884) (Madras HC) and Meteor Satellite Ltd vs. ITO [1979] (121 ITR 311) (Gujarat HC).

Chapter 6
Tax Treatment for Royalty and FTS as per Provisions of the DTAA

Situations where the DTAA has a specific FTS / FIS clause or includes the same within the definition of "royalty"

6.1 The applicable article of the DTAA (i.e., Article 12 / 13 in most cases) would generally prescribe a rate for taxability of royalty / FTS / FIS covered within its fold.

6.2 Similar to the treatment provided in section 115A of the Act, royalty or FTS / FIS not attributable to a PE in India of the non-resident recipient would be taxable on gross basis (as per relevant provisions of the DTAA). Most DTAAs India has entered into provide for a tax rate in the range of 10-15%[147]. In such a scenario, the assesse has an option to apply the tax rate prescribed in the applicable DTAA or section 115A of the Act, whichever is more beneficial to it[148].

6.3 Further, in a situation where the royalty/FTS is attributable to a PE in India of the non-resident, the income liable to tax would be computed on net basis as per relevant Articles of the DTAA (i.e., Article 5 {dealing with PE} read with Article 7 {dealing with Business Profits} in most cases).[149]

6.4 The tax rate applicable in such a scenario would be 40% (plus applicable surcharge and education cess).

6.5 In general, the determination of profits attributable to a PE in India is a complex exercise. A detailed FAR Analysis (functions performed, assets used and risk assumed) would have to be conducted in this regard.

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[147] Surcharge and education cess would not be leviable on such a rate.

[148] Section 90 of the Act.

[149] DCIT v Boston Consulting Group Pte Limited 94 ITD 31

Situations where the DTAA does not have a specific FTS/ FIS clause and also does not include the same within the definition of "royalty"

6.6 As discussed earlier, in some DTAAs (such as those with Bangladesh, Mauritius, UAE, etc.) there is no specific clause relating to FTS / FIS. Further, the "royalty" definition in these DTAAs also does not include FTS / FIS within its fold.

6.7 Though Royalty and FTS/FIS are generally separately classified for the purpose of charging to tax, the said income would in most cases be inherently derived from regular business activities. In some DTAA's FTS/FIS are not separately recognized.

6.8 The absence of the provision in the DTAA is not an omission but is a deliberate mutual agreement between the Contracting States not to recognize/classify any income as Fees for Technical Services for taxation. Therefore the intention for not incorporating any provision in the DTAA is not to tax an income under the category of Fees for Technical Services. Once the income chargeable to tax as per the DTAA are categorized by excluding the FTS then the scope of taxing the said income as FTS cannot be expended by importing the said provision from the Income-tax Act when it is excluded under the DTAA[150] .

6.9 In such cases, based on past judicial precedents[151], a view which is commonly adopted is that any sum paid (which is otherwise in the nature of FTS / FIS) to a tax resident of these countries should not be liable to tax in India in absence of a PE in India of the non-resident recipient (to which such income is attributable). Such payment should also not be taxable as other income since when a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of conditions precedent to such

[150] ABB FZ-LLC [2017] 162 ITD 89 (Bangalore ITAT)

[151] Tekniskil (Seniderian) Berhard vs. CIT [1996] (222 ITR 551) (AAR), GUJ Jaeger GMBH vs. ITO [1990] (37 ITD 64) (Mumbai ITAT), Christiani & Nielsen Copenhagen vs. ITO [1991] (39 ITD 355) (Mumbai ITAT) and Golf in Dubai, LLC, vs. DIT [2008] (306 ITR 374) (AAR). Bangkok Glass Industry v ACIT (2013) 34 Taxmann.com 77 (Madras HC)

taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state[152].

6.10 The AAR [153] has taken a contrary view and held that such income would be covered within the ambit of the Article dealing with "Other Income" as opposed to the Article dealing with "Business Profits".

6.11 Having said the above, in situations where a specific tax treatment is provided for "royalties" and "FTS" (in terms of a separate Article in the DTAA), other generic Articles (like the Article dealing with "Business Profits") should not as such apply to the income dealt with by the specific Article.[154]

Applicability of MOU/Notes/ Protocols given in various DTAA to other DTAA where terms used in DTAA are the same and implications of Most Favoured Nation ('MFN') clause

6.12 MFN clause links bilateral agreements by ensuring that the parties to one agreement are not subjected to a treatment which is less favourable than the treatment provided to other parties under similar agreements. In effect, a country that has been accorded MFN status may not be treated less advantageously than any other country with MFN status by the promising country. In other words, MFN clause refers to a situation wherein two non-resident taxpayers are given impartial treatment by the source country. In DTAAs, MFN clauses find place when countries are reluctant to forgo their right to tax some elements of income. An MFN clause can attract 'more favourable treatment' available in other treaties only in regard to the same "subject matter", the same "category of matter" or the "same class of matter". While the principle is clear, its application may not always be simple or consistent.

6.13 Further, an MFN obligation exists only when a treaty clause creates it. Without a treaty obligation, each country retains the option of discriminating economically among foreign investors.

6.14 A typical MFN clause in any Indian DTAA reads as under –

"In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and Fees for Technical Services) if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD, India limits

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[152] DCIT v. Welspun Corporation Ltd. [2017] 183 TTJ 697 (Ahmedabad ITAT)
[153] Lanka Hydraulic Institute Limited [2011] (AAR) (unreported).
[154] Ishikawajima- Harima Heavy Industries Ltd v DIT [2007](288 ITR 408)(SC)

its taxation at source on dividends, interest, royalties, or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention."

6.15 It is a settled position in law that the protocol is an indispensable part of the treaty with the same binding force as the main clauses therein. In his introduction to Double Taxation Conventions (Third Edition), Klaus Vogel, has clarified the role of a protocol and its role in interpreting a treaty. It is mentioned that, "Protocols and in some cases other completing documents are frequently attached to treaties. Such documents elaborate and complete the text of a treaty, sometimes even altering the text. Legally they are a part of the treaty, and their binding force is equal to that of the principal treaty text. When applying a tax treaty, therefore, it is necessary carefully to examine these additional documents".

6.16 A protocol, therefore, is said to be a treaty by itself that amends or supports the existing treaty.

6.17 The aforesaid view has been upheld in the following judgments –

- P. No. 28 of 1999, ([2000] 242 ITR 208) (AAR);
- Sumitomo Corpn v DCIT (114 ITD 61) (Del);
- DCIT v. ITC Ltd (76 TTJ 323 (Cal.));
- DCIT v. Gupta Overseas (160 TTJ 257) (Agra);
- Poonawalla Aviation (P) Ltd (343 ITR 202)(AAR);
- Idea Cellular Ltd(343 ITR 381)(AAR);
- ISRO Satellite Centre (263 CTR 549) (Karnataka HC);
- Maruti Udyog Ltd (37 DTR 85)(Delhi);
- Tata Iron and Steel Co Ltd (69 ITD 292)(Mumbai); and
- Sandvik AB (ITA No 1720/Pn/2011) dated 28 November 2014

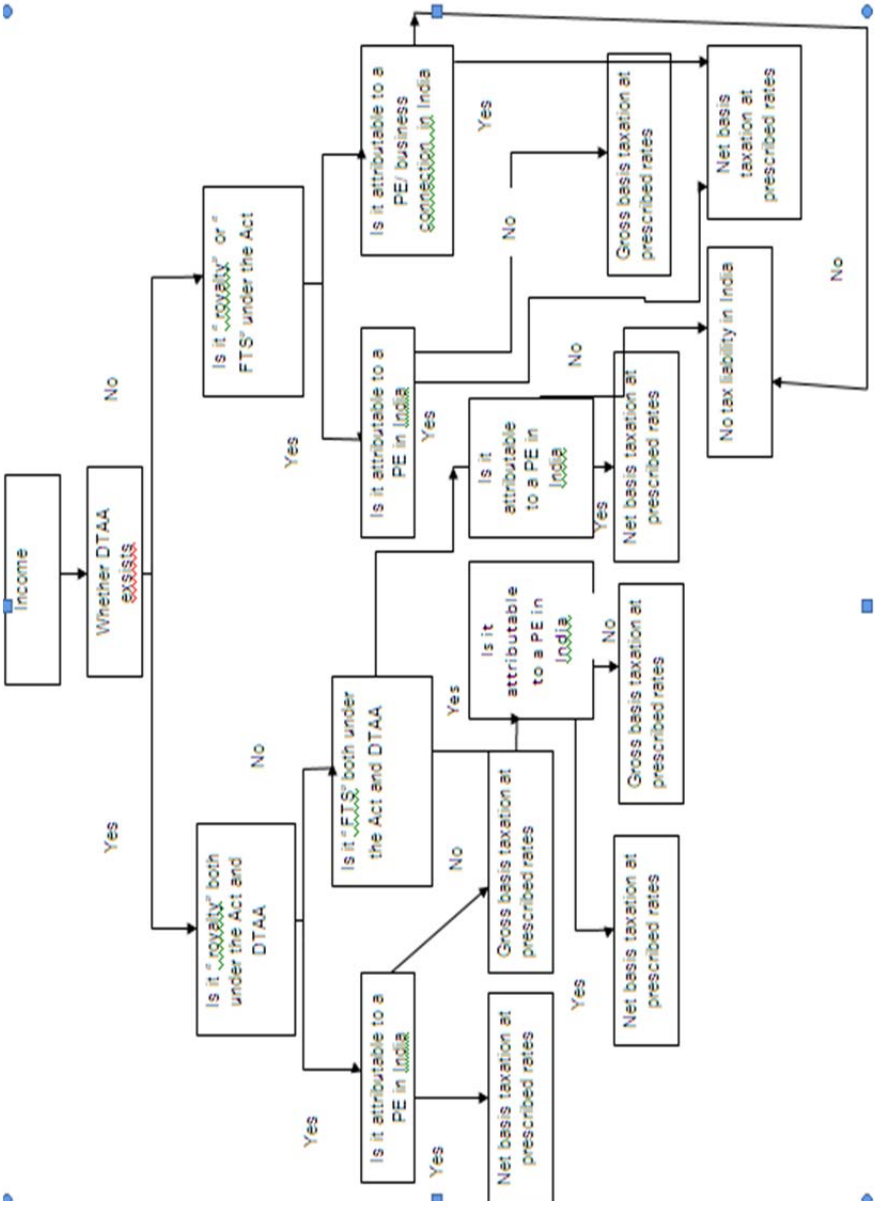
6.18 DTAA is an agreement and not a taxing statute, although it is an agreement about how taxes should be imposed and hence, the principles of literal interpretation does not apply to the interpretation of tax treaties. To find the meaning of words employed in the tax treaties, one has to primarily look at the ordinary meanings given to those words in that context and in the

light of its objects and purpose. Literal meanings of these terms are not really conclusive factors in the context of interpreting a tax treaty which ought to be interpreted in good faith and ut res magis valeat quam pereat, i.e., to make it workable rather than redundant.

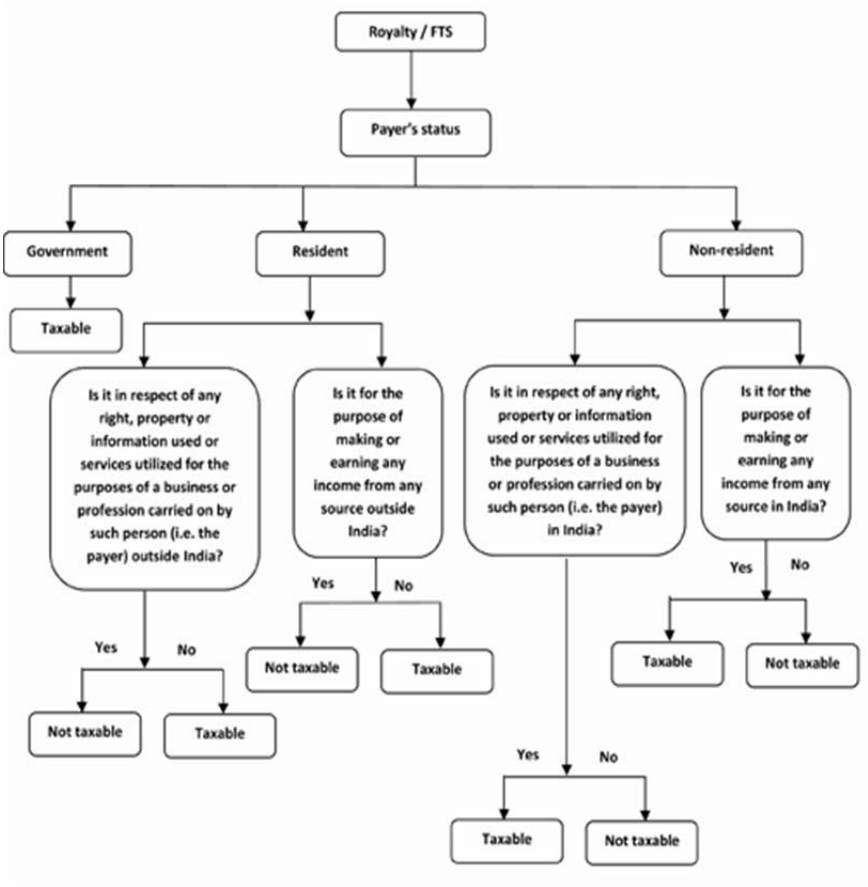
6.19 Accordingly, in case where India enters into any tax treaty with an OECD country or has entered into such treaty, the restrictive rate or scope given under subsequent tax treaty may apply over apply over the first tax treaty. In light of the same, where a DTAA entered into by India has a restrictive rate or scope for payment of Royalty/ FTS and the treaty has an MFN clause, then the favourable rate or scope of the treaty which has been entered earlier can be applied to such payments.

Chapter 7
Diagrammatic Summary

Broad Characterization basis



Tests provided under the Act



Software Payments

7.1 Typical Business Model relating to computer software

- **Single End User model** - Foreign Company supplies a single copy of the software to the end user
- **Distributor Model** - Foreign Company either supplies soft copies to an independent distributor in India for onward distribution to Indian customers either directly or through distribution channels or supplies a single copy of the software to a distributor in India who is given the license to make copies and distribute soft copies to the customers.
- **Multiple user license model** - Foreign Company supplies a single disk containing the software programme to an Indian Company with a right to make copies of the software and distribute to in-house end users
- **Customized model** - Foreign Company customizes the software as per Indian buyers requirements/ specifications - Enterprise Resource Planning software
- **Software embedded in hardware** - Foreign Company supplies integrated equipment (software bundled with hardware)
- **Cost Contribution model –** Foreign Company incurs expenditure for installation and maintenance of software system for the benefit of the group companies. It provides access to such Indian group company to use the system and recharges the cost on the basis of use of the system.
- **Electronic model** - Payment to Foreign Company for purchase of software through electronic media
- Payment to Foreign Company for provision of services for development or modification of the computer programme (incl. for upgradation, training, installation, maintenance etc.)
- Payment to Foreign Company for know-how related to computer programming techniques

Where payment is made for off the shelf software (Shrink Wrapped Software)

7.2 Payments made for off the shelf software is taxable as 'royalty' as per section 9(1)(vi) and under Article 12 of DTAA

Favorable

- Solidworks Corporation - (2013) 152 TTJ 0570 - Mumbai ITAT

- Reliance Industries Ltd [43 SOT 506]
- B4U International Holdings Ltd [32 CCH 0151] (Mum)

Against

- Reliance Infocomm Ltd & Lucent Technology Ltd (64 SOT 137) (MA filed by the Reliance infocomm is pending)
- Samsung Electronics 345 ITR 494 (Kar)

Where payment is made software which is embedded with the hardware (Bundled software)

7.3 Payments made for software which is embedded with the hardware is not taxable as 'royalty' as per section 9(1)(vi) and under Article 12 of DTAA

Favorable

- Infrasoft Ltd (96 DTR 113) (Delhi HC)
- Bartronics India Ltd (52 SOT 188)(Hyderabad Tribunal)
- Financial Software & Systems (P.) Ltd. [2014] 47 taxmann.com 410 (Chennai - Trib.)

Where payment for purchase of software is made by distributor/trader

7.4 Payments made for purchase of software by distributor/ trader is exempt if tax has been deducted and paid by him in view of the CBDT Notification No 21/2012 dated 13 June 2012, w.e.f 1. 6. 2012

7.5 However the issue is highly debatable in light of the various contrary decision on payment for purchase of software

Annexure A

Circular No. 202 dated May 7, 1976 (in verbatim)

Source rule for "royalty" - Section 9(1)(vi)

A non-resident taxpayer is chargeable to tax in India in respect of income by way of royalty which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India. The Income-tax Act, however, does not contain any definition of the term "royalty" nor is there any clear cut source rule specifying the circumstances in which royalty income can be regarded as accruing or arising in India. Further, lump sum payments made for the supply of know-how are not chargeable to tax where such know-how is supplied from abroad and the payment therefore is made outside India even though the know-how is used in India, if no part thereof is attributable to any services rendered in India.

The Finance Act, 1976 has inserted a new clause (vi) in section 9(1) clearly specifying the circumstances in which the royalty income will be deemed to accrue or arise in India and also defining the term "royalty".

Under the new provision, royalty income of the following types will be deemed to accrue or arise in India:

(a) royalty payable by the Central Government or any State Government;

(b) royalty payable by a resident, except where the payment is relatable to a business or profession carried on by him outside India or to any other source of his income outside India; and

(c) royalty payable by a non-resident if the payment is relatable to a business or profession carried on by him in India or to any other source of his income in India.

In view of the aforesaid amendment royalty income consisting of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawings or specifications relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, will ordinarily become chargeable to tax in India. In order, however, to ensure that foreign suppliers of technical know-how who had entered into agreements or had finalised

proposals for the receipt of such lump sum royalties with the approval of the Central Government on the understanding that such payments would be exempt from income-tax, it has been provided that such lump sum payments received under approved agreements made before 1-4-1976 will not be deemed to accrue or arise in India, and for this purpose, an agreement made on or after 1-4-1976 will be deemed to have been made before that date if the following conditions are fulfilled:

In the case of a taxpayer other than a foreign company, if the agreement is made in accordance with proposals approved by the Central Government before that date.

In the case of a foreign company, if the condition referred to in (a) above is satisfied, and the foreign company exercises an option by furnishing a declaration in writing to the Income-tax Officer that the agreement may be regarded as having been made before 1-4-1976. The option in this behalf will have to be exercised before the expiry of the time allowed under section

139(1) or section 139(2) (whether fixed originally or on extension) for furnishing the return of income for the assessment year 1977-78 or the assessment year in which the royalty income first became chargeable to tax, whichever assessment year is later. The option so exercised will be final not only for the assessment year in relation to which it is made but also for every subsequent year.

[The intention of giving an option to foreign companies to claim that agreements made on or after 1-4-1976 may be regarded as agreements made before that date is that where exemption from income-tax in respect of lump sum royalty is allowed, the balance of the royalty income should be charged to tax at the rates applicable in the case of such income derived under approved agreements made before that date. In other words, taxpayers exercising the option will be placed on a par with taxpayers deriving royalty income under approved agreements made before 1-4-1976 in all respects. This aspect has been explained in detail in paragraph 36.1 of the circular.]

For the purposes of the aforesaid source rule, “royalty” has been defined in Explanation 2 to section 9(1)(vi). It will be seen that the definition is wide enough to cover both industrial royalties as well as copyright royalties. Further, the definition specifically excludes income which would be chargeable to tax under the head “Capital gains” and, accordingly, such

income will be charged to tax as capital gains on a net basis under the relevant provisions of the law.

The amendments referred to in this paragraph have come into force with effect from 1-6-1976, and will apply in relation to the assessment year 1977-78 and subsequent years.

[Section 4(b) (Part) of the Finance Act]

Source rule for "fees for technical services" — Section 9(1)(vii)

As in the case of royalty, the Finance Act, 1976 has amended the Income-tax Act clearly specifying the circumstances in which income by way of "fees for technical services" will be deemed to accrue or arise in India and also defining the expression "fees for technical services". For this purpose, a new clause (vii) has been inserted in section 9(1).

Under the new provision, income by way of "fees for technical services" of the following types will be deemed to accrue or arise in India:

(a) fees for technical services payable by the Central Government or any State Government;

(b) fees for technical services payable by a resident, except where the payment is relatable to a business or profession carried on by him outside India or to any other source of his income outside India; and

(c) fees for technical services payable by a non-resident if the payment is relatable to a business or profession carried on by him in India or to any other source of his income in India.

The expression "fees for technical services" has been defined to mean any consideration (including any lump sum consideration) for the rendering of managerial, technical or consultancy services, including the provision of services of technical or other personnel. It, however, does not include fees of the following types, namely:

1. Any consideration received for any construction, assembly, mining or like project undertaken by the recipient. Such consideration has been excluded from the definition on the ground that such activities virtually amount to carrying on business in India for which considerable expenditure will have to be incurred by a non-resident and accordingly, it will not be fair to tax such consideration in the hands of a foreign

company on gross basis or to restrict the expenditure incurred for earning the same to 20 per cent of the gross amount as provided in new section 44D. Consideration for any construction, assembly, mining or like project will, therefore, be chargeable to tax on net basis, i.e., after allowing deduction in respect of costs and expenditure incurred for earning the same and charged to tax at the rates applicable to the ordinary income of non-resident as specified in the relevant Finance Act.

2. Consideration which will be chargeable to tax in the hands of the recipient under the head "Salaries". The aforesaid amendment has come into force with effect from 1-6-1976, and will apply in relation to the assessment year 1977-78 and subsequent years.

Annexure B
Brief Note on PE

As explained in the relevant Article of the DTAAs (i.e., Article 5 in most cases), PEs could be of various types such as fixed place PE, service PE, agency PE, installation PE, etc. A brief gist of some of the relevant ones is as follows –

Fixed place PE –

A non-resident entity could create a "fixed place PE" exposure in India if it has a fixed place of business in India through which its business is wholly or partly carried on.

To qualify as a fixed place PE, the fixed place of business in India would have to meet the tests of "permanence" and "place at disposal".

"Permanence" test – A sporadic business transaction undertaken by occupying a fixed place of business in India for a short time span should not give rise to a fixed place PE in India. There has to be some amount of "permanence" (say 6-12 months) in the business activities carried on from the fixed place of business to constitute a fixed place PE in India. However, if the very nature of business requires it to be carried on only for a short period of time, then a place of business where such business is carried on, may constitute a PE.

"Place at disposal" test – The fixed place of business should be at the disposal of the non-resident entity in order to constitute a fixed place PE of the non-resident entity in India. "Being at disposal" would not necessarily mean ownership of the fixed place. Rather it would mean that the fixed place should be fully at the disposal of the non-resident entity.

For example, - In case employees of a non-resident entity have designated cabins earmarked for them in the office of an Indian entity (through which they carry out the non-resident entity's business in India), it could create a fixed place PE exposure for the non-resident entity in India.

Service PE —

Broadly understood, a service PE is triggered when employees of a non-resident entity visit India for more than a specified number of days for rendition of specified services. Further, a service PE would be triggered only

if the relevant DTAA covers the concept of service PE within the definition of the term “PE”.

Agency PE —

As per the agency PE clause existing in various DTAAs which India has entered into, a “dependent” agent in India who has an authority to conclude contracts on behalf of a non-resident or who solicit orders on behalf of the non-resident or who maintains a stock of goods on behalf of the non-resident could potentially create an agency PE exposure for the non-resident in India.

Likewise, the presence of employees of a non-resident entity in India who have an authority to conclude contracts or who solicit orders on behalf of their employer, could create an agency PE exposure in India (for their employer entity).

Annexure C

Implications under Section 40(a)(i) and Section 201 on account of Retrospective Amendments to Section 9(1)(vi) and Section 9(1)(vii)

Section	Nature of Default	Consequences
40(a)(i)	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of the month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld

Implications u/s 40(a)(i)

Assessee cannot be fastened with any withholding tax liability based on the clarificatory retrospective amendment in the law, which was impossible for the Assessee to foresee in earlier assessment years

Attention is drawn to the legal maxim – *lex non cogit ad impossibilia*

- It means that the law cannot possibly compel a person to do something which is impossible to perform.
- This legal maxim is accepted by the Hon'ble Supreme Court in the case of Krishnaswamy S. Pd. & Anr. (281 ITR 305) (SC)

Favourable judicial precedents

Section 40(a)(i)/40(a)(ia) refer to explanation 2 to Section 9(1)(vi) and hence explanation 3, 4, 5, 6 will not have any implication :-

- SKOL Breweries Ltd [35 CCH 191] (Mum)
- Sonata Information Technology Ltd [33 CCH 117] (Mum)

No TDS due to retrospective amendment

- Infotech Enterprises LTd [39 CCH 029] (Hyd)
- Metro & Metro [37 CCH 0228] (Agra)
- New Bombay Park Hotel Pvt Ltd [37 CCH 0160] (Mum)
- Channel Guide Limited [33 CCH 265] (Mum)
- Sterling Abrasive Ltd. [140 TTJ 68] (Ahd)
- United Helicharters Pvt Ltd [37 CCH 52] (Mum)

Annexure D

Some Judicial Precedents on Income Characterization under the Head "Royalty"*

Voice transmission charges / provision of bandwidth / cellular services / link charges / leased line charges	
Prior to retrospective amendment	
Dell International Services India Pvt. Ltd [2008] (305 ITR 37) (AAR)	Payment for two-way transmission of voice and data through telecom bandwidth cannot be characterized as "royalty" under Article 12 of the India- US DTAA or section 9(1)(vi) of the Act. The equipment under consideration was under the control of the equipment owner. Dell was only procuring a standardized service from the equipment owner. Accordingly, the payment was not in the nature of "royalty". Further, given the "make available" criteria provided in the India-US DTAA, this payment could also not be characterized as "FIS".
Post retrospective amendment	
Verizon Communications Singapore Pte Ltd. v. ITO [2013] 361 ITR 575 (Madras)	Revenues from provision of telecommunication services to Indian customers is "royalty" in nature as it is use of equipment/use of process and thus subject to withholding tax. What is relevant here is that the High Court has invoked Article 3(2) of the treaty to read the domestic (2012) amendments in our 'royalty' definition in tax treaty as well, thus holding the income to be taxable in India both under the Income Tax Act and also the treaty.

