

ITAT invokes MFN clause to import make available clause from India-Portugese DTAA into the India-Sweden DTAA

Summary – The Pune ITAT in a recent case of Sandvik AB, (the Assessee) held that Swedish company can claim Fee for Technical Services ('FTS') received from its Indian subsidiaries as tax-exempt if 'make available' condition is not satisfied on the basis of Indo-Portugese DTAA even though Indo-Sweden DTAA makes no reference to 'make available' condition. In view of the Most Favoured Nation clause ("MFN clause") in the protocol to the Indo-Sweden DTAA, a Swedish company can claim beneficial provisions for FTS contained in a later treaty such as Indo-Portugal treaty

An MFN clause can direct more favourable treatment available in other treaties only in regard to the same subject matter, same category of matter or same clause of the matter. The MFN clause in the protocol attached to the treaty takes care of a situation wherein either of the contracting states enter into a DTAA with another sovereign state and where the same subject matter has been given more favourable treatment by way of a definition or mode of tax. The parties can claim the benefit on the recognized principle of MFN clause. On the basis of protocol to India-Sweden DTAA, a Swedish Company can claim the benefit of 'make available' condition in Indo-Portugal treaty to claim tax-free status for FTS received from its Indian Subsidiaries.

ORDER

R.S. Padvekar, Judicial Member - In this appeal, the assessee has challenged the impugned order passed by the Assessing Officer u/s. 143(3) as per the directions of the Dispute Resolution Panel (DRP) given u/s. 144C(5) of the Income-tax Act for the A.Y. 2007-08. The assessee has taken the following ground in the appeal:

"The Ld. Assessing Officer and Ld. Dispute Resolution Panel have erred in holding that the Management Service Fees ('MSF') of INR 5,92,97,919/- received by the Appellant, is taxable in India as 'Fees for Technical Services' ('FTS') within the meaning of Article 12 of the India-Sweden Double Taxation Avoidance Agreement ('DTAA' or 'the treaty') read with the protocol thereto."

2. The facts which are revealed from the record as under. The assessee is a foreign company incorporated in Sweden. The assessee has received payment of Rs.5,50,33,677/- from Sandvik Asia Pvt. Ltd. (in short "SAPL") and Rs.42,64,242/- from Walter Tools India Pvt. Ltd. (in short "WTIPL"). The assessee stated before the authorities below that i.e. AO/DRP it has provided various management services to SAPL and WTIPL and towards the said services the assessee has received the above amount from the two companies i.e. SAPL and WTIPL. The assessee filed the copy of Agreement before the

authorities below with SAPL. The A.O. has reproduced part of the agreement with SAPL which is in respect of the description of the services provided by the assessee company to its Indian Subsidiaries.

3. After examining the nature of the services, in the opinion of the Assessing Officer the assessee has provided the technical support and guidance to its customers and hence, the nature of the services rendered by the assessee to SAPL is a technical in nature but not a managerial service as claimed by the assessee. The Assessing Officer held that as per the provisions of Sec. 5(2) r.w.s. 9(1)(i) the nature of the services rendered by the assessee is a technical service and hence, the payment received by the SAPL to the assessee is towards the fees for technical service (FTS). The assessee claimed before the authorities below i.e. the AO/DRP, that it is a tax-resident of Sweden and hence, eligible to claim benefits under the India-Sweden DTAA. The assessee took the stand that the nature of the services is not technical and the services rendered by it do not satisfy the 'make available' condition of the tax Treaty. The assessee submitted before the Assessing Officer that the services rendered by it do not satisfy the 'make available' condition of the tax Treaty. The assessee also took the stand that the services rendered by it do not make available any technical knowledge, experience, skill, know-how, process to either SAPL, or WTIPL, enabling it to apply the technology contained therein, which is a pre-requisite for the payment to be categorized as 'FTS' under Article 12 of the India-Sweden Tax Treaty read with the protocol thereto. The assessee also relied on the following decisions:

- i. Intertek Testing Services India P. Ltd. 307 ITR 418 (AAR).
- ii. Anapharm Inc AAR No. 746 of 2008.
- iii. *Invensys Systems Inc. v. DIT* 317 ITR 438 (AAR).
- iv. *Bharati AXA General Insurance Co. Ltd. v. DIT* 326 ITR 477.
- v. *Ernst and Young (P) Ltd.*, 323 ITR 184.
- vi. *Bharat Petroleum Corp. Limited v. Jt. DIT*, 111 TTJ 375.