* updated up to December, 2017

Convergys Customer Management Group Inc. v. ADIT [2013] (58 SOT 69) (Delhi ITAT)	Reimbursements received by assesse from Indian Subsidiary company for link charges do not constitute 'equipment royalty' under the provisions of article 12 of the Tax Treaty as the assesse has merely procured a service and provided the same to the subsidiary; no part of equipment was leased out to subsidiary. Even otherwise, the payment is in the nature of reimbursement of expenses and, accordingly, not taxable in the hands of the assesse.
DIT v. WNS Global Services (UK) Ltd. [2013] 214 Taxman 317 (Bombay High Court)	Receipt of reimbursement of leased line charges on cost to cost basis from the Indian subsidiary company would not classify either as royalty or as income attributed to a permanent establishment in India as there is no income earned by assesse.
Vodafone South Ltd. V. DDIT [2015](53 taxmann.com 441) (Bangalore ITAT)	The Company was engaged in providing international long distance (ILD) services. As part of its ILD services business, the Company was responsible for providing connectivity to calls originating or terminating outside India. In order to achieve its object, the company availed the services of certain non-resident telecom operators (NTOs), who provided to it carriage or connectivity services over the last leg of the communication channel. The Company had entered into agreement with NTOs for provision of international carriage and connectivity services. As per these agreements, the Company had to pay inter connectivity usage charges (IUC) to the NTOs as consideration for the services provided by them. The said consideration paid to NTOs would fall within ambit of royalty as it is paid for use of process in accordance with Explanation 5 to section 9(1)(vi).
CIT v. CGI Information Systems & Management	The assessee had entered into an agreement with CGI Group Inc., a Canadian company for sharing costs by which the Canadian Company would procure licenses from Microsoft and the costs

Consultants (P.) Ltd. [2014] (226 Taxman 319) (Karnataka HC)	relating to that would be subsequently invoiced on the assessee. The Canadian company provided license to use intranet facility to the assessee. The High Court held that intranet facility is similar to availing the leased line facilities. Therefore, the cost sharing agreement cannot be considered as reimbursement of cost and payments made for utilizing the said facilities amounted to royalty under section 9(1)(vi) read with Explanation 4 of the Act and under Article 12 of the India-Canada DTAA.
Kerala Vision Limited v. ACIT [2014] (64 SOT 328) (Cochin ITAT)	Payment made to channel companies for receiving satellite signals in capacity of multi system operator amounts to 'royalties' as defined in clause (i) of Explanation 2 to section 9(1) in view of insertion of explanation 6
CIT v. Infosys Technologies Ltd. [2014] (229 Taxman 335) (Karnataka HC)	Amount paid towards down linking charges to foreign party cannot be treated as royalty
Bharti Airtel Ltd. v. ITO [2016] 47 ITR(T) 418 (Delhi ITAT)	Inter-connect Usage Charges paid by a telecommunication service provider in India to Foreign Telecom Operators in connection with its International Long Distance telecom service business, was not royalty under the Act as well as under the DTAA. The observations of Tribunal are as under: • The term 'process' used under Explanation 2 to section 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available. The term 'process' occurring under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) means a 'process' which is an item of intellectual property. The 'royalty' in respect of use of a 'process' would imply that the grantor of the right has an exclusive right over such 'process' and allows the 'use' thereof to the grantee in return for a 'royalty'. It

	is necessary that guarantee must 'use' the 'process' on its own and bear the risk of exploitation. The 'process' of running the networks in the case of all the telecom operators is essentially the same and they do not have any exclusive right over such 'process' so as to be in a position to charge a 'royalty'. • Explanation 6 to section 9(1)(vi) by Finance Act, 2012 with retrospective effect from 1-6-1976 does not do away with the requirement of successful exclusivity of the right in respect of such process being with the person claiming 'royalty' for granting its usage to a third party. None of the Foreign Telecom Operators have any exclusive ownership or rights in respect of such process, and hence the payment in question cannot be considered as royalty. • Explanation 5 to Section 9(1)(vi) of the Act comes into play only in case of royalty falling within the ambit of section 2 of section 9(1)(vi). When a process is widely available in the public domain and is not exclusively owned by anyone it cannot constitute an item of intellectual property for the purpose of charge of 'royalty' under clauses (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi). Hence, the criteria of possession, control, location indirect use etc., as explained by Explanation 5 has no effect in this case. • The factual finding of the Jurisdictional High Court in this very facts and circumstances is that 'technical services' is being provided by the Foreign Telecom Operators that such 'Technical Service' is not FTS as defined under section 9(1)(vii) as there is no human intervention. Applying the binding decision of the Jurisdictional High Court it is to be held that the payment cannot be termed as covered

	by Explanation 2 read with section 9(1)(vi) of the Act. • On a perusal of the definition of 'royalties' provided in various treaties, it is clear that, all the treaties use the expression 'secret formula or process' is separated by a comma before and after the expression. This implies that formula/process is a part of the same group and the adjective 'secret' governs both. Thus, under the treaties, in order to constitute royalty for use of or the right to use of a process, the process has to be 'secret'. In the case of telecom industry, however, telecommunication services as already observed are rendered through standard facilities and no 'secret process' is involved and hence consideration was not in the nature of royalty.
Transponder hire charges[155]	
Prior to retrospective amendment	
New Skies Satellites N. V. & others v/s ADIT [2009] (319 ITR 269) (Delhi ITAT)	The Special Bench of the Delhi ITAT ruled that consideration paid for transponder capacity would be construed as "royalty" as defined in section 9(1)(vi) of the Act. In arriving at the above conclusion, all prior judicial precedents of on the subject matter (including the unfavourable jurisdictional ITAT order in the case of Asia Satellite Telecommunication Co. Ltd.) were duly considered. **This ruling has now been impliedly overruled by**

[155] Some of these rulings dealt with an interpretational issue as regards the term "secret formula or process" appearing in the definition of "royalty" (both, under the Act as well as the applicable DTAAs).
The confusion was as regards the existence of a comma after the word "process" which was not appearing in the Act but was appearing in the DTAAs. Hence, the issue was whether the word "secret" qualifies only the word "formula" or it qualifies the word "process" as well. Also, the other issue was whether the existence or non-existence of a solitary comma as such makes any difference in the overall interpretation of the term.

	the decision of the Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd.
DCIT v/s Pan AmSat International Systems Inc. [2006] (103 TTJ 861) (Delhi ITAT)	It was held that payments for transponder capacity cannot be characterized as "royalty" within the meaning of Article 12(3)(a) or "FIS" within the meaning of Article 12(4)(b) of the India-US DTAA.
ISRO Satellite Centre (Isac) [2008] (307 ITR 59) (AAR)	Payments for leasing space segment capacity available in a navigation transponder would not qualify as "royalty", both, under Article 13 of the India-UK DTAA as well as section 9(1)(vi) of the Act. In the facts of the case, the customers had not been given any control over parts of the satellite / transponder. Accordingly, the customers did not "use" nor were they conferred with the "right to use" the transponder and hence, the amount paid was held to be not in the nature of "royalty". Further, given the "make available" criteria provided in Article 13(4)(c) of the India-UK DTAA, this payment also did not fall within the ambit of the term "FTS".
Asia Satellite Telecommunication Co. Ltd. v/s DIT [2011] (Delhi HC) (unreported)	The Delhi High Court overruled the prior verdict of the Delhi ITAT on the matter and held that payments for transponder capacity cannot be characterized as "royalty" within the meaning of section 9(1)(vi) of the Act. In arriving at the above conclusion, the Delhi High Court placed reliance on the AAR ruling in the case of ISRO and the OECD Commentary, wherein it has been mentioned that payments made by customers under transponder leasing agreements are for use of the transponder transmitting capacity and would not constitute "royalty".
Post retrospective amendment	
B4U International	Mumbai ITAT held that the amendments made by

Holdings Ltd vs. DCIT [2012] 21 taxmann.com 529 (Mum Tri.) Affirmed by the Bombay High Court (ITA No. 1274 of 2013)	the Finance Act, 2012 does not change the position regarding taxability of payment by TV broadcaster, of hiring charges for transponder and charges for facilities in relation to reception and transmission of signals under Section 9(1)(vi) as there is no change in the DTAA between India and USA and a taxpayer can opt for DTAA or Act whichever is more favourable.
Viacom 18 Media (P.) Ltd. vs. ADIT [2014] 66 SOT 18 (Mumbai ITAT)	The ITAT held that payment of fees for use of satellite transponder services for telecasting/broadcasting programs is covered within definition of 'process' and payments made for use/right to use of 'process' is 'royalty' in terms of India-USA DTAA as well as under the Act.
DIT v. New Skies Satellite BV [2016] 382 ITR 114 (Delhi HC)	Payment made for data transmission services through a transponder is not royalty under India-Thailand DTAA. It was also held that the DTAA cannot be amended unilaterally.
Taj TV Ltd. v. ADIT [2017] 162 ITD 674 (Mumbai ITAT)	Payment of transponder fee to US based company for utilizing its transponder facilities in India cannot be treated as a consideration for 'use' or 'right to use' any copyright of various terms used in para 3(a) of India-USA DTAA. It is also not use or right to use any industrial, commercial, or scientific equipment. Hence, the payment do not fall within ambit of royalty in terms article 12 of India-USA DTAA. The amended definition of 'royalty' as given in section 9(1)(vi) of the Act, will not affect Article 12 of the DTAAs.
Payment for Software	
Prior to retrospective amendment	
IMT Labs (India) Pvt. Ltd. [2006] (287 ITR 450) (AAR)	License fee paid for securing license to a software (which was to be used for producing, hosting and distributing certain applications) was held to be “royalty” as defined in Article 12 of the India-US

	DTAA as well as section 9(1)(vi) of the Act (the application software was construed to be a "scientific equipment"). Further, payments for appurtenant technical and consultancy services rendered (through provision of services of technical personnel and e-mail support) were held to be in the nature of "FIS" as provided in Article 12 of the India-US DTAA, since they were "ancillary and subsidiary to the application and enjoyment of the right to use a scientific equipment".
M/s Frontline Soft Limited / M/s Call World Technologies Limited v/s DCIT [2007] (Hyderabad ITAT) (unreported)	In the facts of the case, inter alia, the assesse had acquired the right to use a particular software (known as "True Dial Software"). The assesse contended that payments made in relation to the same cannot be construed as "royalty" under Section 9(1)(vi) of the Act as well as Article 12 of the India-US DTAA, since this was a case of outright acquisition of the software. The ITAT held that the payment was not for transfer of absolute assignment and ownership of the software. The assesse had only acquired a right to use the software and hence, the consequential payments would be in the nature of "royalty" as defined in section 9(1)(vi) of the Act.
Commissioner of Income-tax, International Taxation v. Samsung Electronics Co. Ltd [2011] 16 taxmann.com 141 (Karnataka HC)	When licence is granted to make use of software by making copy of same and to store it in hard disk of designated computer and to take back-up copy of software, it is clear that what is transferred is right to use software, which owner of copyright owns and what is transferred is only right to use copy of software for internal business as per terms and conditions of agreement. The payment made would constitute royalty as per clause (iv) of Explanation 2 to section 9(1)(vi) and even as per article 12 of DTAA between India and USA. This decision was followed by the Karnataka HC in

	the case of Synopsis International Ltd. vs. DDIT [2016] (76 taxmann.com 118
CIT (Intl Tax) vs. Sonata Information Technology Ltd. [2012] 21 taxmann.com 312 (Kar.)	Consideration paid by Indian customers or end users to assesse, a foreign supplier, for transfer of right to use software/computer program in respect of copyrights falls within mischief of 'royalty' as defined under sub-clause (v) of Explanation 2 to clause (vi) of section 9(1).
ING Vysya Bank Ltd. v. Deputy Director of Income-tax, (International Taxation) Circle 1(1) [2012] 21 taxmann.com 329 (Bangalore Tri)	Assesse, engaged in the business of banking in India, had made certain remittances to ING Vysya Bank N.V. Switzerland towards purchase of software licence without deducting tax at source on them. As per clause (i) of Explanation 2 to section 9(1), onetime payment made by the assesse for obtaining licence is royalty and is taxable in India. Also, as per Article 12(3) of Indo-Switzerland DTAA, payment made for the use of or right to use of the properties would be royalty.
CIT (Intl Tax) vs. ING Vysya Life Insurance Co. (P.) Ltd [2012] 24 taxmann.com 226 (Kar.)	Payment made for the purchase of software was treated as royalty.
On mobile Global Ltd vs. ITO (Intl tax) [2012] 24 taxmann.com 348 (Bang Tri)	Import of software in connection with the business of mobile value added services amounted to royalty taxable.
NCR Corporation India (P.) Ltd vs. DDIT (Intl tax) [2012] 25 taxmann.com 31 (Bang Tri)	Import of software in connection with the activity of manufacture and sale of Automated Teller Machines (ATMs), ATM parts and accessories amounted to payment of royalty.
CIT (Intl Tax) vs.	It was held that consideration paid by the Indian

Ansys Software (P.) Ltd [2012] 23 taxmann.com 344 (Kar.)	customers or end users to the foreign supplier, for transfer of the right to use the software/computer programme in respect of the copyrights is royalty. Treaty angle not discussed in the case law.
Airports Authority Of India [2010] (323 ITR 211) (AAR)	Payment made for software (under a contract for setting up an upgraded automation system) is taxable as "FIS" under Article 12(4)(b) of the India-US DTAA, since the software would be of no value unless the supplier shares the technical knowledge, information and experience and suitably equips the buyer's personnel to handle the system by themselves (it would need training and imparting of valuable information and instructions). Further, the AAR also did not rule out the possibility of the sum being taxable as "royalty" as per Article 12(3) of the India-US DTAA. It may be noted that in this case, the software under consideration presumably was a customized software (as opposed to an off the shelf standardized software).
Microsoft Corporation v/s ADIT [2010] (134 TTJ 257) (Delhi ITAT)	Payment made for acquiring off the shelf / shrink wrapped software is in the nature of "royalty" and hence taxable, both, under the provisions of the Act as well as the India-US DTAA. The decision in the case of Motorola Inc. v/s DCIT [2005] (95 ITD 269) has been distinguished in this ruling. The decision in the case of Tata Consultancy Services has also not been relied upon since the said judgment was rendered in the context of sales tax laws.
Lucent Technologies Hindustan Ltd. v/s ITO [2003] (82 TTJ 163) (Bangalore ITAT)	Payments made for purchase of an integrated equipment comprising of both of hardware and software (where the acquisition of software is inextricably linked to the acquisition of hardware) cannot be treated as "royalty" as per section 9(1)(vi) of the Act and Article 12 of the India-US DTAA. The above conclusion was based on the

	observation that the transaction was for the purchase of a "copyrighted article" (and accordingly, the underlying payment could not be construed as "royalty"). Similar findings have also been upheld in HITT Holland Institute of Traffic Technology B.V. v. DCIT [2017] (78 taxmann.com 101) (Calcutta ITAT).
Tata Consultancy Services v/s State of Andhra Pradesh [2004] (271 ITR 401) (SC)	This was a decision pronounced in the context of sales tax. It was held that software embedded on a CD is a "good" and is liable to sales tax. An analogy from this ruling is often drawn to contend that sale of a CD with software, music, etc. embedded on it cannot give rise to "royalty" income (since it does not give the buyer a right to use the underlying copyright in the software or the content of the CD). Rather, it is in the nature of sale of "goods" and only enables the buyer to use the contents of the CD.
Motorola Inc. [2005] (95 ITD 269) (Delhi ITAT)	A holder of a "copyright" can exploit the same commercially. If the right to commercially exploit the "copyright" is absent, what one has acquired would not be regarded as a "copyright". In such a case, it can only be said that one has acquired a "copyrighted article" and hence, the amount paid for the same (without the right to commercially exploit the "copyright") cannot be characterized as "royalty".
Cosmic Circuits (P.) Ltd v ITO (IT) [2013] 58 SOT 364 (Bangalore ITAT)	The ITAT, relying on the decision of the jurisdictional High Court in the case of CIT v. Samsung Electronics Co. Ltd and the decision of the AAR in Citrix Systems Asia Pacific Pty. Ltd., In re, held that sale or licensing for use of copyrighted software is grant of right to use copyright and payment thereof is 'royalty' and is liable for deduction of tax at source under section 195 of the Act.
Sonata information	Payment for acquiring shrink wrapped software is

Technology Ltd v/s Addl. CIT [2006] (103 ITD 324) (Bangalore ITAT)	not in the nature of "royalty" (since the payment is for acquiring a "copyrighted article" as against use or right to use a "copyright").
Fact Set Research Systems Inc. v/s DIT [2009] (317 ITR 169) (AAR)	In the facts of the case, the assesse was maintaining a comprehensive database which was a source of information on various commercial and financial matters of companies. The assesses job was to collect and collate the said information / data which was available in public domain and put them all in one place in a proper format so that the customer (licensee) could have easy and quick access to this publicly available information. The assesse had to bestow its effort, experience and expertise to present the information / data in a focused and user friendly manner. For this purpose, the assesse was required to do collation, analysis, indexing and noting wherever necessary. These value additions were a product of the assesses efforts and skills and they were outside public domain. In that sense, the database was an intellectual property of the assesse and the "copyright" was attached to it. The AAR held that by simply making this centralized data available to its customers (licensees) for a consideration, it could not be said that any rights which the assesse had as a holder of "copyright" in the database were being parted in favour of the customers (licensees). Accordingly, payments in this regard could not be characterized as "royalty", both, in terms of section 9(1)(vi) of the Act as well as Article 12 of the India-US DTAA.
CIT & Others v/s Samsung Electronics Co. Ltd. & Others [2009]	One of the aspects in appeal pertained to taxability of payment made for acquiring off the shelf / shrink wrapped software. The ITAT initially held that the same cannot be

(320 ITR 209) (Karnataka HC) SC order also passed – matter currently pending before Karnataka HC	characterized as "royalty". The Karnataka HC refrained from adjudicating on the taxability. The SC has remanded back the matter to the HC for adjudication on the taxability.
DDIT vs. Solid Works Corpn [2012] 18 taxmann.com 189 (Mum Tri)	The consideration received by assesse merely for right to use software was not royalty and receipts would constitute business receipts in hands of the assesse since assesse who was a non-resident did not have a permanent establishment, business income of assesse could not be taxed in India in absence of a permanent establishment.
Dassault Systems K.K. [2010] (322 ITR 125) (AAR)	Income arising from the sale of standardized but special purpose software (and not a customized software) is not in the nature of "royalty" as defined in Article 12 of the India-Japan DTAA.
M/s Velankani Mauritius Limited & Others v/s DDIT [2010] (132 TTJ 124) (Bangalore ITAT)	Payment for acquiring off the shelf / shrink wrapped software is not in the nature of "royalty", both as per section 9(1)(vi) of the Act as well as Article 12 of the India-Mauritius DTAA / Article 12 of the India-US DTAA.
Citrix Systems Asia Pacific Pty. Ltd., In re1 (18 taxmann.com 172 (AAR)	Consideration paid for use of a copyrighted software, is also payment for use of the copyright embedded in the software and accordingly would be treated as royalty. Whenever a software is assigned or licensed for use, there is involved an assignment of right to use embedded copyright in software or a license to use embedded copyright, the intellectual property right in software. Therefore licensing of a software for use by end-use customer, is mere sale of a copyrighted article and does not involve grant of a right to use copyright in software is not a valid argument.
M/s. Kansai Nerolac	A software was being acquired which would

Paints Ltd. [2010] (134 TTJ 342) (Mumbai ITAT)	regularly transfer data from the main server to an auxiliary server in a compressed form and also retrieve the data in uncompressed form whenever required. The acquirer also had a right to make copies of the program to enable usage of the same within its own business. However, no source code or programming language or technique was provided to the acquirer along with the program. Based on an examination of the facts and available judicial precedents, it was held that a computer software when put on a media and sold, becomes a "good" like any other audio cassette or painting on canvass or a book. Accordingly, a payment made for the same cannot be construed as "royalty" as defined in Article 12 of India-Singapore DTAA.
Geoquest Systems B.V. [2010] (234 CTR 73) (AAR)	It was held that the income from supply of a special purpose off the shelf software cannot be characterized as "royalty" either under the Act or the India-Netherlands DTAA. In arriving at the above conclusion, reliance was placed on the fact that such a sale resulted in the transfer of a computer software dehors any copyright associated with it, and hence, the same would not fall within the ambit of the term "royalty" as defined in section 9(i)(vi) of the Act as well as Article 12 of the India-Netherlands DTAA. The AAR also observed that such amounts could not be treated as "FTS" under the Act as well as the under the India-Netherlands DTAA.
Allianz SE vs. Assistant Director of Income-tax, (International Taxation)-I, Pune [2012] 21 taxmann.com 62 (Pune Tri)	Licence charges received by assesse, a non-resident company from its Indian affiliates for grant of user right in a copyrighted software amounted to its business income which could not be brought to tax in India as royalty Distinction between copyrighted article and copyright has been analyzed in the case law.

Post retrospective amendment	
DDIT(IT) v Reliance Infocom Ltd. [2014] 29 ITR(T) 132 (Mumbai - Trib.)	It is well-settled that copyright is a negative right. It is an umbrella of many rights and licence is granted for making use of the copyright in respect of shrink wrapped software/off the shelf software under the respective agreement, which authorizes the end-user, i.e., the customer to make use of the copyright software contained in the said software, which is purchased off the shelf or imported as shrink wrapped software. The same would amount to transfer of part of the copyright and transfer of right to use the copyright for internal business as per the terms and conditions of the agreement. Accordingly, the payment for the use of or right to use of copyright and does amount to royalty within the meaning of article 12(3) of the DTAA between India and USA.
DIT v Infrasoft Ltd., [2014] 264 CTR 329 (Delhi)	Where the licensee has acquired only a copy of the copyright article and the copyright remains with the owner what is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted article or material which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income under Article 13 of the DTAA with USA.).
Sonic Biochem Extractions (P.) Ltd. v ITO [2013] 59 SOT 4 (Mumbai - ITAT.)	It was held that mere purchase of software, a copyrighted article, for utilization of computer could not be considered as purchase of copyright and royalty. Further it was also held that purchased software delivered along with computer hardware for utilization in day-to-day business and the same would not involve any intangible asset, hence, depreciation could not be disallowed under section

	40(a)(ia).
Ericsson AB v. DDIT (IT) [2012] 25 taxmann.com 466 (Delhi)	The assesse, a company incorporated in Sweden, was engaged in supply of GSM Mobile Telecommunication system comprising of hardware and software to various cellular companies operating in India (ICO's). Payment received on licensing of software where equipment were delivered at port outside India not taxable in India in the absence of PE in India.
ADIT (IT) v. Siemens Aktiengesellschaft [2013] ITA No 4502 of 2009 (Mumbai - ITATI.)	Where the assesse had not separately sold software but it was part and parcel of the equipment supplied the same would not constitute royalty under Article 13 of the DTAA between India & Germany.
Convergys Customer Management Group Inc. v. ADIT [2013] (58 SOT 69) (Delhi ITAT)	Reimbursements received by assesse from Indian Subsidiary company for software payments (license cost/maintenance charges) is taxable in the hands of the assesse. The purchase of software would fall within the category of copyrighted article and not towards acquisition of any copyright in the software and, hence, the consideration would not qualify as royalty as defined under article 12(3) of the DTAA. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly, not taxable in the hands of the assesse.
Autodesk Asia Pvt. Ltd. V. JDIT [2015] (56 taxmann.com 92) (Bangalore ITAT)	Payment received by assessee for sale of Shrink Wrapped Software license to end user customers in India through its distributors and their retailers would amount to royalty.
Qualcomm Incorporated v. ADIT [2015] (56 taxmann.com 179) (Delhi ITAT)	The assessee, an American company, was engaged in the business of design, development, manufacture and marketing of digital wireless communication products and services, based on CDMA technology. It developed and supplied

	CDMA based integrated circuits and systems software for wireless, voice and data communication, multimedia functions and global positioning system products and granted licence to Original Equipment Manufacturers (OEMs) to manufacture the wireless products, for the right to use its intellectual property folio, including certain patent rights essential to and useful in the manufacture and sale of wireless products. It was held that when royalty is for use of a technology in manufacturing, it is to be taxed at situs of manufacturing product, and, when royalty is for use of technology in functioning of product so manufactured, it is to be taxed at situs of use.
Financial Software & Systems (P.) Ltd v. DCIT [2014] (47 taxmann.com 410) (Chennai ITAT)	Payments made to non-resident companies for procuring standard and copyrighted software products, for distribution or re-sale purpose on principal to principal basis could not be treated as payment towards royalty under section 9(1)(vi) of the Act.
ADIT vs. Antwerp Diamond Bank NV Engineering Centre 65 SOT 23 (Mumbai ITAT)	The assessee, a Belgium based bank, having obtained a licence to use software, allowed its Indian branch to use same software by making it accessible through server located at Belgium, amount reimbursed by branch on pro rata basis for use of said resources was not liable to tax in India as royalty under section 9(1)(vi) or article 12(3) of India-Belgium DTAA as there was no right which had been acquired by Branch in relation to usage of software, because Head Office alone had exclusive right to use software
Infotech Enterprises Ltd. vs. ACIT [2014] 30 ITR(T) 542 (Hyderabad ITAT)	Where assessee purchased software from non-resident company and after bundling it with its own software sold same to its own customers, both in India and abroad, in view of facts that license in respect of software was not obtained by assessee and perpetual license was given directly to end customer by vendor company, payments made by assessee to Netherlands company would not fall

	under ambit of 'Royalty' under section 9(1)(vi) or as per article 12 of India-Netherlands DTAA.
ITO vs. F.L. Smidth Ltd [2014] 51 taxmann.com 90 (Chennai ITAT)	Payment for shrink wrap software license reimbursed under a cost sharing arrangement is royalty under the Act as cost sharing arrangement is internal arrangement does not change characterization of an underlying transactions.
Huawei Technologies Co. Ltd. vs. ADIT [2014] 44 taxmann.com 296 (Delhi ITAT)	A non-resident company, was engaged in business of supplying telecommunications network equipment. There was only one contract and consolidated price for supply of equipment which included hardware and software both. From the agreement with the Indian customer it is evident that the software is set of programmes embedded in the equipment and it is necessary for control, operation and performance of the equipment. Moreover, the buyers were granted a non-exclusive, non -transferable and non-sub-licensable license to use the software. No title or ownership rights or interest in the software are transferred to the buyers. Accordingly, the ITAT held that entire income from supply of equipment was to be assessed as business income arising from assessee's business connection/PE in India.
DDIT v. Reliance Industries Ltd. [2016] 159 ITD 208 (Mumbai ITAT)	Consideration paid for purchasing the copyrighted article and not the copyright itself cannot be considered as royalty. The amendment made to section 9(1)(vi) by the Finance Act, 2012 cannot be said to be pari materia with the DTAA. The amendment to the definition of the term royalty made in the Income-tax Act cannot be read into the DTAA. If the definition of royalty under DTAA is more beneficial to the assessee the same shall prevail and in such an event the provisions of the DTAA will override the provisions of the Income-tax Act.
Energy Solutions	When in the case of the purchaser (group

International Plc. v. DCIT [2010] 3 taxmann.com 791 (Hyderabad ITAT)	company), the payment for purchase of software was treated as sales consideration, the said amount cannot be treated as royalty in the hands of the seller.
Dassault Systems v. DDIT [2017] 79 taxmann.com 205 (Mumbai ITAT)	Payment received for sale of Shrink Wrapped Software to end user customers in India through its distributors and their retailers would not amount to royalty under section 9(1)(vi) of the Act as well as under Article 12(3) of India-USA DTAA.
I.T.C. Limited v ADIT [2017] 79 taxmann.com 206 (Kolkata ITAT)	The assessee entered into an agreement with a foreign software developer, whereby the developer licensed a software to the assessee and the assessee made payment for the same. On perusal of the licensing agreement, the Tribunal noted that the software developer had granted the assessee a perpetual, non-transferable, irrevocable, non-exclusive and non-sub licensable right in respect of computer software. The Tribunal went on to examine whether the software falls within the definition of 'copyright of literary work' and therefore royalty within the meaning of Article 12 of India Singapore DTAA. The Tribunal relied on the provisions of Copyright Act, 1957 to ascertain the term 'copyright' and noted that the license granted to the assessee did not constitute a copyright in the software within the meaning of section 14 of Copyright Act, 1957. The Appellant had only a right to use the computer software and did not have right to use copyright in the computer software. The Tribunal, therefore, held that no copyright in respect of software was granted to the assessee and therefore the payment for software license did not constitute 'royalty' within the meaning of Article 12 of India Singapore DTAA.
DDIT v Shell Informational Technology International BV	The assessee company, a tax resident of Netherlands, entered into a Master Service Agreement with WIPRO and IBM ('the service providers') for provision of IT services to the group

[2017] 80 taxmann.com 64 (ITAT Mumbai)	entities from service providers. In order to provide such IT services, the Service Providers were required to have access to network and software of the assessee. On a reading of Master Service Agreement, the Tribunal held that the right granted to service providers was non- transferable and had limited right to use it for its own business and not for any other purpose. The Tribunal held that the access to software is not for use of any copyright albeit for a copyrighted articles during the course of providing service. The Tribunal went on to examine whether the software falls within the definition of 'royalty' under Article 12 of India Netherlands DTAA. The Tribunal relied on the provisions of Copyright Act, 1957 to ascertain the term 'copyright' and noted that the rights granted by the assessee to the service providers did not constitute a copyright in the software within the meaning of section 14 of Copyright Act, 1957. The Tribunal also held that he limited use of software cannot be held to be covered under the word "use of process", because the assessee had not allowed the end user to use the process by using the software, as the customer did not have any access to the source code. The Tribunal, therefore, held that the payment for software does not amount to 'royalty' under Article 12 of India Netherlands DTAA.
Galatea Ltd. v. DCIT [2016] 46 ITR(T) 690 (Mumbai ITAT)	Consideration received for sale of software supplied as a part of the machine to the end user cannot be construed as royalty under Article 12 of the Indo-Israel DTAA, since there was no transfer of the copyright or any other rights therein on the sale of machine alongwith the operating software. It was also held that the amendment made in the Act to section 9(1)(vi) cannot be read into the provisions of Article 12 of the Indo-Israel DTAA.
PCIT v M. Tech	Payment made for purchase of software as a

India (P.) Ltd. (2016) 381 ITR 31 (Delhi HC)	product would be treated as purchase of software rather than payment made for use or right to use software to be treated as royalty under section 9(1)(vi) of the Act.
Datamine International Ltd. v. ADIT [2016] 48 ITR(T) 229 (Delhi ITAT)	Revenue earned from 'software sale' by an India branch of a UK company to Indian customers was in nature of business receipts under Article 7 and not royalty under Article 13 of India-UK DTAA as same was consideration for sale of a copyrighted product and not for use of any copyright. In arriving at above decision, the ITAT observed that the relevant clauses of the End user Agreement clearly emerges that none of the elements of 'Copyright' as mentioned in section 14 of the Copyright Act have been transferred to the end user. Further, he cannot sell or give on commercial rental any copy of the computer program. On the other hand, simply facilitates him to use the software without infringing copyright. This conclusively demonstrates that the end users have paid consideration for the use of a computer software and not copyright of a computer software. Since receipts from sale of original software had been held to be in nature of business profits covered under article 7 of DTAA, receipts from annual maintenance contract would also be covered under article 7 'business profits' .
ADIT vs. Baan Global BV [2016] 49 ITR (T) 73 (Mumbai ITAT)	Consideration received for pure sale of 'shrink wrapped software' off shelf, cannot be considered as a 'royalty' within meaning of Article 12(4) of India-Netherlands DTAA as the use of source code is for a particular component system to modify such component system for its own internal computing operations. This right is again with the riders and limitations given therein. There is no right given for the 'use of copyright' or any kind of copyright has been given. Hence, Limited right to operate the copyrighted article cannot be reckoned as royalty within the scope of article 12(4) of India-

	Netherlands DTAA. 'Royalty' has been specifically defined in the treaty and amendment to the definition of such term under the Act would not have any bearing on the definition of such term in the context of DTAA since, a treaty which has entered between the two sovereign nations, then one country cannot unilaterally alter its provision.
DCIT v. Atmel R & D India (P.) Ltd. [2016] 74 Taxmann.com 106 (Chennai ITAT)	Payment for acquisition of software from a parent company to be used for its business purpose only, without any right of utilizing copyright of said programme was not in the nature of royalty as per provisions of section 9(1)(vi) of the Act.
Quaolcomm India (P.) Ltd. v. ADIT [2017] 162 ITD 493 (Hyderabad ITAT)	Indian company purchased software support end user software licence packages from its AEs in US, UK, and Germany to test whether wireless equipments were working according to desired specifications. It was held that software was for assisting Indian company in rendering its services and these software were tool in rendering software development services. Software purchased by an Indian company was copyrighted articles and could not be construed as license to use copyright itself and, thus, payment made by Indian company could not be construed as royalty.
Qad Europe B.V. v. DDIT [2017] 53 ITR(T) 259 (Mumbai ITAT)	A Netherland based company, entered into a software licence agreement with an Indian company pursuant which software was sold to an Indian company. The licence agreement did not permit Indian company to carry out any alteration or conversion of any nature, so as to fall within definition of 'adaptation' as defined in Copyright Act, 1957. Moreover, right given to customer for reproduction was only for limited purpose so as to make it usable for all offices of Indian company and no right was given to Indian company for commercial exploitation of same.

	The ITAT held that India-Netherlands DTAA does not include software while defining 'Royalty'. Further, Indian company has paid the consideration for 'use of computer software' and not 'copyright of the computer software'. Thus, the payment do not fall within the ambit of 'Royalty' defined in article 12(4) of the India-Netherlands DTAA
CIT vs. Vinzas Solutions India (P.) Ltd. [2017] 392 ITR 155 (Madras HC)	The assessee was engaged in buying and selling software in open market. The transaction in question was one of purchase and sale of a product and nothing more. The High Court held that the 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. Income from purchase and sale of software is not in the nature of royalty under section 9(1)(vi) of the Act as it amounts to a transaction for sale of 'copyrighted article' and not of 'copyright' itself. Regarding the retrospective amendment inserting Explanation 4 and 7 to section 9(1)(vi), the High Court held that Explanations 4 and 7 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. ZTE Corporation [2017] 392 ITR 80 (Delhi HC)	The assessee, a Chinese resident, was engaged in the business of supplying telecom equipment i.e. mobile handset alongwith embedded software to the customers in India. From the perusal of facts and agreement, it was clear that the supply of software embedded in the supply of equipment enables the use of hardware, without which the hardware was of no use. It was for this purpose a limited, non- transferable, perpetual, non-exclusive license to use the software was granted to the buyer. Thus, what was conveyed to its customers by the assessee bears a

	close resemblance to goods i.e. supply of software in the nature of articles or goods. Therefore, the payment for software was held not to be chargeable to tax as royalty.
Capgemini Business Services (India) Ltd. v. ACIT [2016] 158 ITD 1 (Mumbai ITAT)	'Computer software' has neither been included nor is deemed to be included within the scope or definition of 'literary work' in any definition or Explanation provided under the Act. The term 'literary work' has been separately mentioned under clause (v) to Explanation 2 to include the consideration paid for the same within the scope of royalty, whereas, the term 'computer software' has been recognized as a separate item not only in 2nd proviso to clause (vi) but in Explanation 4 also and has been included in the definition and within the scope of the words 'right', 'property' or 'information'. Right to use accrues to purchaser of software by operation of statute and same would amount to sale of a goods and acts done such as downloading of same to computer or making backup copies etc. would be necessary acts for enabling use of product and would not amount to transfer of copyright or right therein, but only transfer of copyrighted product and, thus, will not be covered under definition of royalty under DTAA
Black Duck Software Inc. v. DCIT [2017] 86 Taxmann.com 62 (Delhi ITAT)	The assessee, a USA based company had granted a non-exclusive, non-transferable software license to Indian customer for a specific time period. It was held that since assessee retained copyright in said software programme, payment received by it was not liable to tax in India as royalty under Article 13 of India USA DTAA.
Use of business information reports	
Dun & Bradstreet Espana S A [2004] (272 ITR 99) (AAR)	The assesse was in the business of providing various products to businesses across the globe. One of their products was a business information report, which it was also selling to a group subsidiary in India.

	A business information report typically provided information in respect of a company on various aspects such as its existence, operations, financial condition, management's experience, line of business, facilities, etc. as also information about any suits, liens, judgments, etc. Based on a detailed analysis, the AAR concluded that sale of a business information report could be equated with the sale of a book (i.e. there is no transfer / grant of right to use the intellectual property rights associated with the book). Accordingly, payments received towards sale of a business information report cannot be characterized as "royalty" as defined in Article 13 of the India-Spain DTAA.
Abc Ltd. (Xyz Ltd).[2005] (284 ITR 001) (AAR)	The sale of business information reports, like the sale of a book, does not involve transfer of any intellectual property rights and accordingly, any consideration received for the same cannot be characterized as "royalty" as defined in Article 13 of the India-UK DTAA.
Credit Agricole Indosuez v DDIT(IT) [2013] ITA NO 4295 and 4965 OF 2005 (Mumbai ITAT)	Where the assesse made payment on account of data processing costs to its head office, the same cannot be considered as royalty as a consideration for the use of the assets specified under Explanation 2 to section 9(1)(vi) and accordingly, there cannot be no disallowance under section 40(a) of the Act.
ITO v. Cross Tab Marketing Services (P.) Ltd [2014] (46 taxmann.com 146) (Bangalore ITAT)	The ITAT held that payments made to specialist agencies located abroad for accessing the record of online customers to carry out market research activities, is treated as royalty under section 9(1)(vi) of the Act.
Reuters Transaction Services Ltd. V. Deputy Director of Income-tax [2014] (151 ITD 510)	The ITAT held that allowing the use of software and computer system to have access to the portal of the assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amounts to imparting of

(Mumbai ITAT)	information concerning technical, industrial, commercial or scientific equipment work and would constitute royalty taxable in terms of article 13(3) of India-UK DTAA
GVK Oil & Gas Ltd. vs. ADIT [2016] 158 ITD 215 (Hyderabad ITAT)	Indian company was granted license by two foreign companies (licensors) and licensors provided data relating to geophysical and geological information and they were not responsible for accuracy or usefulness of such data, since licensors had only made available data acquired by them but did not make available any technology available for use of such data, payments made to said licensors was not in nature of 'Royalty' as per respective DTAA.
Use of trademark	
DIT v/s Sheraton International Inc. [2009] (313 ITR 267) (Delhi HC)	The non-resident assesse had entered into a commercial service agreement with Indian hotels for advertising, publicity and promotion of their sales worldwide. Pursuant to the arrangement, it also allowed the use of its trade name, trademark and stylized “S”. In return, the assesse receives 3% of room sales turnover as its fee. The CIT(A) inter alia held that the consideration for the use of trademarks, trade name and the stylized “S” service mark should be characterized as “royalty” as per Article 12 of the India-US DTAA. Further, the CIT(A) also held that the fee received for publicity, marketing and promotion activities constitutes commercial income and in the absence of a PE of the assesse in India, the said payments cannot be brought to tax in India. The ITAT held that the payments under consideration can neither be treated as “royalty” (under Section 9(1)(vi) of the Act or Article 12 of the India-US DTAA) nor as “FTS” (under Section 9(1)(vii) of the Act or Article 12 of the India-US

	DTAA). The Delhi HC affirmed the above view of the Delhi ITAT.
Use of equipment	
Poompuhar Shipping Corporation Ltd. v. ITO (IT) [2014] 360 ITR 257 (Madras)/	Payment for time charter was held to be in the nature of "royalty" as per section 9(1)(vi) of the Act ("use of industrial, commercial or scientific equipment"). The retrospective amendments by FA 2012 by insertion of Explanations 4 and 5 has removed all doubts as far as interpretation of "use or right to use.
West Asia Maritime Ltd v/s ITO [2013] 2629 to 2630 of 2006 (Madras HC)	Payment for bare boat charter was held to be in the nature of "royalty" as defined in section 9(1)(vi) of the Act / Article 12(3) of the India-Cyprus DTAA.
Cargo Community Network Pte Limited [2007] (289 ITR 355) (AAR)	Payment made by agents for procuring a password to access and use sophisticated services of a portal was held to be in the nature of "royalty" as per Article 12 of the India-Singapore DTAA as well as section 9(1)(vi) of the Act.
Dishnet Wireless Ltd., In re [2012] 24 taxmann.com 298 (AAR)	Payment made for right to use a high capacity submarine telecommunication fibre-optic cable system taxable as royalty.
Sical Logistics Ltd vs. ADIT (Intl tax) [2012] 25 taxmann.com 13 (Chennai ITAT)	Availing the services of vessels owned by foreign shipping companies for transporting coal by chartering of vessels and payment of hire charges in this regard for moving coal would not amount to royalty ("use of industrial, commercial or scientific equipment").
Dell International Services India (P.) Ltd. [2008] (305 ITR 37) (AAR)	In the context of definition of the term "royalty" as provided in section 9(1)(vi) of the Act and Article 12 of the India- US DTAA, the ambit of the term "use" (in relation to an "equipment") was discussed. It was concluded that the word "use" was not to be

	understood in a broad sense of availing the benefit of equipment. The context and collocation of the two expressions "use" and "right to use" followed by the words "equipment" suggests that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage is taken from sophisticated equipment installed and provided by another, it is difficult to say that the recipient / customer uses the equipment as such. The customer merely makes use of the facility, though he does not himself use the equipment.
Isro Satellite Centre (Isac) [2008] (307 ITR 59) (AAR)	Mere provision of segment capacity of a navigation transponder which enables transmission of uplinked data over the entire footprint of a satellite does not result in the grant of "right to use" an "equipment" (i.e. transponder).
Shin Satellite Public Co. Ltd. v. DDIT, (Intl Taxn)-2(2), New Delhi [2011] 12 taxmann.com 6 (Delhi ITAT)	The assessee was a satellite company having footprint in India. It received service charges from various T.V. Channels on account of providing facility of broadcasting their programmes through the transponders located in the satellites. The High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd. v. DIT [2011] 197 Taxman 263/ 9 taxmann.com 168, held that receipts earned from providing data transmission services through provision of space segment capacity on satellites did not constitute royalty within the meaning of section 9(1)(vi). Therefore, service charges received by assesse from various TV channels on account of providing facility of broadcasting their programmes through transponders located in satellites, were not liable to be taxed as royalty in India.
Atos Origin IT Services Singapore Pte. Ltd.* v. Assistant Director	Two expressions 'use' and 'right to use' followed by the word 'equipment' indicated that there must be some positive use or employment of equipment for the desired purpose.

of Income-tax-(Intl. Taxation) 1(1) [2011] 11 taxmann.com435 (Mum ITAT)	In the instant case, the assesse did not have the right to access the computer hardware except for transmitting raw data for further processing. Accordingly, the payment was not royalty within the meaning of article 12(3)(b).
DIT v. Nokia Networks OY [2012] 25 taxmann.com 225 (Delhi HC)	Supply of both hardware and software manufactured to Indian telecom operators from outside India on a principal to principal basis under independent buyer/seller arrangements and installation activities undertaken by its Indian subsidiary not taxable as royalty.
Channel Guide India Ltd. v. ACIT [2012] 25 taxmann.com 25 (Mum ITAT)	In absence of control and possession of user over equipment, amount paid to non-resident company cannot be held to be royalty for use or right to use any industrial, commercial or scientific equipment.
CIT v. Van Oord ACZ Equipment BV [2014] (51 taxmann.com 356) (Madras HC)	Amount received by foreign company for hiring out dredgers to its Indian subsidiary would not be taxable in India as royalty in accordance with Article 12 of India and Netherland DTAA. Amendment to Clause 4 of Article 12 of the DTAA with effect from 1.4.1998 deleting the term "payments for the use of the equipment" differentiates the case from Poompuhar Shipping Corpn. Ltd's [2014] 360 ITR 257.
CIT v. Andhra Petrochemicals Ltd. [2014] (114 DTR 41) (Andhra Pradesh HC)	The High Court held that if the assessee had paid lump sum consideration for supply and installation of machinery which involved transfer of technical know-how, the said payment could not be treated as royalty particularly when it was not related to any particular period.
DDIT v. Savvis Communication Corporation [2016] 158 ITD 750 (Mumbai ITAT)	A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it. Payment received for providing web hosting services though use of certain scientific equipment

	cannot be treated as 'consideration for use of, or right to use of, scientific equipment' which is a sine qua non for taxability under section 9(1)(vi), read with Explanation 2 (iva) thereto and also under article 12 of Indo-US DTAA.
Technip Singapore Pte. Ltd. v. DIT [2016] 385 ITR 408 (Delhi HC)	A Singapore company had entered into a contract with Indian company. Under contract for installation, the equipment was supplied by Indian company and it was used for rendering services to Indian company, control over it was with Singapore company. It was held that for the payment to be characterised as one for the use of the equipment, factually, the equipment must be used by Indian company. There is a difference between the use of the equipment by a Singapore company 'for' Indian company and the use of the equipment 'by' the Indian company. Since the equipment was used for rendering services to Indian company, it could not be converted to a contract of hiring of equipment by Indian company. Hence, consideration received for mobilisation/demobilisation should not be considered as royalty.
Intel Corporation v. DDIT [2016] 76 taxmann.com 125 (Bangalore ITAT)	Transfer of power supply equipment of Vanguard, testers and servers of IBM and HP not specifically programmed but are available in the market does not constitute transfer of any technology or know how or any other process and hence not in the nature of royalty as per the provisions of section 9(1)(vii) or as per the provisions of Article 12 of the DTAA.
Quaolcomm India (P.) Ltd. v. ADIT [2017] 162 ITD 493 (Hyderabad ITAT)	Payment for Customer Premises Equipment (CPE) installed at customer's premises to access network connection was not for use of scientific or commercial equipment within the meaning of 'royalty' under the Act since the CPE was not a personalised equipment for specific and exclusive use.

Atos Information Technology HK Ltd. V. DCIT [2017] (79 taxmann.com 26) (Mumbai ITAT)	The assessee provided services/facilities for data processing through computer hardware and software to Standard Chartered Bank (SCB). The Tribunal held as under: There is absolutely no transfer of any technology, information, knowhow or any of the terms used in Explanation 2 or any kind of providing of technology in the form of data centre, infrastructure, connectivity and application technology by the assessee to SCB for SCB's banking operations. Thus, the payment made by SCB to assessee-company does not fall within the realm of 'royalty' and hence cannot be taxed in India as royalty under section 9(1)(vi) Explanation 5 is to be read with section 9(1)(vi) which was there on the statute as on 1-4-1976. Clause (iva) to Explanation 2 was inserted from 1-4-2002. Thus, retrospective effect of clause (iva) cannot be deemed from 1-6-1976 and hence it cannot be held that Explanation 5 also applies to the said clause.
Information concerning industrial, commercial or scientific experience	
ThoughtBuzz (P.) Ltd., In re [2012] 21 taxmann.com 129 (AAR)	The activity of gathering, collating and making available or imparting information concerning industrial and commercial knowledge, experience and skill and, consequently, payment received from subscribers would be royalty in terms of clause (iv) of Explanation 2 to section 9(1)(vi) and article 12 of DTAA.
ONGC Videsh Ltd. v. ITO [2013] 31 taxmann.com 119 (Delhi ITAT)	Fees paid for procuring information available from website in respect of exploration of oil and gas being specialized technical knowledge and not of general nature is covered under category of 'royalty'.
ADIT (IT) v. Globus Stores (P.) Ltd [2012] 28	Subscription made by garment manufacturer to online fashion website constitutes royalty under the Act and the India-UK DTAA.

taxmann.com 117 (Mum ITAT)	
ONGC Videsh Ltd. v. ITO [2013] (141 ITD 556) (Delhi ITAT)	Payment of subscription fees for which assesse was granted a non-transferable and non-inclusive licence to assesse to use secret names and passwords to download desired information from the websites would constitute as 'royalty' under the domestic law under section 9(1)(iv) (sic) and (vi) along with article 13(3) of the DTAA with UK.
Ceat International SA v/s CIT [1998] (237 ITR 859) (Bombay HC)	An amount received for forgoing exports and for transferring export orders cannot be said to have arisen as a result of imparting any information concerning technical, industrial, commercial or scientific knowledge, experience or skill, nor can it be said to have arisen as a result of rendition of any managerial, technical or consultancy services.
CIT v/s HEG Ltd [2003] (263 ITR 230) (Madhya Pradesh HC)	Providing data of confidential nature (in the form of monthly compilation called “executive overview”) which contains information on Carbon Graphite Electrodes Industry could not be construed as “imparting of technical, industrial, commercial or scientific knowledge, experience or skill” of the supplier.
Hughes Escort Communications Ltd vs. DCIT [2012] 21 taxmann.com 171 (Delhi ITAT)	The activity of enrolling students, and providing infrastructure for accessing course material in a classroom by way of computer broadband access VSAT connectivity etc wherein there was no receipt of any right, title and interest in course material the nature of payment made to the University was not 'royalty'. This payment was not for use or right to use any copyright or literary work, instead it was purely a case of apportioning of fees attributable to the University as per affiliate agreement being remitted to the University and portion of fees collected for providing enrolment infrastructure in order to access study material by students was retained by Indian Company as its share.

Standard Chartered Bank v. Deputy Director of Income-tax* , (International Taxation)- 2(1) [2011] 11 taxmann.com 105 (Mum ITAT)	The appellant Standard Chartered Bank (SCB) is a non-resident company engaged in the business of banking in India through branches established in the different States of India. SCB entered into a Hubbing agreement with SPL, a company incorporated in Singapore for data processing support to the SCB for its business in India. That the data processing was done outside India No part of the payment could be said to be for use of specialized software on which data is processed as no right or privilege were granted to the company to independently use the computer. Hence not royalty.
ITO v. Kendle India (P.) Ltd [2013] 145 ITD 83 (Delhi - ITAT.)	It was held that remittance for procurement of commercial information being information on clinical trial test for onward transmission to the principal, the remittance made by the assessee is not for availing technical services and does not amount to royalty and is not liable for withholding taxes.
Thirumalai Chemicals Ltd. v DCIT [2013] 58 SOT 375 (Mumbai - ITAT.)	It was held that a catalyst in form of rings which was used in oxidation process of converting oxylene to pthalic anhydride, it did not amount to payment of royalty within meaning of Explanation to section 9(1)(vi) and, thus, assessee was not required to deduct tax at source while making said payment.
Diamond Services International (P.) Ltd. v/s Union Of India[2007] (304 ITR 201) (Bombay HC)	Charges paid for grading and certification reports for diamonds and other articles cannot be construed as "royalty" as defined in section 9(1)(vi) of the Act and Article 12 of the India- Singapore DTAA, since it does not – — Grant a "right to use" information concerning technical, commercial or scientific experience; or — Impart any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.

P.T. McKinsey Indonesia v. DDIT [2013] (141 ITD 357) (Mumbai ITAT)	Payment received by the assessee for supply of information which does not arise out of exploitation of the know-how generated by the skills or innovation of the persons who possesses such talent would not constitute as royalty.
ITO v. Heubach Colour (P.) Ltd. [2015] (54 taxmann.com 377) (Ahmedabad ITAT)	Payment for technical know-how cannot be treated as royalty
GECF Asia Ltd. V. DDIT [2014] (165 TTJ 696) (Mumbai ITAT)	In case of industrial, commercial and scientific experience, if services are being rendered simply as an advisory or consultancy, then it cannot be termed as "royalty", because the advisor or consultant is not imparting his skill or experience to other, but rendering his services from his own knowhow and experience. All that he imparts is a conclusion or solution that draws from his own experience.
Marck Biosciences Ltd. v ITO [2017] 80 taxmann.com 275 (Ahmedabad ITAT)	The assessee entered into an agreement with a US entity on account of professional fee for global biopharmaceutical strategic counselling and advisory services viz. (a) business promotion; (b) marketing; (c) publicity; and (d) financial advisory. The Assessing Officer held that these services are in the nature of 'royalty' for use of 'information concerning industrial, commercial and scientific experience.' The Tribunal held that while characterizing nature of payment what is to be seen is the activity triggering in consideration of which the payment is made. The fact that in the process of availing these services, the assessee benefits from rich experience of the service provider is wholly irrelevant in the present context. The payment is for rendition of services and not for right to use any information concerning industrial, commercial or scientific experience, in possession of the service provider. Therefore, the Tribunal held that the

	payment was not in the nature of 'royalty' under Article 12 of India USA DTAA.
Oncology Services India (P.) Limited v. ADIT [2017] 165 ITD 277 (Ahmedabad ITAT)	The Tribunal held that sharing of standard operating procedures (SOPs) amounts to sharing of 'information concerning industrial, commercial or scientific experience'. The Tribunal observed that the SOPs were 'matured validated standard procedures' which had been developed by German company over a period of time and approved by regulatory bodies. Therefore, the payment would fall within meaning of 'royalty' under article 13(3) of India Germany DTAA.
Supply of drawings, designs, etc.	
CIT v/s Davy Ashmore India Ltd. [1990] (190 ITR 626) (Calcutta HC)	Consideration for outright sale of drawings and designs (where the non- resident seller does not retain any property in them) cannot be characterized as "royalty" as defined in Article 13 of the India-UK DTAA.
CIT v/s Klayman Porcelains Ltd [1997] (229 ITR 735) (Andhra Pradesh HC)	Amount paid by an Indian company to a non-resident company for technical drawings pertaining to engineering of a kiln was not towards imparting any information concerning the working of, or the use of any patent, invention, model, design, secret formula or process. Since it inter alia involved an outright transfer of technical drawings (pursuant to which the kiln was constructed), it did not constitute income by way of "royalty" within the meaning of section 9(1)(vi) of the Act.
CIT v/s Neyveli Lignite Corporation Ltd [1999] (243 ITR 459) (Madras HC)	The total contract price paid to a foreign company towards designing, manufacture, supply, erection and commissioning of an equipment (not involving transfer of any license in a patent, invention, model or design) was not in the nature of "royalty" as defined in section 9(1)(vi) of the Act. The above conclusion was arrived at on the basis of the fact that the designs so provided were meant for the limited purpose of ensuring that the equipment met the special design requirements of

	the buyer (and accordingly, the sum so paid could not be construed as "royalty").
Pro-quip Corporation v/s CIT[2001] (255 ITR 354) (AAR)	Consideration for the sale of engineering, drawings and designs cannot be construed as "royalty" as defined in Article 12 of the India-US DTAA (given that this is a case of an outright sale).
CIT v/s Mitsui Engineering and Ship Building Co Ltd [2001] (259 ITR 248) (Delhi HC)	As in the case of Neyveli Lignite Corporation Ltd and Pro-quip Corporation, it has been held that consideration paid for design and working of a machinery (in a consolidated contract for supply of machinery which also includes aspects such as design, engineering, manufacturing, shop-testing and packing) cannot be construed as "royalty" as defined in section 9(1)(vi) of the Act.
Pfizer Corporation [2004] (271 ITR 101) (AAR)	Consideration received for the transfer of documents containing know-how and technical information (in the form of a dossier under a "sale and purchase of technology" agreement) is not in the nature of "royalty" as defined in section 9(1)(vi) of the Act. In this case, the AAR ruled that the transfer of technical information in the form of a dossier was a transfer of a "capital as`" and therefore, is excluded from the purview of the term "royalty" as defined in section 9(1)(vi) of the Act.
International Tire Engineering Resources Llc [2009] (319 ITR 228) (AAR)	In the facts of the case, under an agreement, a non-resident company agreed to grant to an Indian company (for a lump sum consideration) a perpetual irrevocable right to use the know-how as well as to transfer the ownership in tread and side wall designs and patterns required for the manufacture of radial tyres. Further, the non-resident company was to also provide technical assistance and training to the personnel of the Indian company so as to enable them to make proper use of the know how so supplied. It was held that the consideration paid for the