4. The Assessing Officer rejected all the decisions relied on by the assessee by observing that the facts are distinguishable in all the above decisions. The Assessing Officer finally held that the amounts received by the assessee from SAPL and WTIPL to the extent of Rs.5,92,97,919/- are in the nature of the fees for technical services within the meaning of Sec.9(1)(vii) of the I.T. Act, 1961 as well as within the meaning of Article 12 of DTAA between India and Sweden. The reasons given by the Assessing Officer in the draft assessment order in support of the above findings are as under:

"6.2 This clearly suggests that word 'Make available' was used in treaty in that context, that treaty too suggest these services in the nature of technical knowledge, experience, skill etc. were offered or made

accessible to the other party and it never meant that the other party should be trained or made expert in such technical knowledge etc. It will be absurd on part of a person to make other person expert of its core competency, which will result in situation that the recipients of service will not look again to him when these services are again needed in future. Teaching / educational services have separately dealt elsewhere in the treaty. In view of above the meaning of expression 'Make available' has to be read in the present context. In the present case, service provider has provided or made accessible the services of its technical knowledge, experience 'Enabled to apply' phrase used in same MOU does not mean that service provider also has to teach technology embedded in the service provided. A small example can explain this contention if someone is enabled to apply / use Microsoft windows programme in its work, it does not mean that one has been taught about source code or technology of creating windows software. He has been enabled merely to use window programme without understanding technology / know-how behind it.

6.3 In OECD commentary on Article 12 in para. 11.3, while distinguishing transfer of know-how from provision of services it is mentioned "in the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by the supplier, of special / knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party", The above clarification clearly differentiate between transfer of such special knowledge, skill or expertise, which is covered in the definition of royalty under 12(3)[a] of India-US DTAA and fee for included services covered under 12(4)[b] of India-US DTAA.

6.4 By this act, supplier of services has enabled the recipient to use the technology of the subject matter without transfer of know-how or technology. This is precisely explained in memorandum of understanding concerning fees for included services in Article 12 of India-US Tax Treaty dated 15/5/1989. The explanation clearly focuses on the fact that a person acquiring the services should be enabled to apply technology and not related to transfer of the technology. It further goes on to explain typical category of services which generally involves either the development and transfer of technical plants or designs, or making technology available as described in para.4 (b) which include:

1. Engineering services (including the sub-categories of bio- engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical metallurgical and industrial engineering)
2. Architectural services and
3. Computer software development

6.5 Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for example relate to any of the following:

1. Bio-technical services
2. Food processing
3. Environmental and ecological services
4. Communication through satellite or otherwise
5. Energy conservation
6. Exploration or exploitation of mineral oil or natural gas
7. Geological surveys
8. Scientific services and
9. Technical training.

7. Accordingly, assessee's contention is not acceptable. These receipts from technical services are in the nature of Fees for Technical Services within the meaning of section 9(1)(vii) of the I.T. Act, 1961 and FTS within the meaning of Article 12 of the DTAA between India and Sweden read with the protocol thereto. Hence, the amount received by the assessee from its Indian affiliates for rendering these services is taxed as Fees for technical services @ 10% as provided under DTAA. From the above discussion, it is clear that the assessee has failed to offer such income which is clearly taxable under both Income Tax Act and under the provisions of DTAA."

5. The assessee filed the objection before the DRP against the draft assessment order but without success. The main thrust of the argument of the assessee before the Dispute Resolution Panel (in short "DRP") is that the assessee has received the fees towards rendering the management services and not for the fees for technical services within the meaning of Article 12 of the India-Sweden DTAA and the Assessing Officer should have allocated the total fee between FTS and managerial service specially when he has not disputed the nature of services provided by the assessee which comprises of administration, marketing and HR support. The assessee submitted before the DRP that the protocol to India-Sweden DTAA provides that in case India enters into any Agreement or Convention with a third state, which is a member of OECD and India limits its taxation at source on dividends, interest, royalties, or fees for technical service 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. The assessee submitted before the DRP that in the DTAA between India and Portuguese, the "fees for technical services" has been defined in Article 12(4) and definition of the India-Portuguese DTAA purports to

restrict the scope of taxability of FTS. It was argued before the DTAA that as per the India-Portuguese DTAA, any payment for services would be considered as FTS only if the services are:

- i.* Technical in nature: and
- ii.* When such services make available technical knowledge, experience, skill, know-how, processes to the recipient enabling it to apply the technology contained therein.

6. The DRP was not impressed with the stand of the assessee and rejected the above contention and confirmed the view of the Assessing Officer in the draft assessment order. The reasons given by the DRP are as under:

"6. The Panel has considered assessee's submission and arguments in this regard. There is no dispute that above services are taxable as per I.T. Act, 1961 in India, however, in view India- Sweden treaty scope of taxability under fee for technical services is excluded as per the assessee's contention. The first contention of the assessee is that such services should be technical in nature, whereas India-Portugal or India-Sweden treaty clearly provide for 'technical or consultancy services'. The scope of consultancy services have been discussed in protocol of India-US treaty and it has been explained that a consultancy service is wider term then technical services. The authority for advance Ruling has also held in its ruling dated 27/05/2011 in the case of VERIZON Date Services India Pvt. Ltd., AAR/865/2010 that managerial services are covered under fees for included fees. Without prejudice to above this Panel does not agree with the interpretation of word 'make available' in India-Sweden or India-Portuguese treaty.

6.1 The expression 'make available is not defined in the Income-tax Act or DTAA signed by India with various countries. In view of above, one has to look forward for its meaning in other legal enactments or in the general dictionary to understand its meaning. It is found that the expression has been used in various other enactments in United States. The expression has been used in enactment Terrorism Risk Insurance Act 'of United States and in 'Copyright Infringement Act' of USA. On later act number of decisions has come up regarding meaning of expression 'make available' which means "offer or make available or provide for" in the contexts. If these words are substituted in sub para-4(b) of article-12 of India US treaty (where first time word make available was used in treaty context), it will be as under – If such services offered/supply technical knowledge, experience, skills, know-how or processesit makes perfect sense. A person having such technical knowledge/ experience/ skills/ know-how will not be offering through its services these technical knowledge/ experience/ know how to the recipient of the services for the price of only services. If that be the case such services would be covered as royalties under para-3(a) of article-12 of India USA DTAA. Para 49b) of article-12 deals with provision of services to the recipient through use of one's technical knowledge/experience, etc. and not for transfer of such technical knowledge/ experience to the recipient of services. These agreements are for provision of services and do not contain provision for transfer of related experience/ technical knowledge/ know-how etc.

6.3 The Boston court in the USA has given a ruling on the phrase 'make available', which again supports above contention. Quoting from the below mentioned website further supports contention-

"Another Court Ruling Actually Does Say Making Available Is Not Distribution, While the ruling in the Elektra V. Barker case got plenty of attention, even if some of it was misleading, the EFF points out that in another ruling on the same day (which got much less publicity) a court in Boston seems to have made a much stronger case for why making available is not distribution. Once again, the judge did not throw out the case, saying that an "offer to distribute" is still enough of a claim to have the case move forward to trial (at which point the copyright holder would need to show that actual distribution occurred). However, with so many different court rulings making so many different interpretations of "making available, " there are going to be appeals and eventually it will move up the chain. If (as is likely) different appeals courts end up disagreeing it may eventually make it to the Supreme Court, where we can get a final ruling on whether making available is or is not the equivalent of distribution".

(Website reference <http://techdirt.com/blog.php?tag=make+available>)

6.4 Treaty with the Netherlands also uses phrase 'make available', but has not been defined in the treaty or elsewhere. The official web site belonging to the Netherlands government has also used word make available in same context as has been discussed earlier. It has been quoted from web site-

"You make available personnel in the Netherlands: If you make an employee available on the Dutch labour market you will be liable in Dutch law to make salary deductions, submit wage tax and social security declarations and probably withhold and deduct them. Whether the latter will be the case will depend on the tax law of the Netherlands, the tax treaty between the Netherlands and the country of habitual residence and on various international social security treaties such as EU Regulation 1408/11 and the European Social Charter.

Please note:

'Making available' should be taken to mean any kind of supply of personnel, such as posting, transfer or supply. If you make available personnel, you are a supplier. The employer to whom you make available personnel is referred to as the recipient."

(Website reference-<http://www.belastingdienst.nl/variabelbuitemland/en/business-taxpayers/business>)

6.5 The meaning of above expression was also searched on the Internet and it was found in the free dictionary by Farlex that 'Make Available' is the meaning of the word 'offer' and this meaning clearly fits into in para-4 of article-12 of India - Sweden.