	transfer of ownership in tread and side wall designs and patterns required for manufacturing radial tyres cannot be construed as "royalty" as defined in section 9(1)(vi) of the Act as well as Article 12 of the India-US DTAA. Further, the consideration earmarked for technology transfer and product development was held to be in the nature of "royalty" as defined in section 9(1)(vi) of the Act and Article 12 of the India-US DTAA. Lastly, the consideration paid for technical assistance and training was held to be in the nature of "royalty" as per section 9(1)(vi) of the Act. Thereapart, the same was also held to be "FTS" as per section 9(1)(vii) of the Act and FIS as per Article 12 of the India-US DTAA.
CIT v/s Maggronic Devices (P.) Ltd. [2009] (228 CTR 241) (Himachal Pradesh HC)	Outright purchase of plant know-how and product know how from a non- resident cannot be construed as "royalty" as defined in section 9(1)(vi) of the Act.
DCM Limited [2011] 336 ITR 599 (Delhi HC) s	It was held that payment made for transfer of comprehensive technical information and know-how (which included all trade secrets and technical data, designs and drawings, etc.) cannot be construed as "royalty" as defined in Article 13 of the India-UK DTAA. In arriving at the above conclusion, the Delhi HC relied on the following observations – — Pursuant to the transaction, there was a complete transfer of technology and know-how on a non- exclusive basis to the acquirer which was confined to its factories in India and also included a conditional right to sub-license it to third parties (i.e. the acquirer did not acquire a mere right to use the technology and / or know-how owned by the seller). — The mere fact that the seller retained with it

	the right to transfer technology and / or know-how to other parties did not reduce the right obtained by the acquirer under the agreement to one of a mere user of technology and know-how. — For the purpose of being covered under the ambit of the term "royalty", the right conferred should be one of usage (as opposed to a transfer of the underlying right itself).
Finoram Sheets Ltd. V. ITO [2014](52 taxmann.com 206) (Pune ITAT)	Payment for obtaining plant know-how, i.e., designing, characterization of plant and machinery, etc., cannot be considered as payment falling within purview of 'Royalty'. The payments made for technical Product know-how or Process know-how though would fall under ambit of royalty.
Outotec GmbH [2015] 172 TTJ 337 (Kolkata ITAT)	Designs and drawings were sold by foreign customers to Indian customers for internal business purposes for setting up of their plants and not for any commercial exploitation. Accordingly, such designs and drawings amount to use of copyrighted article rather than use of a copyright and therefore, does not constitute royalty and in the nature of business income.
DCIT vs. VJM Media (P.) Ltd. [2016] 68 Taxmann.com 305 (Mumbai ITAT)	Payments in respect of downloading of photographs for exclusive one time use for publication in magazine in India without any right to edit or copy them is for the use of 'copyrighted article' and not use of 'copyright'. Hence, the payment was not royalty under article 12 of India-Singapore and India-UK DTAA
TNT Express Worldwide (UK) Ltd. vs. DDIT [2016] 70 Taxmann.com 129 (Bangalore ITAT)	Where assessee had entered into a composite agreement for providing various services, some of which are purely business/commercial services and others are knowledge and experience based services and it is unable to provide bifurcation of payment relating to each kind of services, then as per OECD Model Tax Convention, other part of

	services can also be given tax treatment as given to principal part of services
Miscellaneous	
Abc [1999] (238 ITR 296) (AAR)	In this case, the Indian company made payment to an American company for having access to and use of its CPU at USA (through a consolidated data network) and to retrieve the processed data using the software developed and protected by the American company. It was held that the payment was for the use of "embedded secret software" (i.e. an encryption product) developed for the purpose of processing raw data and it therefore falls within the ambit of Article 12(3)(a) (i.e. consideration for use of, or right to use ..... design or model, plan, secret formula or process or for information concerning industrial, commercial or scientific experience) as opposed to Article 12(3)(b) of the India- US DTAA (i.e. payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment). While arriving at this conclusion, the AAR observed that generally a "royalty" payment would have the following characteristics - (1) It is a payment made in return for a right to exercise a beneficial privilege or right; (2) The payment is made to the person who owns the right; and (3) The consideration payable is determined on the basis of the amount of use.
Essar Oil Ltd. v/s JCIT [2005] (4 SOT 161) (Mumbai ITAT)	Fee paid towards annual surveillance of credit rating certificate is taxable as "royalty" as defined in Article 12 of the India-Australia DTAA. In arriving at this conclusion, the ITAT relied on the observation that a credit rating certificate is a "commercial information" since it is mandatorily required for raising resources from the international markets. Further, for the period for which the credit

	rating certificate is issued, the company has absolute rights to utilize it for the intended purposes (unless such rating is changed by the rating institution depending upon developments subsequent to the issue of credit rating certificate). Accordingly, the credit rating certificate can also be viewed as rights acquired by the company which can be used for mobilization of higher resources at an appropriate cost.
Snam Progetti Spa v/s JCIT [2005] (95 TTJ 424) (Delhi ITAT)	Tax audit under section 44AB of the Act would not be required in a situation where a non-resident company is chargeable to tax on a gross basis in relation to royalty / FTS income arising to it in India (assuming that the non- resident does not have any taxable presence in the form of a PE in India). The underlying reasoning for the above conclusion is that since the non- resident company is not claiming any deductions (permitted under the provisions of the Act) while computing its taxable income in India, it would be unfair to subject it to the cumbersome procedure of tax audit. Similar findings have also been upheld in ITO v/s Voest Alpine Industrieanlagenbau Gmbh. [1997] (67 ITD 219) (Calcutta ITAT). However, the fact pattern was slightly different in this case – Herein, the assessee was earning some income from India which was as such not liable to tax in India.
CIT v/s Aktiengesellschaft Kuhnle Kopp And Kausch W. Germany By BHEL [2002] (262 ITR 513) (Madras HC)	It was held that "royalty" paid on export sales by a resident to a non-resident is not liable to be taxed in India by virtue of the specific exclusion provided in section 9(1)(vi) of the Act (i.e. where the payer is a resident in India). In arriving at the above conclusion, the Madras HC observed that although the royalty was paid by a resident in India, it cannot be said to have "deemed to accrue or arise" in India (in the hands of the non-resident recipient) as the same was paid out of

	export sales (which is a source outside India for the payer).
Hindalco Industries Limited v/s ITO [2005] (96 TTJ 1009) (Mumbai ITAT)	Payments made to specialized credit rating agencies cannot be characterized as "royalty" as defined in Article 12 of the India-Australia DTAA.
Lanka Hydraulic Institute Limited [2011] (AAR) (unreported)	It was held that payment for services in the nature of field data collection / mathematical model studies / technology transfer are in the nature of "royalty" as defined in Article 12 of India-Sri Lanka DTAA. In this case, the component of technology transfer inter alia involved the procurement and installation of certain software (which was the heart and soul of the technology transferred). The AAR concluded that the transaction did not constitute the sale of an off-the-shelf product but was rather a case of provision of a scientific equipment for perpetual use. Accordingly, the consideration received by the non-resident company was held to be for the "use of scientific work, model, plan" and for the "use of scientific equipment and experience".
Atlas Copco AB of Sweden vs.CIT [2012] 18 taxmann.com 159 (Bom.)	Amounts paid would be taxable as royalty when there is no outright transfer of the know-how but only a right to use is provided for a specific period.
'A' Systems, The Netherlands, In re[2012] 21 taxmann.com 371 (AAR - New Delhi)	A group of company enters into an agreement to carry out the research and development programme. As per the agreement, each member shall individually spend on research and development, and allow other to use the product on payment of consideration. This cost sharing was treated as royalty as: • This payment occurs only on use of product of

	research and not otherwise • Though all parties are joint owners of intellectual property rights, rights are registered in name of applicant and payment for use of product is made to applicant • Consideration for the use of process or formula and hence royalty.
ACIT v Shri Balaji Communications [2013] 30 taxmann.com 100 (Chennai ITAT)	Payment made for acquiring right for satellite broadcasting of film amounted to 'royalty' within meaning of Explanation 2 to section 9(1)(vi).
ADIT v/s M/s. Universal International Music B.V. [2011] (Mumbai ITAT) (unreported) Affirmed by the Mumbai High Court in 214 Taxman 19 (2013)	DTAAs which India has entered into inter alia provide that in order to be eligible to claim benefits of the tax treatment / tax rates, etc. specified in the relevant Article of the DTAA (pertaining to royalty / FTS / FIS), the recipient should be a "beneficial owner" of the same. The Mumbai ITAT had the opportunity to examine this concept of "beneficial ownership" in the case of M/s. Universal International Music B.V. In the facts of the case, a Dutch company was in receipt of "royalty" income from an Indian company (it had acquired certain musical recording rights from other group companies and had licensed the same to the Indian company against payment of royalty). The Indian Tax Authorities alleged that the Dutch company was a mere collecting agent for its group companies and hence, benefits of the India-Netherlands DTAA should not be available to it. The Dutch company had submitted a certificate issued by the Tax Authorities of Netherlands which stated that it was regularly filing its return of income and paying taxes (including on the "royalty" income received from the Accordingly, the above certificate clearly indicated that the Dutch company was a tax resident of Netherlands and further, it was a "beneficial owner" of the "royalty" income received

	by it from the Indian company (within the meaning of Article company could be considered as the "beneficial owner" of the "royalty" income. In arriving at the above conclusion, the ITAT relied on Circular no. 789 of 2000) issued by CBDT and the SC ruling in the case of UOI & another v/s Azadi Bachao Andolan [2003] (263 ITR 706) and 12 of the India-Netherlands DTAA).
JC Bamford Investments Rocester v. DDIT, [2014] (33 ITR(T) 493) (Delhi - ITAT)	The royalty was to be paid by JCBI (Indian company) to the assessee (a UK company), who was to pass on 99.5 per cent of the same to JCBE (another UK company). The issue for decision was whether the benefit of lower rate of taxation would be automatically forfeited as the assessee was not the beneficial owner of royalty. The Tribunal held that it is not that if the formal recipient, a resident of UK, is not the beneficial owner, then the benefit is lost, notwithstanding the fact that the beneficial owner is also the resident of UK. Such relief of lower rate of taxation can be denied if the beneficial owner of the royalty is a resident of some third state, neither being India nor UK.
BIOCON Biopharmaceuticals (P.) Ltd. v. ITO [2013] (144 ITD 615) (Bangalore ITAT)	Issue of shares for right to use know-how would constitute as royalty as per section 9(1)(vi) of the Act. Payment in terms of money is not the only mode contemplated under the provisions of section 195(1). The use of the expression 'or by any other mode' in section 195(1) makes the intention of the legislature clear that those provisions are attracted even to cases where payment is made otherwise than by money.
ACIT v. Shri Balaji Communications [2013] (140 ITD 687) (Chennai ITAT)	Payment made for acquiring right for satellite broadcasting of film amounted to 'royalty' within meaning of Explanation 2 to section 9(1)(vi). Even if the transfer of rights is perpetual or even if the transfer is only a part of the rights, as long as transfer is of any right relatable to a copyright of a

	film or videotape, which is to be used in connection with television or tapes, the consideration paid would be royalty.
Kotak Mahindra Primus Ltd v/s DDIT [2006] (105 TTJ 578) (Mumbai ITAT)	In this case, an Indian company made payments to an Australian entity for specialized data processing (the mainframe computers processing the data being located in Australia). Based on a detailed analysis of all relevant clauses within the definition of "royalty" as provided in Article 12[156] of the India-Australia DTAA, the ITAT concluded that the payments under consideration should not qualify as "royalty".
Abc Ltd. [2006] (289 ITR 438) (AAR)	The consideration payable to a non- resident by a resident for the assignment of rights, interests and obligations under a turbocharger development and supply contract (originally entered into by the non-resident), does not inter alia fall within the ambit of the term "royalty" as defined in section 9(1)(vi) of the Act.
Standard Chartered Bank (Mumbai ITAT) (unreported)	Payment made by an Indian company to a Singapore company for providing data processing services is not in the nature of "royalty" as defined in section 9(1)(vi) of the Act and Article 12 of the India-Singapore DTAA (unless there is material to establish that the circuit / equipment through which data processing support is provided by the Singapore company could be accessed and put to use by the Indian company by means of positive acts). While ruling in favour of the assessee, the ITAT held that data center payments were for a standard facility and not for "use" or "right to use" any "process". The ITAT also held that the payment would not be

[156] In the India-Australia DTAA , there is no separate clause for "FTS", since the same is covered within the definition of "royalty" itself

	considered as payment for "use" or "right to use" equipment since the assessee did not have any "possessory rights" in relation to the equipment.
DIT v/s Sahara India Financial Corporation Ltd [2010] (321 ITR 459) (Delhi HC)	In the facts of the case, a resident had entered into an agreement with a non- resident for sponsorship of an international cricket tournament between India and Pakistan which was to be played in Canada. It was held that payments in connection with the aforesaid sponsorship should not be construed as "royalty" as defined in Article 13 of the India-Canada DTAA (since the sponsorship rights are not in the nature of "copyrights" as envisaged in the aforesaid definition).
Abb Ltd. [2010] (322 ITR 564) (AAR)	Payment representing share of cost incurred towards basic R&D activities (pursuant to a cost contribution / sharing agreement) cannot be characterized as "royalty" or "FTS" as defined in Article 12 of the India- Switzerland DTAA. However, the argument of the assessee that the payment represented a pure reimbursement of expenditure (and is hence not taxable in the hands of the recipient), was not accepted by the AAR.
B4U International Holdings Ltd vs. DCIT [2012] 21 taxmann.com 529 (Mum. ITAT)	The consideration paid for sale, distribution or exhibition of Cinematographic films does not fall within term 'royalty' in view of clause (v) of Explanation 2 to section 9(1)(vi) of the Act.
ADIT (International Taxation) -2(2) v. warner Brother Pictures Inc. [2012] 17 taxmann.com 171	Definition of Royalty under section 9(1)(vi) Explanation 2(v) excludes the payment received with reference to sale, distribution and exhibition of cinematographic films. As per article 12 of DTAA entered into by India with USA, the term Royalty does not include cinematographic films or work on films, tape or other means of production for use in connection with Radio or T.V. broadcasting. Therefore, the amount received by the assessee cannot be considered as Royalty.

Nimbus Communications Ltd v DDIT (IT) [2013] 32 taxmann.com 53 (Mumbai ITAT)	Consideration for live telecast of an event is not royalty because there is no copyright in a live event. Similar view has been taken by the Delhi High Court in the case of CIT v. Delhi Race Club (1940) Ltd. [2014] (51 taxmann.com 550).
DDIT v. Marriott International Licensing Company BV [2013] 144 ITD 333 (Mumbai ITAT.)	A perfunctory look at the definition of term 'royalties' as per the para 4 of the article 12 of the DTAA makes it palpable that it represents payment received as a consideration 'for the use of or the right to use' any copyright of literary, artistic or scientific work including cinematograph films, patent, trade mark or design etc. The term 'royalties' as per article 12(4) contemplates a consideration for the use of or right to use of the defined property which is already in existence and the payment is agreed for its use or right to use. If the payment made is of such a nature which helps in the creation of the defined property, that cannot fall within the ambit of article12(4) of the DTAA.
Hero MotoCorp Ltd. v ACIT [2013] 156 TTJ 139 (Delhi ITAT.)	Payment made by the assessee towards sponsorship of various sports events wherein the assessee was entitled to advertise at venue and in brochures was held to be advertisement and not in the nature of royalty within the terms of Article 12 of India Singapore DTAA.
Delhi Race Club (1940) Ltd. v ACIT [2013] 144 ITD 292 (Delhi ITAT.)	Income generated from betting on basis of live telecast which was being shared on reciprocal basis between assessee and club hosting race was held not to be royalty under Act. Affirmed by Delhi High Court ([2015] 273 CTR 503)
Johnson & Johnson v. ADIT [2013] (ITA NO. 7865 OF 2010) (Mumbai ITAT)	Royalty income is not taxable on accrual basis under the India-USA DTAA as the word used in Article 12(1) of the DTAA is 'paid to a resident of other contracting state'.
Qualcomm	For taxing royalty under section 9(1)(vi)(c) what is

Incorporated v. ADIT [2013] (58 SOT 97) (Delhi ITAT)	important is not whether right to property is used 'in' or 'for the purpose' of a business, but to determine whether such business is 'carried on by such person in India'.
DDIT v. Nimbus Communications Ltd. [2013] (ITA NO.S 1598 and 2270 of 2011) (Mumbai ITAT)	Payment for obtaining licence for live telecast right of cricket series to be played outside India does not constitute royalty. The procedure of live telecasting, does not give birth to a 'work' capable of copyright and any consideration for live broadcasting cannot be considered as 'royalty'. The second or later telecasting of such event shall be considered as use of the 'work' and consideration for the broadcasting of such recorded matches shall be considered as payment for the use of copyright in such event.
Thirumalai Chemicals Ltd. v. DCIT [2013] (58 SOT 375) (Mumbai ITAT)	Payments made by assessee for importing a catalyst in the form of rings which was used in the oxidation process of converting oxylene to pthalic anhydride cannot be considered as 'royalty' for the purposes of the Act in absence of evidence to support that the payment for purchase of the catalyst included the payment for the purchase of any of the description mentioned in the Explanation to section 9(1)(vi).
KPMG India (P.) Ltd. v. ACIT [2013] (142 ITD 628) (Mumbai ITAT)	Payments for professional service for consultancy which were rendered outside India do not fall within the meaning royalty under Article 12.
CIT v. Voest Alpine A.G. [2015] (55 taxmann.com 489) (Delhi HC)	The assessee, Austria based Company had entered into agreement with Indian company for furnishing know-how and technical assistance for producing hydro power equipment It was held that 1. Consideration paid for technical services would be taxable as fees for technical services under Article 7 of the DTAA between India – Austria, to the extent the amounts were attributable to

	the activities performed by the assessee in India. 2. Consideration paid for right to use technical information and know-how would be taxable as royalty under Article 6 of the DTAA between India - Austria. 3. Consideration paid for furnishing technical services outside India, shall not be taxable in India
Agence France Presse v. ADIT [2014] (51 taxmann.com 186) (Delhi ITAT)	Where assessee, an International News Agency having its headquarters in France provides a gamut of service covering three categories, namely, news item, news story, photographs or news without any split, and categories were interlinked, it should be construed as composite service possessing 'modicum of creativity' and copyright subsisted in news reports and photographs distributed/circulated by assessee. Such copyright would qualify as 'royalties' within meaning ascribed under paragraph 3 of Article 13 of DTAA between India and France
ACIT v. Sundaram Asset Management Co. Ltd. [2014] (52 taxmann.com 466) (Chennai ITAT)	Payment to provide investment advice for investments to be carried outside India could not be treated as royalty as it did not include any information provided in course of advisory services
S.P.Alaguvel v. DCIT [2014] (52 taxmann.com 231) (Madras HC)	Transfer of satellite right to assessee under an agreement for a period of 99 years, in terms of section 26 of Copyright Act and definition under clause (5) of Explanation 2 to section 9(1)(vi) is a sale and, therefore, excluded from definition of royalty under section 9(1)
ACIT v. NGC Networks (I.) (P.) Ltd. [2014] (150 ITD 772) (Mumbai ITAT)	Channel placement fee paid to cable TV operator/DTH provider could not be regarded as royalty in terms of Explanation 2 to section 9(1)(vi)
DIT v. Haldor	Payment in relation to a contract for supply of

Topsoe [2014] (369 ITR 453) (Bombay HC)	equipment and spare parts including stipulations for giving basic information so as to guide on installation of equipment at site and thereafter to use it would not be royalty as there is no transfer of rights in the nature contemplated by clauses (i) to (v) of the Explanation 2 to be termed as 'royalty'.
Calicut University Central Co-op. Stores Ltd. V. ITO [2014] (66 SOT 234) (Cochin ITAT)	The use of coma after the words "copyright", "literary", "artistic" or "scientific work" in clause (v) of Explanation 2 to section 9(1)(vi) clearly shows that the legislature intended to treat the words "copyright", "literary" independent of "artistic or scientific work. It is only in respect of artistic or scientific work, the legislature intended to include films or video tape for use in connection with television or radio broadcasting. Amount paid to author of books for printing and publication of copyright or literary work of authors for use of students, would therefore fall within definition of royalty under the Income-tax Act.
Mrs. K. Bhagyalakshmi vs. DCIT [2014] 265 CTR 545 (Madras HC)	Where assessee acquired satellite television rights of some films for a period of 99 years under irrevocable deed of transfer with a liberty to telecast said film without any liability and even with a further right to assign in favour of third party copyright to broadcast said firm, it was a case of sale of satellite television rights and, thus, payment made for same would not fall within definition of 'royalty' as per Explanation 2 to clause (vi) of section 9(1). On a similar set of facts, followed by Hyderabad Bench of Tribunal in case of ACIT v Aishwarya Arts Creation (P.) Ltd. [2015] 67 SOT 245.
DDIT vs. Set Satellite (Singapore) Pte. Ltd. [2014] 269 CTR 197 (Bombay HC)	Where payment made by assessee, a Singapore based company, to another tax resident of Singapore, for acquiring cricket telecast rights throughout licence territory including India had no connection with marketing activities carried out through its permanent establishment in India, such

	payment was not chargeable to tax in India. Thus, there is no economic link between the payments. The payer was not a resident of India and the liability to pay royalty had not been incurred in connection with and was not borne out by the PE of the payer in India.
Flag Telecom Group Ltd. vs. DCIT [2015] 54 taxmann.com 154 (Mumbai ITAT)	The foreign company received an amount towards transfer of the capacity in the undersea cable system for providing telecommunication link to the Indian company. The Tribunal held that the Indian company not only had an exclusive ownership over the capacity but also the exclusive right to use the capacity. The Indian company could assign or transfer or sell such capacity to any other party. Accordingly, there was no assignment of 'right to use' but it was 'sale of capacity' in the cable system. The taxpayer right from the stage of entering the MOU with the parties, signing of capacity sales agreement and C&MA agreement, intended to sale the capacity with transfer of complete ownership, risks and rights. The entire agreement was for the period of 25 years which coincided with the life of the cable. Accordingly, the signatory becomes the owner of the capacity in the cable system after the purchase. If the consideration has been received for transferring the ownership with all rights and obligations then such a consideration cannot be taxed under the head 'royalty' under Section 9(1)(vi) of the Act and hence constitutes 'business income'. The receipt of standby maintenance charges from the Indian company was in the form of fixed annual charge and there was no rendering of any service. If the taxpayer was providing some kind of repair services in the cable system, then it can be termed as 'technical services'. However, if there was no actual rendering of services, but mere collection of

	annual charge to recover the cost of standby facility, agreed by all the members of the consortium on proportionate cost basis, then the taxpayer was not providing any kind of 'technical services'. Therefore, such receipt is not taxable as Fees for Technical Services under Section 9(1)(vii) of the Act. However, whenever payment is received on account of actual repair or maintenance carried out, then same would definitely fall within the ambit of FTS chargeable to tax under Section 9(1)(vii) of the Act.
Bayer Pharma AG [2013] (103 DTR 129) (Mumbai ITAT)	Where the Non Resident received payment only on account of use of knowhow and trademark, such receipt could only be taxed as Royalty u/s 9(1)(vi) of the Act and cannot be said to be transfer for the purpose of capital gains even if the agreement provides for assignment and transfer technical information and trademark for perpetual and exclusive use forever in the territory.
Gupshup Technology India (P.) Ltd. v. DCIT [2017] 162 ITD 643 (Mumbai ITAT)	Where assessee was engaged in sending SMS and for sending SMS it availed services of a telecom operator and it had neither any access nor control over equipments of telecom operator, payment made to telecom operator could not be treated in nature of royalty.
Reebok India Company vs. DCIT [2017] 79 taxmann.com 271 (Delhi ITAT)	Payment made as 'Right fees' was exclusively for use of marks for the purposes of promotion and advertisement and not for manufacture and sale of licensed products. Therefore, the payment was not in the nature of royalty or fees for the technical services.
WiFi Networks (P.) Ltd. v. DCIT [2016] 177 TTJ 767 (Bangalore ITAT)	Where a new co-promoter acquired 51 per cent of shares of assessee from original promoter and right envisaged in relevant share subscription agreement was only for acquiring controlling interest in new initiative of original promoter, the

	consideration paid to the assessee could not be treated as royalty.
DDIT v. IMG Media Ltd. [2016] 67 taxmann.com 343 (Mumbai ITAT)	Consideration received for live audio and visual coverage of cricket matches is neither 'fees for technical services' nor 'royalty'. It was held that the concept of make available was not satisfied in case of production of 'program content' by using technical expertise and the consideration was not taxable as 'fees for technical services'. Further, it was also held that live coverage of events and broadcast does not have a 'copyright' and hence not royalty.
DCIT v. Vertex Customer Management Ltd. [2016] 158 ITD 365 (Delhi ITAT)	Where assessee received reimbursement from its India entity for use of equipment situated outside India and it could not be established that same was on cost to cost basis, it was taxable as royalty in India.
Regents of the University of California UCLA Anderson School of Management Executive Education, USA, In re [2016] 387 ITR 398 (AAR – New Delhi)	Applicant, a US based non-profit public benefit corporation formed for purposes of providing education, enters into agreement with Indian concern to launch management program in order to train senior executives of various companies in India. While carrying out management program, applicant makes available programs of Harvard Publishing University which are publishing material for all over world, amount received by it for providing said material is not liable to tax in India as 'royalty' under article 12 of India-USA DTAA
DIT v. ATN International Ltd. [2016] 242 Taxman 8 (Calcutta HC)	The assessee, a producer of the tele-programmes provided the contents in the form of tapes to the foreign party, engaged in business of broadcasting TV program and said company broadcast the contents through its satellite and in lieu of such broadcasting, foreign party was paid various sums from time to time. Payment made by the assessee would not partake of the character of 'royalty'

	under India- Thailand DTAA as it is not for the use of copyright.
DCIT v. Nava Bharat Ventures Ltd. [2016] 76 Taxmann.com 46 (Visakhapatnam ITAT)	Payment of open access charges towards transmission of electricity from plant to various parts of the country, through transmission lines owned by Power Grid Corporation of India is not in the nature of royalty as defined in clause (iva) of Explanation 2 of section 9(1)(vi) of the Act on the basis that
DCIT v. Welspun Corporation Ltd. [2017] 183 TTJ 697 (Ahd ITAT)	Payment of subscription fees for specialized database containing copyright material was for the use of copyrighted material and not for the use of copyright. Hence, the payment cannot be treated as royalty payments.
ITO v. Cadila Healthcare Ltd. [2017] 162 ITD 575 (Ahd. ITAT)	Payment to a US based entity for access to its online publication/database is not for the use of copyright, but for the copyrighted material. Thus, the payment in could not be treated as royalty.
DCIT v. Bombardier Transportation India (P.) Ltd. [2017] 162 ITD 586 (Ahd. ITAT)	The assessee, an Indian Company had made payment to a Canada based company for Information system ('IT') support services. It was held that: 1. Payments made for IT support services were in the nature of reimbursements in respect of specific cost allocations borne by the assessee. 2. Although the assessee was entitled to certain services during which certain equipment were to be used, however, that by itself did not result in any use of or right to use the equipment by the taxpayer 3. Even where a part of consideration was said to be on account of use of equipment, it was not possible to assign monetary value to each of the segment of this economic activity and consider that amount in isolation, for the purpose of deciding charter of that amount 4. Even if the payment is for use of software,

	since there was no transfer of copyright, it cannot be taxed as 'royalty'.
Piaggio & C.s.P.A v DCIT (IT) [2017] 80 taxmann.com 100 (Pune ITAT)	The assessee, a resident of Italy, had a subsidiary in India. The assessee had entered into an agreement with its subsidiary in India for manufacture of motor vehicles in 2003. In terms of said agreement royalty was offered to tax at the rate of 20 per cent as per DTAA between India and Italy. Subsequently, another agreement was entered into between both the parties on 1-8-2008 and the royalty was offered to tax at the rate of 10% under section 115A of the Act. The Assessing Officer imputed that the agreement was an extension of old agreement and entered into to take the benefit of old rate as per section 115A. The Tribunal after comparing the old and new agreement held that there were significant differences in the old and new agreements as to the products involved, area, scope, etc. and not merely an extension of the old agreement. Therefore, the assessee was held to be eligible for benefit of lower rate of 10% under section 115A of the Act.
Saira Asia Interiors (P.) Ltd. v ITO [2017] 79 taxmann.com 460 (Ahmedabad ITAT)	The royalty is taxable only on payment basis as per India Italy DTAA. Therefore, the liability to withhold under section 195 of the Act arises only at the time of actual payment and not at the time of credit of royalty amount to the account of payee. The Tribunal further held that even though the royalty is taxable only on payment basis as per the provisions of India Italy DTAA, the assessee can opt the rate of tax as per section 115A of the Act which is lower than the rate of tax as per India Italy DTAA. The Tribunal has also held that the adoption of lower rate under the domestic law, does not imply that non-resident recipient could have been saddled with tax liability at the point of accrual when, under the DTAA provisions, the non-

	resident could have been taxed only on payment basis and not on accrual basis.
CIT v Van Oord ACZ Equipment BV [2015] 373 ITR 133 (Madras HC)	The assessee is a tax resident of Netherlands. Income from letting out of dredging equipment in India was held to be not taxable as 'royalty', since the royalty definition as India Netherlands DTAA does not include within its scope 'payments for the use of equipment.'
CIT v Delhi Race Club (1940) Ltd. [2015] 273 CTR 503 (Delhi HC)	The assessee, a horse racing club, made payment for live broadcast of horse races. The Assessing Officer held that such payments were in the nature of royalty. The High Court examined in detail provisions of clause (v) of Explanation 2 to section 9(1)(vi) and also the provisions of Copyrights Act, 1957. The High Court held that the provisions of clause (v) of Explanation 2 to section 9(1)(vi) would be more meaningful if the word 'in' is read by implication in between the words 'copyright' and 'literary.' The High Court also held that live broadcasting of a live sports event is not a copyright and therefore does not amount to royalty under section 9(1)(vi) of the Act. The High Court also held that broadcasting also does not amount to use or right to us 'scientific work.'
Marriot International Inc. v. DDIT (2015) 170 TTJ 305 (Mumbai ITAT)	A US based company, belonging to 'Marriott' group, was engaged in business of operating hotels worldwide under different brands, viz., 'Marriott' and 'Renaissance'. It rendered advertisement and marketing services to the Indian hotels using aforesaid brand names. It has been held that these advertisement and marketing services carried out using these brand names would go to swell the existing brand names and is hence taxable as royalty in terms of Article 12 of the Indo-US DTAA.
Google India (P.) Limited v. ACIT [2017] 86 taxmann.com 237	Google India Private Limited ["Google India"] is a wholly-owned subsidiary of Google International LLC, US. Google India had been appointed by Google Ireland Ltd. ["GIL"] as a non-exclusive

(Bengaluru ITAT)	authorized distributor of "Adwords Programs" to advertisers in India. The Adwords Program Distribution Agreement allows Google India to access all intellectual property and confidential information which is used for activities related to the Distribution Agreement. Google India is also having access to the IP address of the desktop / laptop / tablet, photographs of users and the time spent on websites, eating habits, wearing preferences, etc. Further, the Google search engine has access to data pertaining to the user of the website in the form of name, sex, age, city, state, religion, etc. Accordingly, the Tribunal observed that the Distribution Agreement is not merely an agreement to provide advertisement space but is also an agreement for facilitating display and publishing of an advertisement to the targeted customer. Further, the Tribunal observed that the IP of Google vests in the search engine, technology, associated software and other features, and hence use of these tools for performing various activities, including accepting advertisements, providing before / after sales services, clearly falls within the ambit of royalty. The Tribunal also noted that as per the terms of the Distribution Agreement, Google India was permitted to use tradename, trademarks, service marks, domains or other distinctive brand features of GIL solely for the use under the Distribution Agreement, on a non-exclusive, non-sub-licensable basis for the purposes of marketing and distribution of the Adwords Program. Accordingly, it was held that the payments made by Google India under the agreement were not only for marketing and promoting the Adwords Program but was also for the use of Google brand features. Thus, payment made by Google India to GIL was royalty chargeable to tax in India under the Act as well as India Ireland DTAA.