6.6 The Assessing Officer has also tried and has made efforts to search the meaning of above expression i.e. 'make available' on the google search on the Internet and it was found that the other persons are using this expression 'make available' in the sense of 'making accessible/supply things in the context;

6.7 The Assessing Officer has discussed all the case laws and tax notes in detail and two of the above cases are rulings of 'authority for advance ruling', which does not have precedent value for other cases. The other cases decided on the issue of 'make available' have not been accepted by the department as these are not based on correct interpretation of 'make available'. These cases have not discussed all examples and other technical notes provided in protocol of India- US treaty, there were certain other examples which suggest that transfer / teaching of such experience/ know-how is not required to treat these services as make available, Examples from protocol related to technical and consultancy services could make technology available in a variety of settings, activities and industries. An example given in MOU which is relevant for interpreting term make available is as under:

Example-12

Facts:

An Indian wishes to install a computerized system in his home to control lighting, heating and air-conditioning, a stereo sound system and a burglar and fire alarm system. He hires an American electrical engineering firm to design the necessary wiring system, adapt standard software, and provide instructions for installations. Are the fees paid to the American firm by the Indian individual fees for included services?

Analysis:

The services in respect of which the fees are paid are of the type which would generally be treated as fees for included services under paragraph 4(b). However, because the services are for the personal use of the individual making the payment, under paragraph 5(d) the payments would not be fees for included services.

6.8 This example clearly suggests that the recipient has not been provided by service provider any technical knowledge regarding computerized system so that he can develop such system of his own. In fact, he has been merely advised how he can apply that knowledge for automation for its use. The recipient has not become expert in the technology of the computer system for controlling, lighting, heating etc. in this example.

6.9 This clearly suggests that word 'Make available' was used in treaty in above said context. Treaty too suggest these services of technical knowledge/experience/skill etc. were offered or made accessible to the other party and it never meant that the other party should be trained or made expert in such technical knowledge etc. It will be absurd on part of a person to make other person expert of its own core competency, which will result in situation that the recipients of service will not look again to him when these services are again needed in future. Teaching /educational services have been separately dealt elsewhere in the treaty. The assessee has also not argued on interpretation of word 'make available' in US courts. In view of above the meaning of expression 'Make available' has to be read in the

above context. In the present case, service provider has provided or made accessible the services of its technical knowledge/ experience.... 'Enabled to apply' phrase used in same protocol does not mean that service provider also has to teach technology embedded in the service provided. In view of above, we are of the view that there is no need of any interference in the assessment order of the A.O on this issue."

7. As per the directions of the DRP u/sec. 144C(5) of the Act the Assessing Officer finally brought to tax the entire amount under the provisions of the I.T. Act . Now, the assessee is in appeal before us.

8. We have heard the rival submissions of the parties and have also considered the written submissions and the precedents and decisions relied on by both the parties. The assessee is tax resident of Sweden. It is claimed that that it does not have a permanent place of business in India (PE). The dispute is in respect of the payment of Rs.5.9 Crores received by the assessee company from its Indian subsidiaries i.e. Sandvik Asia Pvt. Ltd. (SAPL) and WTIPL. The claim of the assessee is that the assessee received the said payment from its Indian subsidiaries for rendering the services which are in the nature of commercial, management, marketing and production services. The nature of the services as per the agreement are already mentioned here-in-above. In this case there is no dispute about the legal position that the amount received by the assessee from its Indian subsidiaries is taxable in India under normal provisions of Act more particularly u/s. 9(1)(vii) r.w.s. 5(2) of the Income-tax Act. The main plank of the argument of the Ld. Counsel is that when the assessee is covered by the beneficial clauses in the treaty entered into as per the provisions of Sec. 90 (2) of the Income-tax Act then even if the assessee's income is taxable in the normal provisions still he can claim the exemption from the tax as per the clauses applicable in the treaty.

8.1 Ld. Counsel argues that the above payment received by the assessee company is not taxable in India in view of the beneficial provisions of the tax treaty between India and Sweden read with the protocol which is integral part of said treaty. He submits that the provisions of tax treaty between India and Sweden read with the protocol relating to the scope and taxation of fees for technical services being more beneficial than the correspondence provisions of the Income-tax Act hence, the assessee may be given the benefit of the treaty between India-Portugal on the basis of Protocol. He submits that without admitting even if the amount received by the assessee is in the nature of fees for technical services (FTS) but going on the principles of most favoured nation (MFN) clause in the protocol attached to the DTAA between India and Sweden, the assessee can claim the exemption from tax in India because subsequently the India has also entered into DTAA with Portugal which is also member of the OECD and fees for technical services are not taxable unless the condition of make available is fulfilled.

8.2 Ld. Counsel placed heavy reliance on the decision of the Hon'ble High Court of Karnataka in the case of *CIT, Central Circle, Bangalore and another v. M/s. De Beers India Minerals Pvt. Ltd.* 340 ITR 467 (Kar) and *Bharati Axa General Insurance Co. Ltd. v. DIT* 326 ITR 477. He referred to the assessment order and submits that Assessing Officer has impliedly accepted that the tax treaty between India-Portugal can be

applied to the assessee more particularly in the context of the protocol attached to the India and Sweden treaty. There is condition for beginning to tax the fees for technical services (FTS) in the DTAA between India and Portuguese i.e make available and if said condition is not fulfilled in source Country FTS cannot be taxed. The assessee is to be given the benefit of the India-Portuguese treaty on principle of MFN clause which is well recognized in international taxation. He submits that the identical issue has come for the consideration by the ITAT, Pune in the case of *Sandvik Australia Pty. Ltd. v. D.D.I – International Tax-II*, Pune in ITA No. 93/PN/2011 and the assessee's case is squarely covered on the interpretation of a expression-"make available". Per contra, the Ld. DR relied on the written submissions.

9. In this case the only issue to be considered by us is whether the assessee can be given benefit of India-Portuguese treaty on principle of MFN clause? The India entered into DTAA with the Sweden which was notified vide notification no. GR 705/E dated 17.12.1997. Article 12 of the India-Sweden DTAA provides the mode of taxation of the royalties and fees for technical services whether the same are to be taxed in the source country or in the residence country. The definition of the fees for technical services (FTS) is given in Article 12(3)(b) of the Act. It is true that it is a very conservative definition and there is no condition that the technical services should be made available. The India also entered into the treaty with Portuguese republic which was notified vide notification no. GR F42/E dated 16th June, 2000. In the said Treaty, mode of taxation of the fees for technical services (FTS) between two countries is also provided in the Article 12 but instead of fees for technical services the expression used is "fees for included technical services". As per the Article 12(4) fees for included services means payment of fees of any kind other than those mentioned in article 14 and 15 of the said treaty, to any person in consideration of the rendering of any technical or consultancy services (including through the provisions of services of technical or other personal) if such services—

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment describe in para no. 3 is received or
- (b) make available technical knowledge, expressions, skill, knowhow or process, or consist of the development and transfer of technical plan or technical design which enables the person acquiring the services to apply the technology contained therein.

The main plank of the argument of the Ld. Counsel is that considering the principle of most favoured nation (MFN) clause in treaty between India and Portuguese unless a condition of make available the technical knowledge or skill or services is fulfilled then said payment cannot be taxed in source country i.e. India.

10. In the case of *Sandvik Australia Pty. Ltd. (supra)* and following the decision in the case of *M/s. De Beers India Minerals Pvt. Ltd. (supra)* on the expression "make available" it is held as under:

"12. The Assessing Officer has already reproduced Article 12 of the India Australia Treaty in his draft assessment order and he has interpreted that as per the Treaty FTS means payment of any kind to any person in consideration for the rendering of any technical or consultancy services if such services make available technical knowledge, experience, skill, know-how or process or consists of development and data of technical plan or technical design. In view of the above rendered by the assessee company to its Indian affiliates are in the nature of FTS or royalties and same is taxable in India. We reproduce herein under the relevant part of Article 12:

ARTICLE XII - Royalties - 1. Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed:

(a) in the case of :

(i) royalties referred to in sub-paragraph (3)(b) ;

(ii) payments or credits for services referred to in sub-paragraph (3)(d), subject to sub-paragraphs (3)(h) to (l), that are ancillary and subsidiary to the application or enjoyment of equipment for which payments or credits are made under sub-paragraph (3)(b); or

(iii) royalties referred to in sub-paragraph (3)(f) that relate to equipment mentioned in sub-paragraph (3)(b) ;

10 per cent of the gross amount of the royalties; and

(b) in the case of other royalties :

(i) during the first 5 years of income for which this Agreement has effect :

(a) where the payer is the Government or a political sub-division of that State or a public sector company: 15 per cent of the gross amount of the royalties; and

(b) in all other cases: 20 per cent of the gross amount of the royalties; and

(ii) during all subsequent years of income: 15 per cent of the gross amount of the royalties.