Annexure E

Some Judicial Precedents on Income Characterization under the Head "FTS / FIS"*

Managerial Services	
J. K. (Bombay) Ltd. v/s CBDT [1979] (118 ITR 312) (Delhi HC)	This decision was rendered in the context of section 80-O of the Act. It has discussed in detail the meaning of the term "management". The Delhi High Court relied on an article on "management sciences" in the Encyclopedia Britannica, wherein it was stated that "management" in organizations includes at least the following - a. Discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead towards the goals; b. Getting the organization to adopt the policies; c. Scrutinizing the effectiveness of the policies that are adopted; d. Initiating steps to change policies when they are judged to be less effective than they ought to be.
Linde A. G. v/s ITO [1997] (62 ITD 330) (Mumbai ITAT)	In the facts of the case, an Indian company was paying a fee to a foreign company in lieu of assistance provided by it to the Indian company for procuring raw materials (including conducting inspection and tests, etc.). The ITAT inter alia made the following observations– • By making purchases for the Indian company, no "consultancy" services were provided (since

* updated up to December, 2017

	no advice was given by the foreign company to the Indian company). • Further, it is also not a case of rendition of "technical service", since technical education is concerned with teaching applied sciences and special training in applied sciences, technical procedures and skills required for the practice of trade or profession, especially those involving the use of machinery or scientific equipment. • Lastly, "managerial service" entails adoption and execution of various policies of an organization. It is of permanent nature for the organization as a whole. In making stray purchases, it cannot be said that the foreign company has been managing the affairs of the Indian company or is rendering any "managerial" services. Accordingly, for the above reasons, the ITAT held that procurement fees paid by the foreign company cannot be regarded as "FTS" as defined in section 9(1)(vii) of the Act or Article VIII of the India-Germany DTAA. Further, it was also held that the aforesaid procurement fees cannot be regarded as "royalty" as per section 9(1)(vi) of the Act or Article VIII of the India-Germany DTAA.
Haldor Topsoe v/s DCIT [1996] (57TTJ 53) (Mumbai ITAT)	The meaning of the terms "management" and "management services" was discussed at length. The ITAT concluded that "managerial service" would mean "handling man and their affairs". In this case, the foreign company was required to design, engineer, erect and commission a chemical fertilizer complex. In addition to the same, the foreign company had undertaken to provide construction management services (such as preparing a list of contractors, preparing bid documents for inviting tenders, evaluation of bids, preparing work orders, etc.).

	The ITAT held that these services could not be regarded as purely "technical" services not covering "management" services. Rather, they are "technical" services which include "managerial" services (which have been rendered by the foreign company).
XYZ [1997] (242 ITR 208) (AAR)	In the facts of the case, 5 expatriates were deputed by a foreign company to an Indian company to render managerial services under a management provision agreement. 4 out of these 5 deputationists were engineers. Further, 2 of the engineers had a degree in business administration as well. Also, the 5th deputationist (who was not an engineer) had a degree in business administration. Based on the above facts, the AAR held that these days, even engineers have to qualify in management skills. Since the AAR had no information or material on record to indicate that the deputationists were rendering services of a nature falling beyond the terms of the agreement, it concluded that in the given circumstances, their services are "managerial" in nature and not "technical" or "consultancy" services. Accordingly, the said services are not "included services" as defined in Article 12 of the India-US DTAA (since, the definition of FIS provided in this DTAA does not include "managerial" services).
Intertek Testing Services India Pvt. Ltd., [2008] (175 Taxman 375) (AAR)	In this case, the meaning of the term "managerial" services was discussed in detail. It was observed that the term "managerial" relates to "manager" or "management". Further, a "manager" is a person who manages an industry or business or who deals with administration or a person who organizes other people's activity. Also, the AAR observed that the SC had pointed out in R. Dalmia v/s CIT [1977] (106 ITR 895) that "management" includes the act of managing by direction, or regulation or superintendence.

	Accordingly, managerial service essentially involves controlling, directing or administering the business. While some services may be classified either under managerial or some other head, in such a situation, the test to be applied is whether they are predominantly "managerial" in nature.
Hughes Systique India (P.) Ltd. vs. DCIT [2014] 151 ITD 208 (Delhi ITAT)	Management fees paid by the assessee for rendering 'Payroll and related services' in respect of seconded employees in USA could not be considered as 'fees for included services' as per article 12(4)(b) of India - USA DTAA as nothing was made available to the assessee for use in future by rendering such services.
Technical services	
Hindustan Electrographites Ltd v/s IAC [1982] (145 ITR 84) (Madhya Pradesh HC)	Payment for trial tests conducted in France (so that after passing these tests, the diameter electrodes produced become acceptable in the international market) are towards "technical" services under the India- France DTAA.
Union Carbide Corporation v/s IAC [1993] (50 ITD 437) (Kolkata ITAT)	Dealing with specific problems of an Indian company (pertaining to production of pesticides) and offering advice thereon are in the nature of "technical" or "consultancy" services as appearing in the definition of the term "FTS" (under section 9(1)(vii) of the Act). Further, rendition of training and instruction to technical personnel are also in the nature of "technical" or "consultancy" services as appearing in the definition of the term "FTS" (under section 9(1)(vii) of the Act).
Cochin Refineries v/s CIT [1996] (222 ITR 354) (Kerala HC)	Tests conducted by a foreign company (to evaluate whether coke produced by an Indian company is suitable for making anode for aluminum industry) and reporting the conclusions thereof constitute a "technical" service. Accordingly, payments made in this regard would be in the nature of "FTS" as defined in section

	9(1)(vii) of the Act. Further, reimbursement claimed by the foreign company from the Indian company (as regards certain payments made by the foreign company to its personnel) would also be part and parcel in the process of advice of a technical character. Accordingly, the same would also be regarded as "FTS".
Central Mine, Planning & design Institute Ltd [1997] (67 ITD 195) (Patna ITAT)	In the facts of the case, a foreign company was providing technical assistance to an Indian company in the context of preparation of design, drawings and project reports. In terms of the contract, the Indian company had to inter alia pay the foreign company the following amounts – • Reimbursement of expenses incurred by the foreign company in connection with sending specialists and their salary; • Payments in connection with training of Indians in the USSR; • Payments in connection with preparation of appraisal report and project report, etc. The ITAT held that all the aforesaid payments were in the nature of "FTS" as defined in section 9(1)(vii) of the Act (since the underlying services qualified as "technical services").
TVS Suzuki Ltd v/s ITO [1999] (73 ITD 91) (Chennai ITAT)	Services rendered in the context of examining and improving overall fuel efficiency of carbureted engine of two-wheelers (through modification of existing designs) is a "technical" service. Accordingly, payments made by an Indian company to a foreign company in this regard would qualify as "FTS" as defined in Article 12 of the India- Austria DTAA.
Maruti Udyog Ltd. v/s ADIT [2009]	The ITAT held that carrying out impact tests on cars (to check their quality) and submitting test

(130 TTJ 66) (Delhi ITAT)	reports (which are further used in product development) amounts to rendition of "technical" services. Accordingly, payments made by an Indian company to a foreign company in connection with the above would qualify as "FTS" as defined in section 9(1)(vii) of the Act and Article 13 of the India-France DTAA.
XYZ Ltd., In re [2012] 19 taxmann.com 231 (AAR)	It was held that receipt from activities of inspection, verification, testing and certification services to various customers amounts to fees for technical services. The said services which applicant is rendering for a fee is a technical service rendered by carrying out tests and certifying that goods imported/exported confirmed to certain specifications, it would be chargeable to tax in India as 'fees for technical services' ('FTS') under section 9(1)(vii)(b). Also whether further payments received/receivable in connection with cost incurred and recovery of administrative cost are chargeable to tax as FTS under section 9(1)(vii).
Solar Turbines International Company, In re [2012] 21 taxmann.com 548 (AAR)	The activity of trouble-shooting repair and maintenance of turbines which includes activities like inspection and boroscoping would be fees for technical services under Act. Since the test of 'making available technical knowledge' in terms of paragraph 4 of Article 12 of DTAC cannot be said to be satisfied, amount received by applicant namely Solar Turbines in respect of said activities is not taxable in India. If a part of amount has to be ascribed to modifications incorporated by applicant in respect of which it grants a non-exclusive license to service recipient for its own use directly or through its contractors to enable service recipient to comprehend working of replaced parts or new technologies introduced while overhauling, then the

	said amount is liable to tax in India as fees for included services under paragraph 4(a), read with paragraph 3, of Article 12 of India-US DTAA.
DIT vs. Rio Tinto Technical Services [2012] 17 taxmann.com 70 (Delhi)	An assessee may carry on manufacturing or trading activities and can enter into a contract separately to furnish technical information for a fee to a third party. Fess received for such technical information received from third party is 'fee for technical services', as payment made is to acquire technical information.
US Technology Resources (P.) Ltd. v. ACIT [2013] 28 ITR(T) 26 (Cochin - Trib.)	It was held that where a company was giving training to the assessee's employees in making use of the inputs, experience, experimentation, assistance and advice rendered by them for taking a better and possible decision in order to achieve the desired objectives / goal, the same, would be in the nature of technical services which facilitate the assessee to take correct and suitable decisions. Therefore, the technical knowledge, experience, skill with regard to financial and risk management was made available in the form of advice or service to the assessee and would come under the ambit of FIS under Article 12 of India US DTAA.
Brigade Global Services (P.) Ltd. v. ITO [2013] 143 ITD 59 (Hyderabad - ITAT.)	Where efforts of technical personnel were involved in availing the internet connection and the incidental services, payment made by the assessee to service provider had to be treated as fees for technical services and, hence, the assessee was under obligation to deduct tax at source from the same.
ACIT v Evolv Clothing Co. (P.) Ltd [2013] 142 ITD 618 (Chennai ITAT)	It was held that the word technical services would imply an operation involving skilled precision which 'systematic research' also involves. Therefore, systematic research service falls under definition of technical services under Section 9 of the Income-tax Act, 1961 and article 13 of DTAA between India and Italy.

Skycell Communications Ltd. and another v/s DCIT and another [2001] (251 ITR 53) (Madras HC)	This decision was pronounced in the context of section 194J of the Act (i.e. deduction of tax at source while paying royalty / FTS / fees for professional services to a resident – for the purpose of section 194J of the Act, the term "FTS" would have the same meaning as provided in section 9(1)(vii) of the Act). The Madras HC held that when a person decides to subscribe to a cellular telephone service, he does not contract to receive a technical service. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a "technical service" to the subscriber. Accordingly, the provisions of section 194J of the Act would not be triggered in such a case.
Idea Cellular Ltd. v/s DCIT [2008] (313 ITR 55) (Delhi ITAT)	This decision was again pronounced in the context of section 194J of the Act. Payment of interconnect charges to other telecom service providers In the present case, the assessee was providing telecom services to its subscribers and certain calls were routed by making use of the network of BSNL and for this purpose, the call charges received by the assessee from its subscribers were being shared with BSNL. The ITAT held that the case is similar to the Madras HC decision in the case of Skycell Communications Ltd. [2001] (251 ITR 53) and hence, the payment cannot be construed as "FTS". Accordingly, the obligation to withhold tax under section 194J of the Act would not arise.
CIT v/s Estel Communications P. Ltd [2008] (318 ITR 185) (Delhi HC)	The Delhi HC held that merely because the use of internet facilities requires sophisticated equipment does not mean that "technical services" are being rendered by an internet service provider. A simple case of payment for provision of bandwidth cannot qualify as "FTS" as defined in section 9(1)(vii) of the Act.

CIT v Kotak Securities (2012)(340 ITR333)(Mum HC)	.Transaction charges paid to BSE for BOLT trading system is "fees for technical services". The stock exchange renders managerial services as it manages the entire trading activity of members. The above case has been reversed by the Supreme Court [2016] 383 ITR 1
CIT v/s Bharti Cellular Ltd. [2011] (319 ITR 139) (Delhi HC)	The SC held that the words "technical services" as appearing in the definition of the term "FTS" (in section 9(1)(vii) of the Act) have to be read in a narrow sense by applying the rule of Noscitur a sociis (i.e. the meaning of an unclear word or phrase is to be determined or constructed on the basis of the words or phrases surrounding it), particularly because the words "technical services" come in between the words "managerial" and "consultancy services". Further, since both these terms (i.e. "managerial" services and "consultancy" services) involve some element of human intervention, the term "technical services" would also have to be interpreted accordingly (i.e. a "technical service" without human intervention would not be covered within the ambit of the definition of "FTS" as provided in section 9(1)(vii) of the Act). Though the ruling was set aside by the SC (330 ITR 239) on another issue the above principles will hold good.
DCIT v. Dr. Reddy's Laboratories Ltd. [2013] (144 ITD 302) (Hyderabad ITAT)	Payments for clinical testing services provided by foreign companies in US and Canada would not be taxable in India as fees from technical services under Article 12 of DTAA as there was neither transfer of technical plan or technical design nor making available of technical knowledge, experience or know how to the assessee company.
Dr. Reddy's Research Foundation, [2015] 68 SOT 47	Payments were made by Indian company to UK and Netherlands company for pre-clinical studies. As the Indian company has rights over the patents, secret knowledge, etc. attained during the course of

(Hyderabad ITAT)	conducting research, there is transfer of technical know-how and accordingly the payments constitute FTS as per provisions of section 9(1)(vii) and also definition for these technical services as per relevant DTAA with UK and Netherlands.
Siemens Ltd. v. CIT(A) [2013] (142 ITD 1) (Mumbai ITAT)	Any technology or machinery is developed by human and put to operation automatically, wherein it operates without much of human interface or intervention, then usage of such technology cannot per se be held as rendering of 'technical services' as contemplated in Explanation 2 to section 9(1)(vii).
ITO v. Right Florists (P.) Ltd. [2013] (143 ITD 445) (Kolkata ITAT)	Fees for online advertising could not be considered as fees for technical services as there is no human element involved in rendering the services.
ADIT vs. Joint Stock Company Zangas [2014] 149 ITD 9 (Ahmedabad ITAT)	Fees for providing services in respect of design and engineering for laying pipelines, preparing welding procedure, reviewing work procedure and deputing expert manpower for site review are in nature of technical supervision and qualify as fees for technical services
POSCO Engineering & Construction Co. Ltd. vs. ADIT [2014] 31 ITR(T) 255 (Delhi ITAT)	Amount received for rendering design and engineering services inextricably linked to offshore supplies of equipment, being in nature of technical services, was liable to tax in India as 'fees for technical services' under section 9(1)(vi)
DCIT vs. Velti India (P.) Ltd. [2014] 163 TTJ 691 (Chennai ITAT)	Carrier payments in order to transmit bulk SMS data could not be considered as fees for technical services as no technical knowledge required for rendering the services.
Cosmic Global Ltd. v. ACIT [2014] 48 taxmann.com 365 (Chennai ITAT)	Payment made for translation services involving translation of text from one language to another could not be considered as fees for technical services as it would not fall within scope of "fees for technical, managerial or consultancy service" as

	mentioned in Explanation 2 to section 9(1)(vii) of the Act
Birla Corporation Ltd. V. ACIT [2015] (53 taxmann.com 1) (Jabalpur ITAT)	Installation, commissioning or assembly of a imported plant, machinery or equipment, or any supervision activity connected therewith, is ancillary and subsidiary, as well as inextricably and essentially linked, to sale of such a plant equipment or machinery; therefore, any consideration for such installation, commissioning or assembly activities, or supervision services cannot be included in FIS or FTS Further, installation or assembly activities do not involve transfer of technology.
DDIT v/s A.P. Moller Maersk [2014] 64 SOT 50 (Mumbai - ITAT) Affirmed by the Supreme Court in [2017] 392 ITR 186	Assessee engaged in business of operation of ships developed software for running of shipping business globally in a more effective and efficient manner and access of such software was provided to various agents/group companies all over the world who used this software for facilitating the freight receipts from shipping, for which they reimbursed the cost to the assessee without any mark-up. Such recovery of cost cannot be taxed as FTS or royalty independently as the assessee is not rendering any service of managerial, technical or consultancy to its agent or group entities by allowing its group companies to be usage of software.
GFA Anlagenbau Gmbh [2014] 47 taxmann.com 313 (Hyderabad ITAT)	During the year under consideration, the assessee had received contractual receipts from an Indian company for rendering technical and supervision services. The assessee had rendered services to the above mentioned resident company by engaging foreign technicians at the work sites in India and the total stay of technicians deputed by the assessee company on the projects exceeded 183 days. (220 days). On the basis of these particulars of stay, Assessing Officer concluded that the assessee was having Permanent Establishment within the meaning of article 5 of DTAA between India and Germany.

	It is held that the assessee's supervisory activities do not constitute a Permanent Establishment in India under the provisions of the Act as well as article 5 of the India-German Treaty as assessee do not have any building site or construction site of its own. The assessee should be assessed for its supervisory activities under article 12 of the India-Germany DTAA as the activities being of a technical nature.
ITO v. Primenet Global Ltd. [2016] 48 ITR(T) 451 (Delhi ITAT)	Payment made for utilizing standard facilities which were provided by way of use of technical gadgets, since it did not involve technical services, payments made for utilizing such services was not in nature of fee for technical services.
Stempeutics Research (P.) Ltd. v. JCIT [2016] 161 ITD 677 (Bangalore ITAT)	Payment by a stem cell research company based in India, to its Malaysian subsidiary for carrying out clinical trial and R&D pursuant to Product Development agreement with Cipla, being service of technical nature constituted FTS under article 13 of Indo Malaysia Tax Treaty in absence of make available in the Tax Treaty
Consultancy services	
ADIT v/s Ess Vee Intellectual Property Bureau [2005] (7 SOT 38) (Mumbai ITAT)	Services pertaining to registration and enforcement of intellectual property rights are "consultancy" services and accordingly, payments made for the same are in the nature of "FTS" as defined in section 9(1)(vii) of the Act. Further, the fact that a service is a "professional service" does not affect taxability under section 9(1)(vii) of the Act (since there may be some amount of overlap between "professional services" and "technical, managerial or consultancy services").
English Indian Clays Ltd. v ACIT(IT) [2014] 64 SOT 25 (Cochin - ITAT)(URO)	Where the assessee company entered into an agreement with a foreign entity to identify potential customers and file a report regarding the market strategy and developmental studies would be in the nature of consultancy services taxable in India.

Sintex Industries Ltd. v. ADIT [2013] (141 ITD 98) (Ahemdabad ITAT)	The assessee company made payment to U.K. Company 'T' for providing details of fabric designs. As per the agreement, the consultant, in the present case, is required to deliver fabric designs for cotton shirting to the assessee every quarter. The consultant is also required to show and/or make available all documents/reports in respect of the transaction relating to this agreement and to provide detailed quantity report in writing to the client i.e. the assessee, along with specific /new design developed by the consultant. Therefore, the services rendered by the consultant to the assessee company are falling within Article 13(4)(c) of India UK DTAA and, therefore, it is FTS.
iGATE Computer Systems Ltd. vs. DCIT [2015] 53 taxmann.com 431 (Pune ITAT)	Transmission of data via technical gadgets without any human intervention won't amount to technical services.
CIT & others v/s Bharti Cellular Ltd. & others [2008] (319 ITR 139) (Delhi HC) Further to the HC ruling, the SC has also ruled on this matter (please refer to [330 ITR 239])	In this ruling, the meaning of the word “consultant” was discussed. The word “consultant” is a derivative of the word “consult” which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. “Consult” has also been defined in the Shorter Oxford English Dictionary (fifth edition) as “ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval for a proposed action”. The service also necessarily entails human intervention. A consultant (who provides the consultancy service) has to be a human being. Further, a machine cannot be regarded as a consultant.
Guangzhou Usha International Ltd., In re [2015] 378 ITR 465 (AAR New	A Chinese company renders market research services and provides expert advice for improvement of high quality of standards, advising on new development in China with regard to

Delhi)	technology/product/process-up gradation to its Indian holding company in connection with procurement of goods from vendors in China, said services would come within ambit of 'consultancy services' and taxable in India as FTS.
Dr. Reddy Laboratories Ltd., In re [2016] 289 CTR 24 (AAR New Delhi)	A pharmaceutical company enters into an agreement with its Russian subsidiary to avail of product promotion services. Product promotion services by way of meeting Doctors and Pharmacies and participation in pharmaceutical circles and distribution of promotional materials to medical/ pharmaceutical experts are neither managerial or consultancy in nature. Therefore, fee payable for such services is not fee for technical service under the Act and thus, not taxable in India.
Raytheon Ebasco Overseas Ltd. v. DCIT [2016] 158 ITD 200 (Mumbai ITAT)	A foreign company had entered into a contract with Indian company to set up a power plant in India. The nature of services rendered included providing of engineering and designing work, providing material based on overall design, providing quotations based on specifications developed by Indian company for the power plant, supplying drawing review to enable integration of the equipment and undertaking document of design. The services were split up under the head technical services, start-up services and overall responsibilities. The overall responsibility and management of the project was carried out from outside India and no PE was created in India. The technical services or the start-up services provided did not include any construction, assembly, mining or like projects and, therefore, the payment received would not constitute FTS as per the provisions of the Act. Based on contract entered into, the services provided under the contracts did not in any way make available technical knowledge and experience skill or know-how to the Indian

	company. It had supplied the equipment to Indian company outside India, so the payments made by Indian company to foreign company would not constitute FIS, as per article 12 of the Treaty. Article 12(5) of the Treaty stipulates that FIS would not include the amounts if same are inextricably and essentially linked to the sale of property. The services provided were linked inextricably and essentially to the start-up services and sale of equipment. Therefore, the payment received by it cannot be treated as FIS and payment received by foreign company under the contract constituted business profit within the meaning of article 7.
UPS SCS (Asia) Ltd vs. ADIT (Intl tax) [2012] 18 taxmann.com 302 (Mum. ITAT)	It was noted that activity of performing only destination services outside India by unloading and loading of consignment was not to be categorized as managerial services. Also payment in lieu of freight and logistics services could not be ranked as consultancy services. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the

	directions of the other for doing a specific task.. Thus it is manifest that the word `managing' is wider in scope than the word `executing'. Rather the later is embedded in the former and not vice versa. The word "consultancy" means giving some sort of consultation de hors the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc. that the same falls within the scope of "consultancy services". The word `consultancy' excludes actual `execution'. As noted above the word `technical' has been sandwiched between the words `managerial' and `consultancy' in Explanation 2 to sec. 9(1)(vii) and no definition has been assigned to the `technical' services in the relevant provision, we need to ascertain the meaning of the `technical services' from the overall meaning of the words `managerial' and `consultancy' services by applying the principle of nosticur a sociis. It has been held above that the `managerial services' and `consultancy services' pre-suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility albeit developed or manufactured with the use of technology is used, such a user cannot be characterized as using `technical services'.
Seismic surveys and related activities	
Wavefield Inseis Asa[2009] (320 ITR 290) and [2010] (322 ITR 645)	Findings identical to the rulings in the case of Geofizyka Torun Sp. Zo. O. Chrobrego and Seabird Exploration Fz Llc (i.e. taxability upheld under section 44BB of the Act).

(AAR)	
OHM Limited v/s DIT (AAR No. 935 of 2010) affirmed by the Delhi HC in 212 Taxman 440(2013)and Bergen Oilfield Services AS v/s DIT (AAR No. 857 of 2009) (AAR) (unreported)	Revenue from seismic survey is covered under section 44BB of the Act. In arriving at the above conclusion, the AAR relied on its earlier ruling in the case of Geofizyka Torun Sp. Zo. O. Chrobrego. The decision of the AAR was affirmed by the Delhi High Court. The Delhi High Court considered the provisions of section 44BB as amended by the Finance Act 2010. However they observed that the assesse was engaged in activities covered by the provisions of section 44BB which were more specific than section 44DA.
Oil & Natural Gas Corpn. Ltd. v ACIT [2013] 59 SOT 160 (Ahmedabad - ITAT)	Where the parties to whom the payments has been made for rendering technical services are not in the business of mining but they are in business of providing technical services for pre-mining/preparing for mining i.e., conducting seismic survey and rendering connected services, said payment would be liable to TDS under section 194J and not 194C.
Geofizyka Torun Sp. Zo. O. Chrobrego v/s DIT [2009] (320 ITR 268) (AAR)	Income from services in connection with seismic surveys, data acquisition, processing and interpretation of such data is covered under Section 44BB of the Act (i.e. special provision applicable to non- residents for computing profits and gains in connection with the business of exploration, etc. of mineral oil) and cannot be regarded as "FTS" as defined in section 9(1)(vii) of the Act.
Seabird Exploration Fz Llc [2009] (320 ITR 286) (AAR)	The assessee (a tax resident of UAE) had entered into a contract with a resident oil company for conducting 2D seismic survey, gravity and magnetic data acquisition and rendition of board seismic data processing services. It was held that payments in connection with the above services are covered under Section 44BB of the Act (i.e. special provision applicable to non-residents for computing profits and gains in connection with the business of exploration, etc. of mineral oil) and cannot be regarded as "FTS" as

	defined in section 9(1)(vii) of the Act. In arriving at the above conclusion, the ruling in the case of Geofizyka Torun Sp. Zo. O. Chrobrego was relied upon.
PGS Exploration (Norway) AS v. ADIT [2016] 383 ITR 178 (Delhi HC)	Payment received for carrying out 2D/3D seismic survey in connection with exploration of oil, would not be in nature of 'fees for technical services' in terms of Explanation 2 to section 9(1)(vii).
Miscellaneous	
Gartner Ireland Ltd. v. ADIT(IT) [2013] ITA 7101 OF 2010 (Mumbai - ITAT)	Subscription fee to subscribe to a research product sold by assessee amounted to royalty as per Section 9(1)(vi) of the Income-tax Act, 1961, read with article 12 of DTAA between India and Ireland.
G.V.K. Industries Limited & another v/s ITO & another [1997] (228 ITR 564) (Andhra Pradesh HC)	Success fee (@ 0.75% of the total debt financing), paid by an Indian company to a foreign company (which is a consultant) for preparing a scheme for raising finance and obtaining a loan (the services inter alia include financial structure and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the Indian company in loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a co-ordinated and expeditious manner) is in the nature of “FTS” as defined in section 9(1)(vii) of the Act. Affirmed by the Supreme Court in GVK Industries Ltd. [2015] 371 ITR 453 (SC)
Elkem Technology v/s DCIT [2001] (250 ITR 164) (Andhra Pradesh HC)	In this case, a foreign company entered into a contract with an Indian company for the supply of equipment as well as for providing engineering data and personnel services in connection with establishing a submerged arc furnace in India. The HC upheld that the amount received by the foreign company towards charges for providing engineering data and other personnel services

	(which were stated separately in the agreement) were in the nature of "FTS" as defined in section 9(1)(vii) of the Act. In arriving at the above conclusion, the HC did not accept the contention that the aforesaid sums received by the foreign company were for the purchase of equipment and towards "construction" of the project (and hence, provisions of section 9(1)(vii) of the Act should not be applicable).
Wallace Pharmaceuticals P. Ltd. [2005] (278 ITR 97) (AAR)	In the facts of the case, an Indian company engaged in the manufacture and sale of pharmaceutical products entered into an agreement with a foreign company for obtaining certain services (such as research relating to the business development practices of the Indian company, identifying certain target pharma and biotech companies in the US and outside US with a view to market the Indian company's products, etc.). The Indian company was to pay consultancy fees and commission to the foreign company for the aforesaid services. The AAR held that such consultancy fees and commission are in the nature of "FTS" as defined in section 9(1)(vii) of the Act. Further, the AAR held that the consultancy fees are not in respect of services utilized in business or profession carried on by the Indian company outside India or for the purposes of making or earning any income from any source outside India (and accordingly, the exclusion provided in section 9(1)(vii) of the Act cannot be applied).
International Hotel Licensing Company [2006] (288 ITR 534) (AAR)	An Indian company was making payments to a foreign company in connection with advertising, marketing promotion, sales programme and certain other special services being rendered by the foreign company (both, within and outside India). The AAR held that the above services would qualify as "managerial" and "consultancy" services.

	Accordingly, the amounts paid for these services would be in the nature of "FTS" as defined in section 9(1)(vii) of the Act.
Cargo Community Network Pte Limited [2007] (289 ITR 355) (AAR)	In the facts of the case, a foreign company was providing access to a web based portal to its agents in India. Further, the foreign company was also providing helpdesk support facility in relation to the web based portal (during office hours via telephone or email and on-site helpdesk support in cases where the issue could not be otherwise resolved). The AAR held that the charges paid for the said help desk support facility is in the nature of – "FTS" as defined in section 9(1)(vii) of the Act; and also "FTS" as defined in Article 12 of the India Singapore DTAA (being ancillary and subsidiary to the application and enjoyment of right to use a scientific equipment i.e. the web based portal).
Dr. Hutarew & Partner (India) (P.) Ltd. v/s ITO [2008] (123 TTJ 951) (Delhi ITAT)	Payments made to a non-resident company towards data processing charges (where the solutions being provided depend on the specific needs of the customer as opposed to being a standardized service) are in the nature of "FTS" a defined in section 9(1)(vii) of the Act.
Gmp International Gmbh[2010] (321 ITR 411) (AAR)	Amounts received by a consultant for the supply of architectural designs and drawings are in the nature of "FTS" as defined in section 9(1)(vii) of the Act and Article 12 of the India- Germany DTAA. The contention that this is a case of an outright sale of designs and drawings (and hence not taxable as FTS) was not accepted by the AAR.
Hms Real Estate Pvt. Ltd v/s CIT [2010] (325 ITR 71) (AAR)	Consideration received by a non- resident entity (which specializes in architecture) from a resident payer for development and sale of architectural designs and consultancy services (in connection with a construction project in India) was construed as "FIS" as defined in Article 12 of the India-US

	DTAA. This was a case of a consolidated contract and hence, the AAR held that the components of the contract could not be split up as such for determining the taxability (i.e. the contract had to be examined in entirety).
DDIT (Intl tax) vs. Toyo Engineering Corpn [2012] 22 taxmann.com 18 (Mum ITAT)	The activity of managing or supervising construction/erection of units and not directly entering into such activity was mixture of managerial, technical and consultancy services and, therefore, amount received by assessee squarely fell within purview of 'fees for technical services' as per Explanation 2 to section 9(1)(vii).
Metro & Metro v. Addl CIT (147 ITD 207) (Agra - ITAT)	Leather testing charges incurred by the assessee company was held to be FTS under section 9(1)(vii) of the Act and the DTAA with Germany. Further it was also held that a customer is not the source of income, he is an important part of the business and the exception under section 9(1)(vii) cannot be triggered merely because the customers were outside India or the assessee was a 100% export oriented unit.
De Beers UK Ltd. v. DDIT (IT) [2012] (53 SOT 319) (Mumbai ITAT)	Receipts from Marketing Contribution and value added services (VAS) is to be treated as fees for technical services as per section 9(1)(vii) and is to be taxed at rate of 10 per cent.
C.U.Inspections (I) (P.) Ltd. v. DCIT [2013] (142 ITD 761) (Mumbai ITAT)	Payment routed through holding or related company abroad for services received from third parties shall be subjected to TDS as if assessee has made payment to such independent party de hors routing of payment through holding company.
ITO v/s National Mineral Development Corporation Ltd. [1992] (42 ITD 570) (Hyderabad ITAT)	The ITAT held that erecting a conveyor belt is a form of “construction”. Section 9(1)(vii) of the Act does not specify the type of “construction” contemplated in the provision (i.e. the portion dealing with prescribed exclusions from

	the purview of FTS). Accordingly, even if loose parts of a machinery are assembled, it could be regarded as "construction of the machine". Given the above, payments made for erecting a conveyor belt should not be regarded as "FTS" as defined in section 9(1)(vii) of the Act.
Orissa Synthetics Ltd. v/s ITO & Others [1992] (203 ITR 34) (Orissa HC)	Payment of USD 350 per man-day by an Indian company to a foreign company for the time spent by experts of the foreign company (in providing services to the Indian company) would not be regarded as income chargeable under the head "salary". Accordingly, it cannot be excluded from the purview of "FTS" as defined in section 9(1)(vii) of the Act (i.e. this payment does not fall within the prescribed exclusion). However, the aspect as to whether the technical services of the technicians was connected with the "construction" work of the project (and would therefore be excluded from the scope of the term "FTS") was not separately examined.
CIT v/s Sara International Ltd [2008] (217 CTR 491) (Delhi HC)	This decision was rendered in the context of section 194J of the Act. The Delhi HC held that commission paid for export of wheat cannot be construed as "FTS" as defined in section 9(1)(vii) of the Act.
DDIT (Intl tax) vs. Sheraton International Inc [2012] 19 taxmann.com 122 (Delhi ITAT)	The assessee-company was engaged in business of providing various hotel related services to hotels across world. It entered into agreement with chain of hotels in India, to provide marketing and advertising services through its system of sales, promotion, public relations and reservations and income was received in form of marking fees, and fees for 'Frequent Flier Program' (FFP), and 'Starwood Preferred Guest' (SPG). The payments received were in the nature of business income,

	and not in nature of royalty or fees for technical services.
Guy Carpenter & Co. Ltd vs. ADIT (Intl tax) [2012] 20 taxmann.com 21 (Delhi ITAT)	It was held that payment received by assessee from Indian Insurance Co. in process of reinsurance risk placed by Indian Insurance Co. with International reinsurance companies was not taxable in India as 'fees for technical services.
CIT v. Angelique International Ltd [2013] 359 ITR 9 (Delhi HC)	Export commission paid outside India would not be chargeable to tax in India under section 9(1)(vii) of the Act prior to applicability of Circular No. 7 of 2009.
Bharat Forge Ltd. v. ACIT [2013] 36 taxmann.com 574 (Pune - ITAT.)	The Explanation to section 194J(1) defines professional service to mean the service rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board. The payments made by the assessee towards testing and inspection charges cannot be consumed as payments towards professional service. Therefore provisions of section 194C of the Act would apply and not section 194J of the Act.
ACIT v Dakshin Haryana Bijli Vitran Nigam Ltd. [2013] 59 SOT 133 (Delhi ITAT)	It was held that the expression 'technical services' takes colour from the expressions 'managerial services' and 'consultancy services' which necessarily involve a human element. The payment towards Wheeling/SLDC charges would not be liable for TDS as technical service where the technical service is not provided to the personnel of the assessee. It was also held that installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision to technical service to the customers for a fee.

Aqua Omega Services (P.) Ltd. v. ACIT [2010] (141 ITD 434) (Chennai ITAT)	Assessee was in business of providing underwater diving services in Saudi Arabia under a contract and paid fees to non-resident divers there. Held that fees paid for services utilized in business carried on outside India for purpose of earning income from any source outside India is not taxable.
CIT v ISRO Satellite Centre [2013] 218 Taxman 74 (Karnataka)	Where the assessee entered into an agreement with respect to launching, tracking of satellites and other services in this connection, the payments made under the agreement would come under the ambit of FTS under section 9(1)(vii) of the Act. However, since these services do not make available technical knowledge, experience, skill, know-how, or processes or consists of development and transfer of technical plan or a technical design, the payments made would not come under the purview of FTS under the DTAA with France and USA.
Adidas Sourcing Ltd. v. ADIT (IT) [2012] (55 SOT 245) (Delhi ITAT)	Income from services rendered by non-resident assessee company to Indian Company for sourcing of goods from outside India is 'commission' and not 'fee for technical services**'.**
DDIT (IT) v. Euro RSCG Worldwide Inc [2012] (140 ITD 210) (Mumbai ITAT)	'Creative fees' and 'database cost' received by assessee who acted as a communication link between its AEs and AEs, multinational clients were in nature of 'fees for included services' chargeable to tax in India; whereas 'co-ordination fees' was business profit which could not be taxed in India *as* assessee did not have a PE in India.
ADIT (IT) v BHEL-GE-Gas Turbine Servicing (P.) Ltd [2012] (151 TTJ 126) (Hyderabad ITAT)	Repairs of routine nature do not constitute 'FTS' as they are merely repair works and not technical services.
ITO v. Emami Paper	Dismantling of paper mill machinery was 'contract

Mills Ltd [2017] 163 ITD 212 (Kolkata ITAT)	of work' and not a 'contract of service'. In 'contract of work' the activity is predominantly physical; it is tangible. In 'Contract of service', the dominant feature of the activity is intellectual, or at least, mental. Payment made under contract of work could not be regarded as fee for technical services requiring deduction of tax at source.
Credit Lyonnais v. ADIT [2013] (144 ITD 644) (Mumbai ITAT) (Followed by DDIT(IT) v. Abu Dhabi Commercial Bank Ltd. [2013] 60 SOT 71 (Mumbai - ITAT)	Payment was made as fees and commission to sub-arranger for mobilizing deposits both in and outside India. An overview of the duties of sub-arrangers and collecting banks make it abundantly clear that these are in the nature of soliciting NRI customers for IMD of SBI and then to remit the amount invested by them to the designated branches. Thus, the same was not in the nature of 'managerial or technical or consultancy services'. Affirmed by Bombay HC in [2016] 238 Taxman 157 (Bombay)
IHI Corporation v. ADIT [2013] (58 SOT 225) (Mumbai ITAT)	The assessee was awarded three engineering and procurement contracts by 'P' in India. The contract consideration under these agreement is segregated into offshore portion and onshore portion. By means of Explanation under section 9(2), the rendering of services even outside India would be income of non-resident from fees for technical services within the purview of section 9(1)(vii) if such services are utilized in India. However, income from offshore services is exempt from taxation in India under the DTAA. Thus, the same cannot be taxed in India in the light of section 90(2).
Obeetee (P.) Ltd. v. ACIT [2013] [2013] 142 ITD 104 (Allahabad - ITAT)	Payments made by Assessee to non-resident for using its trade mark cannot be said to be fee for technical services.
Harvard Medical	The assessee for the purpose of Wockhardt award

International Inc. v. DCIT [2013] (58 SOT 329) (Mumbai ITAT)	is assisting 'WHL' in the selection of the awardees in the various medical specialties and is mainly providing structuring and managing of the Wockhardt selection committee to help them to select potential award nominees, providing selection criteria and invitation to the awardees to deliver scientific address at approximate clinical forums. From a reading of the nature of services under the agreement provided by the assessee to 'WHL' it is seen that the assessee is not doing any service, which falls within the definition of 'FIS' as contemplated in article 12 (4) of the DTAA. These are merely facilitation services with regard to the selection of awardees for Wockhardt Award and 'WHL' has not gained any technical knowledge from such services.
Vishwak Solutions (P.) Ltd. [2015] 38 ITR(T) 522 (Chennai)	Internet charges for data storage to a resident of US does not qualify either as royalty or FTS under the India-US DTAA. It is towards hiring of storage space and constitutes its business income.
Le Passage to India Tours & Travel (P.) Ltd. [2014] 369 ITR 109 (Delhi ITAT)	In order to promote its business in foreign countries the assessee had appointed agents in various countries to market its services and in lieu thereof, representation charges/retainership fee and commission was paid to them. Services rendered by the agents in this case are purely in the nature of advancement of business of the assessee-company and cannot be categorized as managerial/technical/consultancy services
Oxford University Press, In re [2014] 364 ITR 251 (AAR)	Retainer fees for promotion of sale and brand name of Assessee paid to non-resident cannot be said to be fee for technical services under section 9(1)(vii) of the Act.
ITO vs. Clear Water Technology Services (P.) Ltd. [2014] 36 ITR(T) 528 (Bangalore	Payment made by assessee to a US company for utilizing telecom services in USA did not constitute fee for technical services as it is nature of business profits.

ITAT)	
CIT vs. Faizan Shoes (P.) Ltd. [2014] 48 taxmann.com 48 (Madras HC)	The assessee engaged in the business of manufacture and export of articles of leather. It entered into an Agency Agreement with a non resident agent to secure orders from various customers and as per the terms of the Agency Agreement the business was transacted by opening letters of credit or by cash against document basis. The non-resident agent was responsible for prompt payment in respect of all shipments effected on cash against document basis. The assessee undertook to pay commission of 2.5 per cent on FOB value on all orders procured by the non-resident agent. The HC held that The services rendered by the non-resident agent can at best be called as a service for completion of the export commitment and would not fall within the definition of 'fees for technical services'.
DDIT vs. DQ Entertainment (International) P. Ltd [2014] 64 SOT 152 (Hyderabad - ITAT)	The production of animation films nor in the production of a part or certain episodes of an animation film did not have element of any Technical Services to attract the provision of Section 9(1) (vii) read with Section 5(2)(b) of the Act. Just because such expertise, knowledge, technology and experience is possessed by the party and the same has been utilized for rendering the services, it cannot be said that the services so rendered are in the nature of technical and consultancy services without making any technology available to the other party. The viewership of animation films was located outside India hence it is covered by exception provided to resident under section 9(1)(vii)(b) in respect of utilization of services for earning income from source outside India.
DDIT vs. JC Bamford Excavators	The assessee was a flagship company of JCB in UK which owned, developed and manufactured

Ltd. [2014] 43 taxmann.com 343 (Delhi ITAT)	excavators sold under the JCB brand name. It entered into a Technology Transfer Agreement (TTA) with its wholly owned subsidiary JCB India Ltd. In terms of agreement, the assessee granted intellectual property rights ('IPR') to JCB India for manufacture and market 'Excavator Loader' in the territory of India and outside under the trademark of 3DX. In terms of TTA read with IPAA, assessee also sent its personnel to the plant of JCB India for solving problems relating to the licensed products. The Tribunal noted that consideration received by the Taxpayer can be allocated to three income streams as follows: (i) consideration for the supply of IPRs under the TTA; (ii) consideration for services of employees occasionally visiting India for inspection and quality testing (Occasional Visitors) as part of the obligation under the TTA; and (iii) consideration for services of employees "loaned" to Indian Co on an assignment basis for providing technical assistance and overall management of Indian Co (Assignees). Consideration for the grant of use of IPRs in relation to the technical knowhow, patent rights and confidential information for the manufacture and sale of licensed products was taxable as royalty income in India under the treaty as well as under the Act. Consideration received for the provision of services of personnel was for the application/enjoyment of IPRs and it qualified as FTS under the Treaty, as well as the Act. In terms of the Treaty, where a right or property or contract for which the royalty or FTS is paid is effectively connected with a PE then such royalty/FTS would be taxed as "business profits" under Article 7 and Article 13 on royalty and FTS would cease to apply. The royalty income from IPRs cannot be said to be effectively connected with the Service PE and the

	same would be taxable as a royalty under the Treaty as well as under the Act. It is of significance to note that an effective connection is required to be seen between the PE and the "contract" from which such fees resulted and not such FTS per se. The mere fact that such fee is effectively connected with the PE is not sufficient to bring the amount within the purview of business profits. It also held that activities of inspection and testing by employees of the Taxpayer were undertaken to ensure that the quality of the licensed products adhered to the specifications/global standards, which was in the interest of the Taxpayer. Such activities would amount to stewardship activities and would not give rise to a PE in India. However, technical assistance which was rendered to the Indian subsidiary by employees of the Taxpayer resulted in a Service PE and fees for such technical services were effectively connected with the Service PE. Accordingly, such fees were taxable as business profits under the Treaty.
CIT vs. Model Exims [2014] 363 ITR 66 (Allahabad HC)	The foreign agents appointed for securing export orders would not provide any managerial services hence it would not qualify as fees for technical services under section 9(1)(vii) of the Act. Explanation added to section 9(1) by Finance Act, 2010 with effect from 1-6-1976 was not applicable in view of fact that agents did not provide any managerial services to assessee and they had their offices situated in foreign country.
ITO vs. Device Driven (India) (P.) Ltd. [2014] 29 ITR(T) 263 (Cochin ITAT)	The assessee, an Indian company was engaged in development and sale of software. The assessee paid export commission to the non- resident Director. As per the terms of agreement, the scope of work for export commission includes facilitate marketing of the services and will provide support as well as sales expertise for projects to be executed at customer site, generate leads and

	initiating interaction with end customers in the relevant competency areas of the assessee, support to assessee in evaluation from a business perspective, in the light of his relationships with the proposed clients and local expertise, assessee presentations and other Collateral proposals and contracts and hold periodic meetings with the assessee to track project progress and status. The ITAT held that the responsibilities and obligation placed upon the commission agent is more than what is normally placed upon agents working in normal business transactions. Customised software is highly technical product which is developed in accordance with the requirements of the customers. Even after the development, it requires constant on-site monitoring so that necessary modifications are carried out in order to make it suitable to the requirements. Unlike sale of commodities, the role of the commission agent is not limited but vast technical knowledge and experience is required to understand the needs of the clients, to procure orders, to identify the markets, making introductory contacts, arranging meetings with prospective clients, assisting in preparation of presentation for targeted clients, monitor status and progress of the projects etc. Accordingly, the services rendered are technical in nature.
Welspring Universal v. JCIT [2015] 153 ITD 496 (Delhi ITAT)	Export commission paid to non-resident agent for procuring export orders was not chargeable to tax in hands of said agent.
CIT v. Farida Leather Company [2016] 287 CTR 565 (Madras HC)	Agency commission/sales commission paid to non-resident agents, for services rendered outside India, in procuring export orders would not partake character of 'fees for technical services'.
CIT v. Maharashtra State Electricity Distribution Company Limited	The High Court held that the transmission and wheeling charges are not fees for technical services as no services provided to the assessee. System owner provided services like maintenance,

[2015] 375 ITR 23 (Bombay HC) (Bombay HC)	superintendence and repairs to transmission system is under his obligation towards the Electricity Act. The Supreme Court has dismissed the SLP filed by the Revenue [2016] 242 Taxman 369 (SC)
Bajaj Hindustan Ltd. [2011] 13 taxmann.com 13 (Mumbai ITAT)	Consultancy services (assistance in acquisition of business outside India) rendered was utilized by the Assessee for the purpose of earning income from a source outside India and therefore the payment by the Assessee of fees for technical services was outside the scope of Sec. 9(1)(vii) of the Act.
GKN Holdings Plc [2014] 50 taxmann.com 307 (Pune - Trib.)	The assessee was the proprietor of certain Trade Marks and had entered into agreements with GKN Sinter Metals Ltd. and GKN Driveline (India) Ltd. permitting them to use the trade marks in respect of various products and services. The revenue authorities opined that the subsequent agreements entered into in the year 2007 was extension of existing agreement between the contracting parties. Since it was extension of earlier agreement, the assessee would not get advantage of lower rate of taxability. ITAT held that provisions of section 115A(1)(b)(AA) does not debar the Assessee to enter into new agreements after change of situation in the provisions of section 115A(1)(b)(AA) as far as the reduced rate of royalty is concerned
CIT v. Sundwiger EMFG & Co [2003] (185 CTR 434) (Andhra Pradesh HC)	Separate payments for rendering of services in India by specialists employees of non-resident supplier of capital equipment being part and parcel of the sale consideration of machinery under the original agreement, payments made by resident to said specialists by way of daily payments, travel and pocket expenses, etc. was not income deemed to be accruing or arising in India to non-resident in terms of section 9(1)(vii) as there did not exist any business connection.

Flag Telecom Group Limited [2015] 69 SOT 679 (Mumbai ITAT)	Under the restoration activity the cable of the assessee is merely providing an alternative route to the VSNL for a certain period of time. Hence, it cannot be held that for providing such a standard facility through its cable system, the assessee is rendering any kind of technical services to the VSNL, so as to fall within the ambit of FTS u/s 9(1)(vii). For rendering of technical services there has to be delivery of technical skills through human element or there is a constant human endeavor in providing technical service or advice or make available such a technical skills or services. But if any technical equipment developed by human has been put to operation automatically, then usage of such a technology per se cannot be held as rendering of technical services. Transmission of a data or telecommunication through a cable is not a rendering of a technical service but a use of technical device/equipment. Thus, in our opinion such a standard facility for transmission of data and telecommunication traffic by cable operators cannot be termed as rendering of technical services. Therefore, Payment under the "Restoration Agreement" for use of alternative route of telecommunication using the spare capacity available in its cable system, not 'fees for technical services' u/s 9(1)(vii), holds it taxable as "business income".
Aditya birla nuvo ltd. Vs. [2011] 44 SOT 601 (Mumbai ITAT)	Consideration paid to foreign company was only for supervising the erection of machines which cannot be said to be a payment for assembly of machines to fall within the exclusion clause of Expln. 2 to s. 9(1)(vii); however, as persons who rendered services were not present in India for the required number of days as envisaged by art. 5(j) of the DTAA r/w art. 13(5), income was not chargeable to tax in India and there was no obligation to deduct tax at source on such payment.