3. The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for :

- (a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark or other like property or right;
- (b) the use of, or the right to use, any industrial, commercial or scientific equipment;
- (c) the supply of scientific, technical, industrial or commercial knowledge or information;
- (d) the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such property or right as is mentioned in sub-paragraph (a), or any such equipment as is mentioned in sub-paragraph (b) or any such knowledge or information as is mentioned in sub-paragraph (c);
- (e) the use of, or the right to use :
 - (i) motion picture films;
 - (ii) films or video tapes for use in connection with television; or
 - (iii) tapes for use in connection with radio broadcasting;
- (f) total or partial forbearance in respect of the use or supply of any property or right referred to in sub- paragraphs (a) to (e);
- (g) the rendering of any services (including those of technical or other personnel), which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design; but that term does not include payments or credits relating to services mentioned in sub-paragraphs (d) and (g) that are made;
- (h) for services that are ancillary and subsidiary, and inextricably and essentially linked, to a sale of property;
- (i) 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;
- (j) for teaching in or by an educational institution;

- (k) for services for the personal use of the individual or individuals making the payments or credits; or
- (l) to an employee of the person making the payments or credits or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14.

4. The provisions of paragraphs (1) and (2) shall not apply if the person beneficially entitled to the royalties, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the property, right or services in respect of which the royalties are paid or credited are effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself or a political sub-division or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the royalties, whether the person is a resident of one of the Contracting States or not, has in one of the Contracting States or outside both Contracting States a permanent establishment or fixed base in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment or fixed base, then the royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, owing to a special relationship between the payer and the person beneficially entitled to the royalties, or between both of them, and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law, relating to tax, of each Contracting State, but subject to the other provisions of this Agreement.

13. We are concerned with para No.3 of Article 12, which defines the term Royalty. Under the IT Act, the term royalty and expression FTS are classified as two different connotations, i.e. 9(1)(vi) and 9(1)(vii). So far as Article 12 is concerned, FTS is included in the term "royalty" for the purpose of deciding in which contracting state the income from the same is to be taxed. Clause (g) in Article 12(3) goes to the roots of the issue. Main thrust of the argument of the Ld. Counsel is that it is not only sufficient to render the services but the same should be made available to the recipient and this particular important aspect is missed by the DRP/TPO. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying

or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that persons own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself.

14. The expression 'make available' has come for consideration before the Hon'ble High Court of Karnataka in the case of *M/s.De Beers India Minerals Pvt. Ltd. (supra)*. In the said case, the Treaty between India and Netherlands was for the consideration of their Lordships. The assessee in that appeal was a providing company engaged in the business of prospecting and mining for diamonds and other minerals. They have been granted licences (Reconnaissance Permits) by the State Government of Karnataka, Andhra Pradesh and Chhattisgarh. During the early stage, various techniques were employed for the purpose of carrying out geophysical survey, the assessee entered into agreement with M/s.Fugro Elbocon B.V. Netherlands, who had a team of experts specialised in air borne geophysical services for clients. For the technical services rendered by them the said assessee had paid consideration. The Assessing Officer applied Article 12 of the Indo-Netherlands Treaty and held that the same was taxable in the hands of the Netherlands Company. As the wordings of Article 12 in the Indo-Netherlands Treaty are analogous to Article 12 of the India Australia Treaty, as expression 'make available' is also used while determining fiscal jurisdiction of the contracting state, the Hon'ble High Court explained the meaning of the expression 'make available' which was appearing in the Indo-Netherlands Treaty, the Lordships explained the expression as under:

"13. Under the Act if the consideration paid for rendering technical services constitute income by way of fees for technical services, it is taxable. However, Article 12 of the aforesaid India-Netherlands Treaty defines fees for technical services for the purpose of Article 12 which deals with royalties and fees for technical services. The fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to clause (vii) of sub-section (1) of Section 9. In view of Section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know how or processes which enables the person acquiring the service to apply technology contained therein. Though this provision is not contained in India Netherlands Treaty, but virtue of Protocol in the agreement, Clause (iv)(2) reads as under:

"If after the signature of this convention under any Convention or Agreement between India and third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment 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, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."