Gupta overseas [2014] 42 taxmann.com 42 (Agra ITAT)	Where technical and consultancy services was utilised outside India and payment was made outside India, the same cannot be taxable in India
Marriot International Inc. v DDIT [2015] 41 ITR (T) 542 (ITAT Mumbai)	The assessee used to undertake international advertisement and marketing programs for "Marriott" and "Renaissance" brands on behalf of the hotels worldwide. The assessee received from three Indian hotels using the assessee's brand names, income for International Marketing and Marketing services. The assessing officer proposed to charge the income for the said services as royalty. On appeal, the Tribunal observed that one of the Marriot group companies is the owner of brands, another group company is authorized by the first company to give license to the hotels and collect yoyalty and the assessee company is entrusted with the job of undertaking international marketing works of both the brands. In view of these peculiar facts, the Tribunal observed that the real question was whether the Marriott had bifurcated royalty amount into more than one component. The tribunal held that the amount received by the present assessee company should be examined from the point of view of the original owner of the brand. The Tribunal concluded that the Indian hotels have considered agreements entered with M/s Marriott group as agreements pertaining to single transaction, but agreed to pay the amount to different companies. Thus, it is seen that the Marriott group has planned to dissect the single transaction into more than one component and further, Marriott group has seen that each of the component was received by a different company. The Tribunal held that this was a clear colourable devise to split the royalty consideration into different component taxable in the hands of different companies for tax planning purposes. The

	Tribunal therefore held that the entire income received for international marketing / advertisement activities was carried out in the name of 'Marriot' and 'Renaissance' and such expenses go to swell the existing Brand names referred above. Therefore should be taxed as 'royalty.'
Datamine International Ltd. v. ADIT [2016] 48 ITR(T) 229 Delhi ITAT	Training of personnel of end users for which the consideration had been received was ancillary and subsidiary to sale of software, such receipts were covered under article 7 as business profits and not as fees for technical services under article 13 of India-USA DTAA.
Bharti Airtel Ltd. v. ITO [2016] 47 ITR(T) 418 (Delhi ITAT)	Inter-connect Usage Charges paid by a telecommunication service provider to Foreign Telecom Operators in connection with its International Long Distance telecom service business cannot be characterized as Fee for Technical Services under section 9(1)(vii) of the Act since there is no manual or human intervention during the process of transportation of calls between two networks. In arriving at the above conclusion, the Delhi ITAT relied on judgment of the Supreme Court of India in the case of Bharti Cellular Limited [2011] 330 ITR 239. In respect of taxability under the DTAA, it was held that wherever under the DTAA's 'make available clause' is found, then as there is no imparting, the payment in question is not 'FTS' under the Treaty and when there is no 'FTS' clause in the treaties, the payment falls under article 7 of the Treaty and is business income.
Gujarat Pipavav Port Ltd. v. ITO [2016] 158 ITD 687 (Mumbai ITAT)	Where assessee, Indian company entered into Specific Purchase Contract with Chinese Company for supply of cranes and a Service Contracts for rendering installation and commissioning services in relation to such cranes according to which Chinese company transported cranes to designated site, provided installation and commissioning

	services as also after sales services and spare parts, since services were intrinsically connected to sale of goods, same could not be treated as FIS or FTS and they would constitute part of business income.
Bramhacorp Hotels & Resorts Ltd. v DDIT [2015] 61 taxmann.com 186 (Pune ITAT)	Where there is no transfer of technology, technical know-how or any technical knowledge or skill which can apply in furtherance of his business objects, payments for same to a Singaporean company does not fall within scope of 'fees for technical services' as per India-Singapore DTAA
UC Berkeley Center for Executive Education, USA, In re [2016] 289 CTR 106 (AAR New Delhi)	A US educational institution, non-profit corporate organisation, has entered into an agreement with an Indian company to launch management programmes for senior executives of various companies in India, programme fees received by applicant from Indian concern will be covered by article 12(5)(c) of India-USA DTAA.
BNP Paribas SA v. ADIT [2016] 69 taxmann.com 248 (Mumbai - ITAT)	A French bank carried on business in India through a branch office (PE), payment on account of data processing charges paid by Indian branch/PE to Singapore branch/PE could not be taxed in hands of French head office by applying provisions of Article 13 of India-France Tax Treaty.
ACIT v. BSR & Co. [2016] 70 taxmann.com 69 (Mumbai ITAT)	Professional services rendered outside India in relation to audit, taxation, transfer-pricing, information technology, background checks, etc. would be independent personal services in absence of fixed base or PE in India, payment would not be chargeable to tax in India
Technip Singapore Pte. Ltd. v. DIT [2016] 385 ITR 408 (Delhi HC)	Under contract for installation, though equipment was supplied by Indian company and it was used for rendering services to Indian company, control over it was with Singapore company and there was no transfer of technology, skill, experience or know-how by Singapore company to Indian company to undertake such activities on its own, payment to Singapore company would neither be royalty nor

	FTS
Batlivala & Karani Securities (India) (P.) Ltd.v. DCIT [2016] 159 ITD 924 (Kolkata ITAT)	Simple marketing services rendered by foreign subsidiary in form of introducing foreign institutional investors to invest in capital markets in India and no technical service was being made available, payments made to subsidiaries would not fall within definition of 'fees for technical services'
CIT v. Hero Motocorp Ltd. [2017] 81 taxmann.com 162 (Delhi HC)	Payment of export commission to export agent under export agreement where Indian company had not been transferred or permitted to use any patent, invention, model, design or secret formula and export agent had not rendered any managerial, technical or consultancy services and hence neither royalty nor fee for technical services.
DIT v. A.P. Moller Maersk A S [2017] 392 ITR 186 (SC)	A foreign shipping company, set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, payment received for providing said facility was not taxable as fee for technical services. IT system is an integral part of shipping business and business cannot be conducted without the same, it is only a facility that was allowed to be shared by the agents. Accordingly, the same cannot be treated as technical services.
DCIT v. Welspun Corporation Ltd. [2017] 183 TTJ 697 (Ahd. ITAT)	Assessee paid commission to non-resident export commission agents for highly technical products. It was held that just because a product is highly technical does not change the character of activity of the sale agent. The object of the salesman is to sell and familiarity with the technical details, whatever be the worth of those technical skills, is only towards the end of selling. Payment to non-resident commission agents was for securing orders and not for rendering any managerial, technical or consultancy services per se. The commission paid to non-resident export commission agents is not taxable in India whether

	or not the non-resident is tax resident of a jurisdiction having a tax treaty and whether or not the tax treaty has an FTS clause.
Atos Information Technology HK Ltd. v. DCIT [2017] (79 taxmann.com 26) (Mumbai ITAT)	Services provided through standard facility cannot be reckoned as rendering of technical services in terms of Section 9(1)(vii) of the Act in absence of imparting of any technical knowledge.
Reimbursement of expenses	
Timken India Ltd. [2004] (273 ITR 67) (AAR)	In the facts of the case, an Indian company entered into an agreement with its holding company (which is a foreign company) pursuant to which the foreign company would be rendering various services to the Indian company. These services would be rendered in the US (i.e. no part of the services would be rendered in India). The foreign company was to recover from the Indian company various costs incurred by it (without mark up) in connection with rendition of the aforesaid services. It was argued that the said consideration should not be liable to tax in India since it represents a "reimbursement" of expenditure with no "profit" element embedded therein. The AAR held that the consideration could not be said to represent "recovery" or "reimbursement" of costs and accordingly, the entire sum is liable to be taxed in India as "FTS" (as defined in section 9(1)(vii) of the Act) on a gross basis, irrespective of whether any "profit" element is embedded therein or not. A similar view as regards the "reimbursement" issue was also taken in the case of Danfoss Industries Private Limited [2004] (268 ITR 1) (AAR).
AT&S India Private Ltd. [2006] (287 ITR 421) (AAR)	In the facts of the case, a foreign company had seconded some of its personnel to an Indian company. The salary of the seconded personnel was being paid by the foreign company and cross

	charged to the Indian company without any mark up. It was contended that since the cross charge is only a reimbursement of the actual expenditure incurred by the foreign company on behalf of the Indian company (without any mark up or separate fee for the secondment arrangement), the same should not be liable to tax in India. The AAR held that the cross charge is for rendition of services of technical or other personnel. Accordingly, the same would be in the nature of "FTS" as defined in section 9(1)(vii) of the Act and Article 12 of the India-Austria DTAA. In arriving at the above conclusion, the AAR observed that the specific exclusion (i.e. other than payments to an "employee" of a person making payments) provided under Article 12 of the India-Austria DTAA shall not be attracted in the facts of the case. Further, while determining the taxability, it is not material as to whether the foreign company is charging any separate fee / mark up for the secondment of the personnel or not. It would also not be material as to whether the seconded personnel works under the direct control of the Indian company or not. A similar view as also been taken in the case of Steffen, Robertson & Kirsten Consulting Engineers & Scientists [1998] (230 ITR 206) (AAR).
Verizon Data Services India Private Limited [2011] (AAR) (unreported) Composite EPC contracts	In the facts of the case, the Indian company was engaged in rendering services (such as development and maintenance of telecom software solutions, IT enabled services) to its parent company in the US. To build efficiency into the system and to ensure optimal productivity, 3 personnel were seconded to the Indian company by another US company (which was an affiliate of the US parent company). One of these seconded personnel assumed the

	position of Managing Director of the Indian company. The role of the other two personnel was to liaise between the Indian company and the parent company and to supervise and provide directions on the manner in which the activities of the Indian company should be carried out. Under the secondment agreement, the Indian company was required to reimburse the US company for the salary and expenses paid by the US company to the seconded personnel (without any mark up or fee for the secondment). The AAR held that the services so rendered are in the nature of "managerial" services. Accordingly, the payments made would qualify as "FTS" as defined in section 9(1)(vii) of the Act and also as "FIS" as defined in Article 12.
CSC Technology Singapore Pte. Ltd vs. ADIT [2012] 19 taxmann.com 123 (Delhi ITAT)	An Indian company reimbursed the foreign company expenses in respect of SAP licence and RAS charges paid to third party for getting connectivity and no part of it was incurred for earning royalty/FTS by holding company. Such payments being reimbursement was not taxable in India. However, when reimbursements were in connection with travel expenses in connection with the technical service agreement, such expenses would be treated as royalty/ FTS and would be taxed on a gross basis.
M/s. IDS Software Solutions (India) Pvt. Ltd. v/s ITO [2009] (122 TTJ 410) (Bangalore ITAT)	In the facts of the case, an Indian company was securing the services of a personnel of a foreign company. The Indian company was to reimburse the foreign company for the remuneration of this personnel (including but not limited to salary, bonus and all out of pocket expenses) without any mark up (i.e. the foreign company was to pay the remuneration to the personnel and recover it from the Indian company).It was contended that since the aforesaid payment was in the nature of a reimbursement (without any mark up thereon), the

	same should not be liable to tax in India. The ITAT held that the payment cannot be construed as "FTS" as defined in section 9(1)(vii) of the Act. In arriving at the above conclusion, the ITAT relied on the following observations – • The secondment agreement constitutes an independent contract of service in respect of employment of the seconded personnel with the Indian company (though the contract as such is between the Indian company and the foreign company). • Although the foreign company is the employer of the personnel in a legal sense, the Indian company can be considered as the "economic employer", as it is the Indian company which actually controls the services of the seconded personnel in terms of the secondment agreement and the salary is met / borne by it. • Certain clauses in the secondment agreement dealing with duties and obligations of the seconded personnel (which include acting as an officer or authorized signatory or nominee or in any other lawful personal capacity for the Indian company) as well as the clause relating to indemnification would typically not feature in a contract for rendition of technical services. • The salary paid to the seconded personnel has been subjected to withholding tax and accordingly, the Indian company was not liable to deduct tax on the reimbursement representing the salary cost of the seconded personnel (payable to the foreign company).
DDIT v/s Tekmark Global Solutions LLC [2010] (131 TTJ 173) (Mumbai ITAT)	In the facts of the case, a foreign company had deputed its personnel to an Indian company (based on specific requirements of the Indian company). The salary of the deputed personnel was being paid by the foreign company and cross charged to the Indian company without any mark up. The ITAT inter alia held that the actual salary of the

	deputed personnel recovered from the Indian company is only a "reimbursement" of salary payable by the Indian company (advanced as such by the foreign company). In arriving at the above conclusion, the ITAT relied on the following observations – • The personnel work under the control and supervision of the Indian company. For all practical purposes, the personnel are employees of the Indian company. Further, the foreign company has no control over the activities or the work to be performed by the personnel. • The Indian company has the right to remove the personnel from service. • What the foreign company recovered from the Indian company was the actual salary payable to the deputed personnel. • These would clearly show that the deputation cannot be treated as a part of any "technical services" to be rendered by the foreign company to the Indian company.
Temasek Holdings Advisors (I) (P.) Ltd. v. DCIT [2013] 27 ITR(T) 125 (Mumbai ITAT)	It was held that payments made by the Indian company on account of reimbursement of salary of two employees and other costs, was not in the nature of 'fees for technical services', being rendering of managerial and consultancy services within the ambit of section 9(1)(vii) and also under article 12(4)(b) of the India Singapore DTAA.
Mahindra & Mahindra Ltd. v. Assistant Director of Income-tax (IT) Range-1 [2011] 16 taxmann.com 386 (Mum ITAT)	The payment-in-question was a reimbursement of expenses and was not in the nature of fees for technical services as contended by the revenue. The law is well settled that in respect of reimbursement of expenses there is no obligation to deduct tax at source. India-US DTAA. In arriving at the above conclusion, the AAR relied on the following observations –

	• The control and superintendence of the Indian company vests with the Managing Director. Hence, it may not be appropriate to assume that the Managing Director is under control and supervision of the Indian company; • During the period of secondment, the 3 personnel retained their employment with the US Company and further, the rights to terminate their employment was also with the US Company (and not with the Indian company). This goes to show that it was the US company which had rendered managerial services to the Indian company; • The application of "income" (i.e. the amounts received from the Indian company) by the US company for making payment of salaries to its personnel would not have any relation with the accrual of the said "income" in India. In other words, correlating the fees for services with the salaries paid to the personnel would not change the substance of the transaction to a "reimbursement".
Saipem S.A. v. DDIT (IT) [2012] (54 SOT 111) (Mumbai ITAT)	Where assessee, a non-resident, receives reimbursement of travelling expenses incurred by its personnel while performing technical services in India, from service receiver, such reimbursement being without any profit element cannot be treated as fees for technical services.
Abbey Business Services (India) (P.) Ltd v DCIT [2012] (53 SOT 401) (Bangalore ITAT)	Where an Indian company pays all expenses incurred by a foreign parent company towards employees seconded to Indian company, such payment, being pure reimbursement, cannot be regarded as income in hands of foreign company; neither can it amount to fees for technical services.
Centrica India Offshore (P.) Ltd. [2014] 364 ITR 336 (Delhi)	There is no distinction between the provision of services by the overseas entities and the mere secondment of employees, since the services provided by the overseas entities is the provision of technical services through the secondees.

	The Special leave petition has been dismissed by the Supreme Court [2014] 227 Taxman 368.
Morgan Stanley International Incorporated, [2015] 53 taxmann.com 457 (Mumbai)	The seconded employees will constitute service PE of the taxpayer in India. Accordingly, salary cost of said employees reimbursed by Indian companies will be governed under Article 7 of the India-US DTAA and not under Article 12 as FIS.
Cotecna Inspection India (P.) Ltd. vs. ACIT [2015] 56 taxmann.com 220 (Mumbai ITAT)	Even corporate advisory services, rendered at cost would assume nature of income in hands of NR payee as it is in the nature of specialized services, even at cost, would only impact their valuation, i.e., the cost of those services to the payer and not the character of the payment.
ADIT v. Aktieselskabet Dampskibsselskabet Svendborg [2014] 64 SOT 181 (Mumbai ITAT) (URO)	Assessee maintained a global telecommunication facility capable of supporting communication facility between itself and its agents in various countries on a combination of mainframe and non-mainframe servers located at Denmark. Cost for setting up global telecommunication facility was shared between assessee and its agents. Amount received by assessee towards shared IT Global Portfolio Tracking system from its agents could not be regarded as fee for technical service as it is reimbursement of expenses for providing a particular facility.
AMD Research & Development Center India (P.) Ltd., [2015] 67 SOT 230 (Hyderabad ITAT)(URO)	The issue was taxability of payments made by the assessee to its parent company ATI in Canada for software and engineering services rendered by SIPL, an independent service provider in India. The ITAT observed that services were rendered by SIPL pursuant to a contract with ATI and that benefit of the services of SIPL was not availed by the assesee directly and exclusively. All proprietary rights in innovations and work products of SIPL belonged to ATI. Accordingly, the assessee received services from ATI rendered through SIPL. The Tribunal therefore held that the payments made to ATI for services availed through SIPL were are not reimbursement and taxable as FIS under

	the domestic law and also under India-Canada DTAA. On a separate issue as to whether software expenses paid by assessee to its ATI was towards right to use a copyrighted article or right to use copyright in said software, it was held that payment in question could not be regarded as royalty under article 12 of the DTAA.
Intel Corporation v. DDIT [2016] 76 Taxmann.com 125 (Bangalore ITAT)	Payments made by the Indian company on account of reimbursement of salary relocation and other costs of all expatriates was in the nature of 'fees for technical services', since all the expatriates were holding managerial position and were experts in their respective fields of managerial skills and were rendering managerial and highly expertise services.
Bureau Veritas-Indian Division v. ADIT [2015] 67 SOT 272 (Mumbai ITAT)	Technical expenses allocated by head office to Indian division was in nature of reimbursement of technical expenses and not on account of any specific technical services having been 'made available' and, therefore, such amount could not be fall under the definition of FTS under article 13 of Indo-French Tax Treaty.
Food World Supermarkets Ltd.v. DDIT [2015] 174 TTJ 859 (Bangalore ITAT)	A foreign company deputed its employees in India rendering managerial services to Indian company requiring high expertise, salary reimbursed by Indian company to foreign company in respect of those employees amounted to 'fee for technical services' in terms of Explanation 2 to sec. 9(i)(vii)
Flughafen Zurich, AG v. DDIT [2017] 79 taxmann.com 199 (Bangalore ITAT)	A non-resident engaged in providing operations and management services to airports, entered into agreement with an Indian company for secondment of its skilled personnel for rendering managerial services, amount received by it in respect of services so rendered was taxable in India as fee for technical services
Composite EPC contracts	
Rotem Co.,	In the facts of the case, since the consideration for

Mitsubishi Corporation [2005] (279 ITR 165) (AAR)	the entire contract was a fixed lump sum price, it was contended that the contract was a composite one for sale and accordingly, no part of the lump sum consideration could be regarded as "FTS". The AAR held that though the contract is a composite one under which a fixed lump sum price is payable, the pricing schedule has itself disintegrated the fixed lump sum price into various cost centres (which laid down milestone activities for payment). Accordingly, since the contract comprises of both, supply and services, the "FTS" component can be clearly demarcated from the lump sum consideration. Hence, the same cannot be taxed as "business profits" under Article 7 of the applicable DTAAs' (since these DTAAs provide for taxability of "FTS" separately).
Ishikawajma-Harima Heavy Industries Ltd v/s DIT [2007] (288 ITR 408) (SC)	Some important principles laid down by the SC in the context of EPC contracts are as follows – • When payment for the offshore and onshore supply of goods and services was in itself clearly demarcated, then it could not be held to be a composite contract (which has to be read as a whole). • A contract must be construed keeping in view the intention of the parties and not the taxing provisions. • In cases where different severable parts of the composite contract are performed in different places, the principle of apportionment can be applied. To summarize, the SC held that where a contract is clearly divisible (i.e. where the scope and consideration of each divisible portion is distinctly provided, where different parties are executing different portions of the contract, etc.), the tax implications of each divisible portion would have to be examined separately.

	Accordingly, in case of composite contracts, where a significant portion of the contract revenues is in the nature of "FTS", the same would not mean that the entire contract revenue (including the revenue from the supply of goods) should be construed as "FTS" (or vice versa).
CIT v/s Hyundai Heavy Industries Co. Ltd [2007] (291 ITR 482) (SC)	The SC held that even in cases of a composite contract, an artificial division has to be made between profits earned in India and outside India, if the same is clearly divisible. Accordingly, it has applied the same principles as laid down by the SC in the case of Ishikawajma-Harima Heavy Industries Ltd.
Worley Parsons Services Pty. Ltd [2009] (313 ITR 74) (AAR)	In the facts of the case, the AAR held that the principles laid down by the SC in the case of Ishikawajma- Harima Heavy Industries Ltd could be applied only where the composite contract consisted of distinct and severable segments. However, where there is a single agreement covering only one particular type of work / services, the principle laid down by the SC ruling could not be extended and accordingly, the entire profits related to such a composite contract would be liable to tax in India.
Make available	
No. P/6 of 1995 [1995] (234 ITR 371) (AAR)	Payments made by an Indian company to a foreign company for consulting services (in-depth reservoir management study of offshore oil fields, review of hydrocarbon reserves, analysis and review of data, maps, reserves, etc.) in connection with a gas flaring reduction project is in the nature of "FTS" as defined in section 9(1)(vii) of the Act (i.e. these would not be taxable under section 44BB of the Act). Further, the said payments would be in the nature of "FTS" as defined in Article 13 of the India-UK DTAA (i.e. "make available" criteria duly satisfied).

Sahara Airlines Ltd. v/s DCIT [2002] (83 ITD 11) (Delhi ITAT)	In the facts of the case, a foreign company was providing training to instructors of an Indian company in relation to the use of a simulator (which the instructors would in turn use, to train pilots of the Indian company). It was contended that the agreement was not for training the instructors but only for the use of a simulator. The ITAT held that the training so rendered was in the nature of "technical" services as appearing in the definition of "FTS" under section 9(1)(vii) of the Act. Further, it was also in the nature of "FTS" as defined in Article 13 of the India-UK DTAA, since technical knowledge and experience were being "made available" to the instructors (the flight training personnel providing the training were experts who shared their experiences and knowledge in the course of the training).
ITO v/s Sinar Mas Pulp & Paper (India) Ltd. [2003] (85 TTJ 794) (Delhi ITAT)	Payment made by an Indian company to a foreign company (which is a consultant) for conducting an independent assessment of its project and preparing a bankable report (i.e. feasibility report required for raising loan from financial institutions) is in the nature of "FTS" as defined in Article 12 of the India-Singapore DTAA. The above conclusion was based on the observation of the ITAT that the aforesaid project report "makes available" technical knowledge, experience and skill to the Indian company (since it inter alia lays down the mill site & infrastructure, deals with mill organization & training, takes care of the grades to be produced and deals with the markets which will supply fiber to the mill, the technology & environment aspects, operating costs, capital requirements, financial returns & risks, etc.).
Hindalco Industries Ltd. v/s ACIT, [2005]	Technical assistance and training provided (under a technical assistance agreement) to enable the

(94 TTJ 944) (Mumbai ITAT)	recipient to design, construct and operate a plant which manufactures aluminum foil is a service which satisfies the "make available" criteria and accordingly, payment for the same is covered within the scope of "FIS" as defined in Article 12 of the India-US DTAA. Further, it was held that reimbursement of incidental expenses shall also be treated as "FIS".
Gentex Merchants (P.) Ltd. v/s DDIT [2005] (94 ITD 211) (Kolkata ITAT)	Provision of technical plans, designs and information (and related advice) to enable the recipient to execute and install water features fulfills the "make available" criteria as required by Article 12 of the India-US DTAA and therefore, payments made in this regard are in the nature of "FIS".
Shell India Markets (P.) Ltd., In re [2012] 18 taxmann.com 46 (AAR)	The applicant receives services in form of general finance advice, taxation advice, legal advice, advice on information technology, media advice, assistance in contract and procurement and assistance in marketing. This implies that knowledge is made available to applicant and is in nature of fees for technical services within meaning of Article 13.4(c) of DTAC between India and UK.
Mersen India (P.) Ltd., In re [2012] 20 taxmann.com 475 (AAR)	The services in the nature of assistance, professional and administrative consultation, training, overall management and direction, marketing and managing accounts and financial operations, advice and assistance provided on business strategy, on general management, on marketing and commercial matters, on financial control and accounting matters, and on purchase and sales, environment and safety and giving of training to optimize sales techniques to employees of applicant, are all capable of being put to use by applicant in future on its own and, thus, consultancy services are also made available to applicant would amount to fees for technical services.
ACIT v. TexTech	If instructions sent by entity abroad were such that

International (P.) Ltd [2012] (139 ITD 382) (Chennai ITAT)	it could give a technical expertise to assessee, which it could use even after expiry of contract thereby giving it an enduring benefit in its business, it would fall within meaning of 'fees for included services'.
Bajaj Holdings & Investments Ltd. v. ADIT [2013] (141 ITD 62) (Mumbai ITAT)	Assessee has purchased printer and a particular technology from foreign company as per the terms of agreement. The agreement allowed the assessee 'to file patent application, design application or any such application for intellectual property rights arising out of foreground IP'. Thus, the particular technology was made available to the assessee. Payments made pursuant to the agreement held to be 'FTS'.
Intertek Testing Services India (P.) Ltd. [2008] (175 Taxman 375) (AAR)	It was held that some centralized services under consideration such as training staff on the use of accounting software, passing feedback to the subsidiary after review of financial information (aimed at improving accounting skills), providing advice on tax planning, developing IT related systems design, implementing global IT policies and systems and providing accounting policies manual could be regarded as satisfying the "make available" criteria. Further, some of the centralized services may be border line cases (qua the "make available" criteria) and most others would not satisfy the "make available" criteria.
Raymond Ltd. v/s DCIT, [2002] (86 ITD 791) (Mumbai ITAT)	Key finding of the ITAT are as under– Payment of management commission for services rendered by overseas lead managers in connection with managing a GDR issue qualifies as "FTS" as defined in section 9(1)(vii) of the Act. • The GDR issue was for the purpose of the Indian company's business in India and hence, the exclusion provided in section 9(1)(vii) of the Act (i.e. in the context of a payer who is a resident) could not be invoked.

	• Underwriting commission (in so far as it relates to the issue of GDRs' within USA to qualified institutional buyers) falls within the ambit of the term "FTS" as defined in section 9(1)(vii) of the Act. • Selling commission (paid to the lead managers per GDR issued) is in the nature of "FTS" as defined in the Act. It was also held that none of the aforesaid services rendered by the overseas lead managers "make available" any technical knowledge, experience, skills, know-how or process, etc. and hence, the payments would not be in the nature of "FTS" as defined in Article 13 of the India-UK DTAA.
Wipro Ltd. v/s ITO [2003] (80 TTJ 191) (Bangalore ITAT)	Payment made for a standard telecom service is not in the nature of "FTS" as defined in section 9(1)(vii) of the Act. Further, the same is also not "making available" any technical service or process to the service recipient (and hence, cannot be construed as "FIS" as defined in Article 12 of the India- US DTAA). Lastly, the payment also does not qualify as "royalty" as defined in section 9(1)(vi) of the Act.
C.E.S.C. Ltd v/s DCIT [2003] (275 ITR 15) (Kolkata ITAT)	Merely reviewing the project documentation and providing expert opinion on various aspects of the project per se does not result in "making available" any technical knowledge, experience, skill, know-how or process. Accordingly, any payment made for the same cannot be construed as "FTS" as defined in Article 13 of the India-UK DTAA.
NQA Quality Systems Registrar Ltd v/s DCIT [2004] (92 TTJ 946) (Delhi ITAT)	Consideration paid by an Indian company to a foreign company for quality assurance assessment and certification activities (i.e. undertaking assessment surveillance for the purpose of ISO certification) cannot be regarded as "FTS" as defined in Article 13 of the India-UK DTAA since, the aforesaid activities do not "make available" any

	technical knowledge, experience, skills, know- how or process to the Indian company.
McKinsey & Co., Inc. & others v/s ADIT [2005] (99 ITD 549) (Mumbai ITAT)	In the facts of the case, an Indian branch office of a foreign company was procuring geographical specific data and commercial & industrial information from its foreign group companies. This was used by the Indian branch office for providing strategic consultancy services. The ITAT held that the above support (provided by the foreign group companies) did not result in fulfillment of the "make available" criteria as specified in Article 12 of the India-US DTAA.
DCIT v/s Boston Consulting Group Pte. Ltd. [2005] 94 ITD 31 (Mumbai ITAT)	Consultancy services in the nature of "strategy consulting" (intended to improve the performance of clients by focusing on fundamentals of business) which are not "technical" in nature are not covered within the scope of "FTS" as defined in Article12 of the India-Singapore DTAA103
Bharat Petroleum Corporation Ltd. v/s JDIT [2007] (14 SOT 307) (Mumbai ITAT)	Remuneration paid for market study updation (including inter alia supply demand analysis, product price forecasts, developing cash flow projections and presentation and reporting of the results of the analysis) cannot be regarded as "FTS" as defined in Article 12157 of the India-Singapore DTAA, since no element of "technology" is contained in the said "consultancy" services.
Taxation Department, ICICI Bank Ltd. v/s DCIT [2007] (20 SOT 453) (Mumbai ITAT)	Amount charged for rendition of analytical services (in connection with counter party rating of a floating rate Euro Notes Issue) cannot be regarded as "FIS" as defined in Article 12 of the India-US DTAA, since no technical knowledge, experience, skill, know how or process was "made available" to the recipient.
Diamond Services International (P.) Ltd. v/s UOI [2007] (304	Charges paid for grading and certification reports for diamonds and other articles cannot be construed as "FTS" as defined in Article 12103 of

[157] The India-Singapore DTAA contains the "make available" clause.

ITR 201) (Bombay HC)	the India-Singapore DTAA for the following reasons – • It is not a consideration paid for services of a "managerial", "technical" or "consultancy" nature. • Also, the reports do not "make available" technical knowledge, experience, skill etc. (to enable the person acquiring the service to apply the technology contained therein).
Worley Parsons Services Pty. Ltd. [2008] (301 ITR 54) (AAR)	Project monitoring services (i.e.) monitoring and supervision of project work to ensure timely completion within the approved costs) do not result in "making available" technical knowledge, experience, skill or know- how to the recipient. Accordingly, payments made by an Indian company to a foreign company in lieu of rendition of the said services cannot be characterized as "royalty" as defined in Article 12 of the India-Australia DTAA.
Anapharm Inc. v/s DIT [2008] (305 ITR 394) (AAR)	Fee received by a non-resident company from Indian pharmaceutical companies in lieu of undertaking clinical and bio-analytical studies cannot be regarded as "FIS" as defined in Article 12 of the India- Canada DTAA, since the non-resident company does not "make available" or reveal the method of conducting the said studies / tests (so as to enable the service recipient to carry out the test independently in the future).
DDIT v/s Stock Engineers & Contractors B.V. [2008] (318 ITR 42) (Mumbai ITAT)	Engineering services rendered (in relation to inspection of materials required for executing a project), though "technical" in nature, do not "make available" any technical knowledge, experience, etc. to the recipient. Accordingly, it was held that payments made for the aforesaid services are not in the nature of "FTS" as defined in Article 12 of the India-Netherlands DTAA.
Ernst & Young (P.) Ltd. v/s CIT [2010]	Support services rendered by a foreign company to its group entities (including an Indian company) in

(323 ITR 184) (AAR)	fields such as area, global and market development etc. (so that the group entities have access to standardized human, financial and other resources which would in turn, ensure that consistent, high quality professional services are provided to the client base of the group) do not satisfy the "make available" criteria as provided in Article 13 of the India-UK DTAA. Accordingly, the ITAT held that consequential cost allocation charged to the Indian company (in relation to the above services) would not be fall within the ambit of the term "FTS" as defined in Article 13 of the India-UK DTAA.
Federation of Indian Chambers of Commerce & Industry (FICCI) [2010] (323 ITR 399) (AAR)	Payments made for workshops and learning programmes conducted by institutes where no technical knowledge, experience or skill is "made available" to the participants (even though the participants may as such be motivated or better equipped to deal with problems, challenging situations, etc. post the workshop), could not be termed as "FIS" under Article 12 of the India-US DTAA.
Joint Accreditation System of Australia and New Zealand, [2010] (326 ITR 487) (AAR)	Granting accreditation to various entities which provide third party certification and / or inspection services does not satisfy the "make available" criteria (since as such, there is no transfer of any skill, technical knowledge, experience, process or know-how). Accordingly, payments received in connection with the above would not be in the nature of "royalty" as defined in Article 12102 of the India- Australia DTAA.
Wockhardt Ltd v/s ACIT [2011] 10 taxmann.com 208 (Mumbai ITAT)	In the facts of the case, an Indian company made payments to a foreign company in connection with a conference on future strategies (which was held for the benefit of the employees of the Indian company) addressed by a professional of the foreign company.

	The ITAT held that these services cannot be regarded as "technical" or "consultancy" services so as to fall within the definition of "FIS" as provided in Article 12 of the India-US DTAA. In arriving at the above conclusion, the ITAT inter alia observed that "consultancy" services which are non- technical in nature would not be covered by the definition of "FIS" (as also provided in the MOU to the India-US DTAA). Further, the Indian company also made certain payments to another foreign company for conducting tests and experiments on drugs (developed by the Indian company) and issuing analysis reports containing results of such tests and experiments. The ITAT held that these services cannot be regarded as "FIS" as defined in Article 12 of the India-US DTAA (since no technology was being "made available" to the Indian company).
R.R. Donnelley India Outsource Private Limited [2011] 335 ITR 122 (AAR)	Payments made by an Indian company to a foreign company for services (such as sorting hardcopy applications as per client specifications, reviewing the applications for basic completeness, returning damaged applications, scanning the applications using a document scanner to produce document images and checking the clarity of images, etc.) rendered by the foreign company cannot be characterized as "FTS" as defined in section 9(1)(vii) of the Act (since these services cannot be regarded as "technical", "managerial" or consultancy" services). Further, since there is no transfer of technical skill or know-how while rendering the services, the payments cannot be construed as "FTS" as defined in Article 13 of the India-UK DTAA.
CIT vs De Beers India Minerals (P) Ltd. [2013] 346 ITR	Make available has been discussed as under: The technical or consultancy service rendered should be of such a nature that it "makes available"

467	to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied
ADIT(IT) v. Mark & Spencer Reliance India (P.) Ltd. [2013] 27 ITR(T) 448 (Mumbai - ITAT) Affirmed by the Bombay High Court	Merely providing the employees or assisting the assessee in the business and in the area of consultancy, management, etc. would not constitute make available of the services of any technical or consultancy in nature under Article 13(4)(c) of the DTAA between India and UK. Accordingly, payment made towards salary expenditure of employees under a secondment agreement cannot be treated

in ITA No. 893 of 2014	as FTS.
United Helicharters (P.) Ltd. v. ACIT [2013] 60 SOT 58 (Mumbai - ITAT)(URO)	The training provided to the pilots and other staff as per the requirement of the DGCA Rules which was only a part of the eligibility of the pilots and other staff for working in the industry of aviation would not fall under the term "service make available" under article 12 of India-USA DTAA.
HITT Holland Institute of Traffic Technology B.V. v. DDIT [2017] 78 taxmann.com 101	A half-day training intended to familiarize the client with the operation of the equipment. cannot be said to "make available" technical knowledge, experience, skill, know-how or process, etc. under Article 12(5)(b) of India- Netherlands DTAA
Shell International B.V. v ITO [2013] 145 ITD 81 (Ahmedabad ITAT)	The term 'make available' means that the person receiving the services has been enabled to utilize that knowledge or the receiver has become wiser to utilize that knowledge independently. Mere rendering of services is not enough unless the person utilizing the knowledge is able to make use of that technical knowledge by himself for his own benefit independently i.e. without the guidance of the said service provider.
ITO(IT) v Veeda Clinical Research (P.) Ltd [2013] 144 ITD 297 (Ahmedabad ITAT.)	The 'make available' clause is not satisfied unless there is a transfer of technology involved in technical services and, accordingly, the consideration for such services cannot be taxed under article 13(4)(c) of India-UK tax treaty. Therefore, fees for training services was not taxable as fees for technical services as per article 13 of India-UK DTAA. Further it was also held that in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve transfer of technology.
Brakes India Ltd. v. DCIT [2013] 144 ITD	Payments made for export sales commission, consultancy charges, logistics, clearing,

403 (Chennai i ITAT)	warehousing and freight charges to non-residents. The logistics service rendered was essentially warehousing facility cannot be equated with managerial, technical or consultancy services. Such nature of services will come not within the definition of "fees for technical services" given under Explanation 2 to Section 9(1)(vii) of the Act as by virtue of such services, the concerned recipients had not made available to the assessee any new technique or skill which assessee could use in its business.
Sandvik Australia Pty. Ltd. v. DDIT [2013] (141 ITD 598) (Pune ITAT)	Assessee provided services in the nature of help desk, administrative and maintenance IT support. The terms of the agreement between the assessee-company and its group company substantiates that the assessee has not made available any technical knowledge or expertise to the recipient Indian company. In view of the above, such services were held to be not taxable in India in terms of Article 12 of the India- Australia DTAA.
Romer Labs Singapore Pte. Ltd. v. ADIT [2013] (141 ITD 50) (Delhi ITAT)	Services relating to testing solutions, sample analyses and analytical testing of food and feed samples could not be said to 'make available' any technical knowledge to Indian company as defined under article 12(4) of DTAA between India and Singapore. The output of the service is test reports which cannot be said to make available any technical knowledge, experience, skill, know-how or processes which enables the Indian company to acquire the services able to apply the technology contained therein.
Bajaj Allianz General Insurance Co. Ltd [2015] 55 taxmann.com 305 (Pune ITAT)	Payments were made by an Indian insurance company to non-resident surveyors who carried out surveys to assess damages in Spain, Belgium, Israel countries with whom DTAAs contain Most Favored Nation clause.

	The MFN clause results in applicability of the 'make available' condition. Since surveyors did not make any technical know-how available to Indian company, payments made to them was not taxable in India as FTS
DDIT v. IATA BSP India [2014] 64 SOT 290 (Mumbai ITAT)	A branch office of IATA, Canada, operating in India, received BSP link services from a French company whereby manual operations such as issue of debit notes/credit notes, issue of refund, billing statement and all information relating to tickets were carried out electronically, since said services did not make available to assessee any technical knowledge, experience, skill, know-how or processes so as to enable them to apply said technology, payment made in respect of same was not in nature of 'fees for included services' within meaning of article 13 of India-France DTAA.
ITO v. Adani Port Infrastructure (P.) Ltd. [2014] 165 TTJ 684 (Ahmedabad ITAT)	The assessee had entered into an agreement with, a foreign company, (Wallingford) for morphological studies, sedimentation assessment, navigation and mooring assessment in respect of a port. In the agreement it is provided that the report so prepared by Wallingford would not be transferable by the assessee. The assessee company shall not use the know-how in performing services for any other client in future. Even the assessee company was not entitled to sub-license any of the rights granted in the report. The output of the service is reports which cannot be said to make available any technical knowledge, experience, skill, know-how or processes which enables the Indian company to acquire the services able to apply the technology contained therein.
Endemol India (P.) Ltd., In re [2014] 361 ITR 353 (New Delhi AAR)	Payment to a non-resident for production of programmes for purpose of broadcasting and telecasting shall not be treated as 'Fees for technical service' in terms of article 12.4 of India Singapore Tax Treaty as the services rendered by

	the non-resident company do not made available any technical knowledge, expertise, skill/ know-how or process by enabling it to apply the technology independently.
Steria (India) Ltd. [2014] 364 ITR 381 (AAR - New Delhi).	A Protocol cannot be treated as the same with the provisions contained in the treaty itself, though it may be an integral part of the Treaty. It will be inappropriate to import words, phrases or clauses that aren't available into the Treaties between two Sovereign nations, on the basis of Treaties with another countries. Therefore, in absence of 'make available' clause in India-France DTAA, the payments for management services rendered would be FTS both under Act and Treaty The above principle has been set aside by Delhi High Court in Steria (India) Ltd v. CIT [2016] 386 ITR 390
Endemol India (P.) Ltd., In re [2014] 361 ITR 340 (AAR New Delhi)	The Indian Company entered into consultancy agreement with Netherland company for providing General Management, International Operations, Legal advisory, Tax Advisory, Controlling and Accounting & reporting, Corporate Communications, Human Resources, and Corporate Development, Mergers and Acquisitions. The consideration paid for the services rendered by the non-resident company in this case is covered by the broad definition of fees for technical services in the Act. Requirements of 'make available' in tax treaty is met if technology, knowledge or expertise can be applied independently by person who obtained services. In this case the applicant merely took assistance of the Holding company in its business activities outside India and no technical know-how, skill, knowledge and expertise are transferred to the applicant so as to enable the applicant to apply this technical know-how etc. independently. Therefore, requirement of the 'make available' clause in the

	article 12(5) of the India-Netherlands Tax Treaty is not satisfied and hence the payment for the services rendered will not come under 'fees for technical services' under the 'tax treaty'.
DDIT v. Sun Microsystems India (P.) Ltd. [2014] 369 ITR 63 (Karnataka)	Rendering of logistic services without making available its technical knowledge, experience or skill will not fall under definition of FTS.
ITO v. Denial Measurement Solutions (P.) Ltd. [2014] 67 SOT 76 (Ahmedabad ITAT)	Rendering of calibration and testing of equipment services without passing expertise connected with the testing will not be considered as FTS.
ABB Inc v. DDIT [2015] 69 SOT 537 (Bangalore ITAT)	Market support services provided by American company to Indian AEs did not involve enabling recipient of services to utilize knowledge or know how on his own in future without aid of service provider, 'make available' clause is not satisfied and, accordingly, consideration for such services cannot be taxed under article 12(4)(b) of India US tax Treaty
ITO v. Skill Infrastructure Ltd. [2015] 70 SOT 186 (Mumbai ITAT)	An Indian company had merely availed services of U.K. Company for global market survey to determine business prospects to carry out project in India were neither geared to nor did they 'make available' any technical knowledge, skill or experience to assessee or consisted of development and transfer of a technical man or technical design to assessee does not qualify as FTS under article 13 of DTAA between India and U.K..
ITO v. Nokia India (P.) Ltd. [2015] 42 ITR(T) 708 (Delhi ITAT)	A foreign company merely provided services to Indian company to ensure that HV AC, Electrical and Fire Protection systems, to be installed, by contractor at its factory were of suitable design and quality did not 'make available' any technical knowledge, skill or experience nor was it consisted of development and transfer of a technical plan or

	technical design. Thus, payments made to said company did not constitute FTS
Measurement Technology Ltd. United Kingdom, In re [2015] 376 ITR 461 (AAR New Delhi)	After amendment effective from 11-2-1994 in India and UK Tax Treaty, managerial services are not covered in definition of 'Fees for technical services'. Services generally related to human resource matters, cost control, fund management, quality and design reviews, etc., are routine managerial activities and cannot be classified as technical or consultancy services Even technical or consultancy services, if they do not meet criterion of 'make available', cannot be treated as FTS.
ITO v. B.A. Research India (P.) Ltd. [2016] 70 taxmann.com 325 (Ahmedabad ITAT)	Non-resident companies located in USA rendered bio-analytical services on samples provided without making available services rendered to the assessee and accordingly, the said services would not fall within purview of 'included services' under article 12(4)(b) of India and USA Tax Treaty.
Cummins Ltd., In re [2016] 381 ITR 44 (AAR New Delhi)	Indian company works with U.K. company only to ensure market competitive pricing from suppliers and U.K. company maintains contract supply agreement with suppliers after identifying products availability, capacity to produce and competitive pricing, U.K. Company is not imparting its technical knowledge and expertise to Indian company based on which it will acquire such skills and will be able to make use of it in future and, thus, make-available clause in article 13 of India-UK Tax Treaty is not satisfied
DDIT v. MSV International Inc, Gurgaon [2016] 157 ITD 757 (Delhi ITAT)	Foreign company provided consultancy for highway projects in India, it would not amount to technical service as it was related to construction activity and thus it would not be subjected to presumptive taxation under section 44D. There was no importing of technical skill which was absorbed by receiver so that receiver could deploy similar technology in future without depending on assessee and

	therefore receipts does not qualify for FTS under Article 12(4) of India-USA Tax Treaty
Foster Wheeler France S.A. v. DDIT [2016] 157 ITD 793 (Chennai ITAT)	An expertise non-resident company in engineering and construction works, obtained procedures from foreign company and said foreign company was not only reviewing and tracking execution plans periodically, but also undertaking project budget and client satisfaction, said foreign company had made available its technical knowledge, expertise and know-how in execution of contract to assessee in India and assessee was liable to deduct tax under section 195 on said payment
ONGC v. ITO [2016] 69 taxmann.com 421 (Delhi ITAT)	Non-resident providing auditing/third party certification service in respect of oil reserves without providing relevant technology and knowledge required to carry out similar work in future, payment made by ONGC could not be taxed as 'fees for technical services' under section 44D; revenue received would be charged to tax under section 44BB, read with Para 4(b) of article 12 of Indo-USA DTAA as it was in connection with prospecting for extraction or production of mineral oil.
Stanley Consultants (P.) Ltd. v. DCIT [2016] 72 taxmann.com 257 (Delhi ITAT)	Recruitment fees without making available technical knowledge, experience, skill, know-how, or processes or consist of development and without transfer of a technical plan or technical design does not qualify for fees for included service under article 12 of India USA Tax Treaty
Foster Wheeler (G.B.) Ltd., In re [2016] 389 ITR 509 (AAR New Delhi)	A foreign company, in order to carry out contract for rendering engineering design services in connection with an Indian Oil refinery, availed certain administrative services such as account receivable, human resources and payroll management, tax support, etc from its sister concern which do not make available any technical skill or knowledge to its employees, payments

	made for said services cannot be regarded as fee for technical services
Nilgiri Dairy Farm (P.) Ltd. v. ITO [2017] 162 ITD 109 (Bangalore ITAT)	A foreign company rendered consultancy services and made available to Indian company for its enduring benefit and those consultancy advisories, opinions or services could be used by Indian company for its business purposes in succeeding years without any aid and assistance of consultant, payment made for said services amounted to fee for technical services under section 9(1)(vii)
Rolls Royce Industrial Power (India) Ltd. v. DDIT [2016] 73 taxmann.com 37 (Delhi ITAT)	A foreign company undertaken a contract for operation and maintenance of power plant for its owner, income received for executing works contract did not fall within definition of 'fees for technical services' as company had not made available any technical knowledge, skill, etc. to owner
DCIT v. Xansa India Ltd. [2016] 75 taxmann.com 123 (Delhi ITAT)	Management services rendered in relation to advise and guidance on key management decisions to explore possibilities of acquisition of businesses in absence of satisfying make available test in terms of provisions of article 13 of Indo UK DTAA, fees paid to UK company would not be taxable in India as FTS.
Outotec Oyj v. DDIT [2017] 162 ITD 541 (Kolkata ITAT)	No technology or technical knowhow, skills etc. were made available to enable service recipient to function on its own without dependence of service provider, agreement entered between them was for an indefinite period and such services were provided on recurring basis, amounts received did not qualify as FTS as per India and Finland Tax Treaty
Dr. Reddy's Laboratories Ltd. v. ACIT[2017] 53 ITR(T) 285 (Hyderabad ITAT)	Indian company, engaged in manufacture of pharmaceutical products, made payment to a US contract research organisation (CRO) for conducting clinical trials of its products and submit their reports. US company had only provided final results to its Indian clients by using highly

	sophisticated bio-analytical know-how, without providing any access whatsoever to clients to such know-how, fee received by it was business income and not fee for technical/included services or royalty.
ACIT v. D.A. Jhaveri [2016] 183 TTJ 447 (Mumbai ITAT)	In view of MFN clause in India and Belgium Tax Treaty, Indian company, could claim that Belgian company by providing certification services of diamonds had not parted with technical knowledge or expertise to Indian company so as to classify payment made to Belgian company as FTS in terms of India UK Tax Treaty
Net App B.V.v. DDIT [2017] 78 taxmann.com 97 (Delhi ITAT)	Foreign company rendered installation, integration and training assistance to Indian customers in relation to products sold by it, since it did not 'make available' any technical knowledge or skill to its customers, amount is not qualified as 'fee for technical services' in India
IMG Media Ltd. v. DDIT [2015] 155 ITD 527 (Mumbai ITAT)	Sum paid to foreign company for capturing and delivering live audio and visual coverage of IPL cricket matches was not Fee for Technical Services as BCCI had not acquired technical expertise from the foreign company which would enable them to produce the live coverage feeds on their own after the conclusion of IPL
International Management Group (UK) Ltd. v. ACIT [2017] 162 ITD 219 (Delhi ITAT)	Foreign company was hired for conducting research in respect of the appropriate structure for the IPL and makes recommendations to BCCI. Accordingly, various documentation and material viz. Constitution of IPL, structure of IPL etc. provided to the BCCI enable it to use such know-how and documentation generated from provision of services, independent of the services of IMG. By providing all the rules and regulations of IPL, standard operating procedures of matches, copies of the franchisee agreement, various documentation/ contracts etc. to BCCI (which shall remain with BCCI), make available test is satisfied.

	Merely because the BCCI has entered into a contract with foreign company for conducting further nine events does not lead to the conclusion that the information documentation, agreements, contracts etc. have not been made available.
Interroute Communications Ltd v. DDIT [2016] 179 TTJ 355 (Mumbai ITAT)	Sum received by assessee, UK based company from Indian telecom operators towards use of Virtual Voice Network, i.e., facility provided to connect calls to end operators through assessee's port could not be treated as fee for technical services in terms of article 13 of India-UK DTAA since the services does not makes available the technology in the sense that recipient of service is enabled to apply the technology, and do the same work without recourse to the service provider.
DCIT v. Bombardier Transportation India (P.) Ltd. [2017] 162 ITD 586 (Ahd. ITAT)	Payment towards administration, marketing, procurement and human resources cannot be considered as FTS under the India-Canada DTAA as no services were "make available"
ITO v. Cadila Healthcare Ltd. [2017] 162 ITD 575 (Ahd. ITAT)	Granting bio analytical services to USA, Canada and UK entity do not satisfy the "make available" criteria as the services do not involve any transfer of technology and recipient of services are not enabled to use these services in future without recourse to service provider. Accordingly, payments received in connection with the above would not be in the nature of "fees for technical services" as defined in Article 12 of the India- Canada and India- US DTAA and Article 13 of India-UK DTAA.
Referral fees	
Cushman & Wakefield (S) Pte. Ltd. [2008] (305 ITR 208) (AAR)	Referral fee received by a non- resident company from an Indian company (for referring potential customers who require real estate consultancy and associated services in India) cannot be construed as "royalty" as defined in section 9(1)(vi) of the Act. Further, the referral fee is not in the nature of "FTS"

	as defined in Article 12 of the India-Singapore DTAA (since inter alia no expertise, or know-how has been "made available" to the Indian company by way of these referral services).
Real Resourcing Ltd. [2010] (322 ITR 558) (AAR)	Referral services do not fall within the ambit of the "make available" criteria. Accordingly, referral fee received by a foreign company from an Indian recruitment company cannot be regarded as "FTS" as defined in Article 13 of the India-UK DTAA.
CLSA Ltd. v. ITO [2013] (56 SOT 254) (Mumbai ITAT)	Referral fees received by the assessee from Indian subsidiary for referring the subsidiary to overseas financial institution with which the assessee had business relations cannot be considered as technical, managerial or consultancy services as envisaged in Explanation 2 to section 9(1)(vii). Also, there did not exist any real and intimate relation between the activities carried on outside India by the applicant and the activities in India that contributed to the earning of income. Hence, the same cannot be considered as taxable as business income.
Absence of FTS clause	
Tekniskil Sdn Bhd v/s CIT [1996] (222 ITR 551) (AAR) G U J Jaeger GMBH v/s ITO [1990] (37 ITD 64) (Mumbai ITAT) Christian & Nielsen Copenhagen v/s ITO [1991] (39 ITD 355) (Mumbai ITAT)Golf in Dubai, LLC v/s DIT [2008] (306 ITR 374) (AAR) IBM India Private Limited vs. DIT TS-	In certain specific DTAAs' which India has entered into (for e.g. – the India- Mauritius DTAA or India-UAE DTAA), the concept of "FTS" / "FIS" (i.e. technical / managerial / consultancy services) has not been specifically dealt with. In such cases, courts have consistently held that any income arising to a non-resident in India (who is a tax resident of one of these countries), which is otherwise in the nature of "FTS" / "FIS", shall not be liable to tax in India in the absence of a PE of the non-resident in India. In this context, it is also pertinent to note that in the case of Lanka Hydraulic Institute Limited [2011] 11 taxmann.com 97 (AAR - New Delhi), it has been held that in the absence of a specific Article for taxation of FTS in the India-Sri Lanka DTAA, any

78-ITAT-2014 (Bangalore ITAT)	income in the nature of FTS should be governed by Article 22 (dealing with "Other income") as opposed to Article 7 (dealing with "Business profits") of the India-Sri Lanka DTAA (as per Article 22, such income would be taxable only in Sri Lanka. Hence, this interpretation may prove beneficial to the assessee).
Bangkok Glass Industry Co Ltd v ACIT (2013) (34 Taxmann.com 77) (Madras HC)	As the taxpayer did not have a Permanent Establishment (PE) in India, the consideration for technical services cannot be brought to tax under Article 7 of the India-Thailand tax treaty. The income which would be taxable in India in the instant case is only the income falling under Article 12 of the India-Thailand tax treaty as royalty income and nothing beyond that. Further, the consideration for technical assistance could not even be taxed under the other income article of the India-Thailand tax treaty since it did not classify as miscellaneous income.

Annexure F
Inter-play of Provisions between DTAA and the Income Tax Act

Few examples & discussion to explain inter connection / overlapping of issue of Royalty and FTS with help of practical examples

Whether for each stream of income, Tax Payer can adopt taxability either under Act or under DTAA, whichever is beneficial to the Tax Payer

Favourable rulings

(a) Foramer S.A. [52 ITD 115] [Delhi Tribunal]

It was held that there is no justification for holding that foreign nationals, having elected to be governed by the DTAA, cannot ask for application of any provisions of the Act even when such provisions are beneficial to them.

(b) British Airways Plc [80 ITD 90] [Delhi Tribunal]

It was held that section 90(2) of the Act in fact gives an option to a Tax Payer to choose whichever provision is more beneficial to it whether of the agreement or the Act and he can seek application at the same time of the provisions of both the agreement and the Act considering the benefits thereof.

Against ruling

(c) Dresdner Bank AG [108 ITD 375] [Mumbai Tribunal]

In a case where the Government of India has entered into a Tax Treaty with a foreign country, then in relation to a Tax Payer on whom such Tax Treaty applies, the provisions of the Act apply only to the extent these are more beneficial to the Tax Payer. However, once a Tax Payer himself abandons his option to be assessed to tax in accordance with the provisions of the Tax Treaty, it cannot be open to Tax Payer to go back for the treaty protection on one aspect of the tax assessment i.e. on applicability of MAT under section 115JA of the Act. Either a Tax Payer is to be assessed to tax on the basis of the provisions of the Tax

Treaty or not. The assessment of income cannot be split into several segments and then the applicability of treaty provisions, vis-a-vis tax law provisions, cannot be separately considered for each segment. Liability for MAT under section 115JA of the Act is an integral part of Tax Payer's assessment of income, and, once the Tax Payer chooses to be assessed as per provisions of the Act, in preference over the provisions of the Tax Treaty, it cannot be open to the Tax Payer to seek treaty protection in respect of one of the aspects of the assessment of the income i.e. applicability of MAT under section 115JA of the Act.

Every year option available either to opt for Act or DTAA

Favourable rulings

(a) Patni Computer Systems Ltd. [114 ITD 159] [Pune Tribunal]

Once an income is held to be taxable in a tax jurisdiction under a DTAA, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Act is no longer applicable in a situation provisions of a DTAA entered into under section 90 of the Act apply. The next question then arises whether in a loss situation in the PE State, can the Tax Payer be forced to go for taxation in accordance with the provisions of the treaty with the said PE State. The provisions of section 90(2) of the Act are quite unambiguous and categorical in this regard. Section 90(2) of the Act, inter alia, provides that when the Government of India has entered into a DTAA with Government of any other country, "in relation to an Tax Payer to whom such agreement applies, the provisions of this Act shall apply to the extent these are more beneficial to that Tax Payer". Section 90 of the Act only grants relief; it does not impose any liability. Merely because India has entered into a DTAA with a foreign country, the Tax Payer cannot be denied the taxability under the scheme of the Act. The scheme of the DTAA cannot, therefore, be thrust upon the Tax Payer. There is no support for the proposition that in case the Tax Payer does not opt for being taxed on the basis of DTAA for one year, he will be shut out from the benefits of DTAA in the subsequent years

(b) The Prudential Assurance Co. Limited [2012] 18 ITR(T) 186 (Mumbai Tribunal)

The situation is not that if a Tax Payer, to whom DTAA applies, shall be

mandatorily ruled by the provisions of such DTAA in supersession of the provisions of the Act. Thus if the income itself is not chargeable to tax under the Act, then the DTAA cannot create a liability to tax by roping in such income under any of its relevant Articles. Even if any Article of DTAA provides for chargeability of a particular amount which is not chargeable to tax under the Act, then such provision of the DTAA shall have to lean in favour of the provision of the Act. The corollary that follows is that one needs to firstly examine as to whether the particular sum is chargeable to tax under the Act or not. If it is chargeable to tax then it needs to be examined as to whether such income is not taxable as per DTAA. If the income is chargeable to tax both under the Income-tax Act as well as DTAA, then the Tax Payer cannot escape tax on it. If however such income is not chargeable to tax in India under the Act, then the matter ends there. There is no need to consider the provisions of the DTAA as to whether any charge is attracted there under on such income. If such income is chargeable to tax in India under the Act but the provisions of DTAA exempt it, then again there can be no question of taxability of such sum due to the mandate of section 90(2). The essence is that a Tax Payer, to whom the DTAA applies, has been given option to be governed by the Act or DTAA, whichever is more beneficial to it.