14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA, the liability to tax is not attracted."

11. Now, the next question is whether the assessee is entitled for the benefits of DTAA between India-Portuguese as second condition make available is not fulfilled. There is a Protocol to the treaty between India and Sweden which is as under:

At the signing of the Convention between the Government of the Republic of India and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, the undersigned have agreed that the following shall form an integral part of the Convention :

With reference to Articles 10, 11 and 12 :

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 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."

11.1 An MFN clause refers to a situation wherein two non-resident tax payers are given impartial treatment by the concerned country. In DTAAs, MFN clause find place when countries are reluctant to forego their right to tax some elements of the income. An MFN clause can direct more favourable treatment available in other treaties only in regard to the same subject matter, the same category of matter or the same clause of the matter. The protocol attached to the treaty take care of a situation where in cases either of the contracting states enter into a bilateral agreement into the nature of DTAA with the another sovereign state and where the same subject matter has been given more favourable treatment by way of a definition or mode of tax then the parties can claim the benefit on the recognized principle of MFN clause. In his introduction to 'Double Taxation Conventions' (Third Edition) Klaus Vogel has explained the role of the protocol and its role in interpreting the treaty. The same has been considered by the ITAT, Calcutta in the case of DCIT V. ITC Ltd., 76 TTJ 323.

11.2 In the case of *Maruti Udyog Ltd., v. ADIT* reported in [2010] 37 DTR 85 (Delhi) explaining the scope of the protocol it is held as under :

"11.1 It is settled position in law that protocol is an indispensable part of the treaty with the same binding force as the main clauses therein, as protocol is an integral part of the treaty and its binding force is equal to that of the principal treaty. The provisions of the aforesaid DTAA are, therefore, required to be read with the protocol clauses and are subject to the provisions contained in such protocol. Examined in the light of DTAAs between India and UK, USA and Switzerland, we find that in the case before us the assessee had not purchased any property from UTAC France. Therefore, none of the fees i.e., impact testing fees or fee paid for test reports is ancillary and subsidiary as well as inextricably and essentially linked to the sale of a property. Therefore, the decision of the Tribunal, Calcutta Bench in the case of *Dy. CIT v. ITC Ltd. (supra)* relied upon by the assessee is not applicable to the facts of the case. In this case the assessee had purchased machines from UK and payments were made to foreign party for installation and commissioning of the machines. The foreign party did not have any PE in India to which such income could be attributed. In this view of the matter it was held that the payments made to foreign party for installation and commissioning of the machines were related to technical services, which were ancillary and subsidiary as well as inextricably and essentially linked to the sale of the property. Hence, the payments made to the foreign party were not liable to be taxed in India. In the decision relied upon by the assessee in the case of *Raymond Ltd. v. Dy. CIT (supra)*, it was held that no technical knowledge, experience, skills, know-how or process etc. was made available to the assessee company by the non-resident managers of the GDR issue within the meaning of art. 13(4)(c) of the

DTAA. Likewise, decisions in the cases of *Skycell Communications Ltd. (supra)* and *NQA Quality Systems Registrar Ltd. (supra)* are distinguishable on facts, hence, are not applicable to the facts of the assessee's case."

11.3 It is also worthwhile to refer to the ruling given in the case of Authority for Advanced Ruling (AAA) in the case of Poonavala Aviations reported in 343 ITR 381 though it is having persuasive value which reads as under :

"16. 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. He says, "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". A protocol is said to be a treaty by itself that amends or supports the existing treaty. We cannot also forget the observations of the Supreme Court in *Union of India v. Azadi Bachao Andolan* [2003] 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) at p. 751 that "An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases". So the argument of the Revenue that the protocol cannot be relied on to understand the scope of taxation cannot be accepted."

12. So far as the present case before us is concerned, on the basis of the protocol to the DTAA between the India and Sweden the assessee can claim the benefit of the conditions imposed for bringing to tax the fees for technical services in the treaty between the India and Portuguese. We, therefore, hold that on the principle of the most favoured nation (MFN) clauses the payment of Rs.5.93 Crores received by the assessee company from its Indian subsidies cannot be brought to tax. We, therefore, allow the grounds taken by the assessee on the above reasons.

13. In the result, the assessee's appeal is allowed.