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

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
New Delhi

CA. G. Ramaswamy
President
ICAI

Preface

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 Royaly & 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
New Delhi

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

Preface

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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Broad Scheme of Taxation in India

Taxability as per provisions of the Act

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

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.

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 (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]).

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

India has entered into comprehensive DTAAs with more than 70 countries for the avoidance of double taxation.

An assessee has the option[7] to be governed by the provisions of the Act or the applicable DTAA, whichever are more beneficial to it.

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 would help in optimizing the overall tax position in India.

[7] Section 90 of the Act.

Applicability of Deeming Provisions

As per generally accepted principles, taxability under the deeming provisions (i.e., "deemed to accrue or arise" in India) should be examined only if the income is not actually "accruing" or "arising" in India.

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

Further, apart from interest, 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 occurred in India or not. For all other streams of income (such as capital gains, business income, etc.), taxability would be triggered in India under the deeming fiction only if immediate nexus between India and the income generating activity is established (in the form of presence of the capital asset in India or existence of a business connection/PE in India, etc.).

[8] CIT vs. Oriental Co. Ltd [1981] (137 ITR 777) (Calcutta HC).

Royalty – Scope of the Term

Generally understood meanings of the term "royalty"

Encyclopedia Britannica, 1972 Edition[9]

"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[9]

"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[9]

"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."

Wikepedia

"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".

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

Dictionary.com

"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

At the outset, it is pertinent to understand that royalty income is taxed as per the source rule[10].

Section 9(1)(vi) of the Act

The term "royalty" has been defined under section 9(1)(vi) of the Act.

This section also provides for taxability of "royalty" under "deeming" circumstances.

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;

v. the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

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

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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.

In other words, royalty means –

- With respect to patent, invention, model, design, secret formula or process or trade *mark* or similar property, payments for –
  - Use;
  - 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.
- With respect to any industrial, commercial or scientific equipment (excluding where section 44BB of the Act is applicable), payments for –
  - 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.

Broadly, the following conditions need to be satisfied for an amount 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[11].

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

[11] 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.

- 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;
- Facts of the case;
- Substance of the arrangement;
- Classification of the payment under the Import Policy[12];
- Characterization of the payment in the RBI approval[12], if any;
- Characterization of the payment in the Government approval13[13], if any.

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.

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

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
  - — for the purpose of making or earning any income from any source outside India[14].

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[12] CIT vs. Davy Ashmore India Ltd [1990] (190 ITR 626) (Calcutta HC).

[13] ACIT vs. Hewlett Packard Ltd [2001] (75 TTJ 786) (Delhi ITAT).

[14] 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). Held that the "source" (i.e., for the payer) was in India - Dell International Services India (P.) Ltd [2008] (305 ITR 37) (AAR).

- 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[15]; or
  - — for the purpose of making or earning any income from any source in India.

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[16], 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[17] –
  - — lump sum payment is made by a resident
  - — for transfer of all or any rights[18] 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.

The term "computer software" for this purpose means[19] "any computer programme recorded on any disc / tape / perforated media / other information

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15 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).

16 Proviso 1 to section 9(1)(vi) of the Act.

17 Proviso 2 to section 9(1)(vi) of the Act.

18 Including the granting of a licence.

storage device (and includes any such programme or any customized electronic data)".

Further, as per Explanation[20] 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.

Provisions of the DTAA

Definition of the term "royalty" as per the UN Model Convention is 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

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[19] As per explanation 3 in section 9(1)(vi) of the Act.

[20] 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.

scientific equipment, or for information concerning industrial, commercial or scientific experience".

Further, the definition under the OECD Model Convention is 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".

Accordingly, as can be observed above, the definition of "royalty" under the OECD Model Convention is narrower when compared with the UN Model Convention.

Most DTAAs 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, 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.

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.

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

- Licence to reproduce a software and distribute it to the public;
- Access to a portal located outside India in specified circumstances[21];
- Use or right to use a customized software[22];
- Use of an internet based software hosted on the server of a foreign company[23] in specified circumstances;
- Use or right to use a design, secret formula, patent, trademark, invention, etc.;
- Payment for time charter[24] or bareboat charter[25] of a ship.

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

- Sale of off the shelf software[26];
- Use of leased capacity of a transponder[27];
- Outright sale of engineering designs, calculations, etc.[28];
- Transmission of voice and data through telecom bandwidth[29];
- Access to data in a copyrighted web based database[30].

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21 Cargo Community Network Pte Ltd [2007] (289 ITR 355) (AAR).

22 Airports Authority of India [2010] (323 ITR 211) (AAR).

23 IMT Labs (India) Pvt. Ltd [2006] (287 ITR 450) (AAR).

24 Poompuhar Shipping Corporation Ltd vs. ITO [2006] (108 TTJ 970) (Chennai ITAT).

25 West Asia Maritime Ltd vs. ITO [2006] (109 TTJ 617) (Chennai ITAT).

26 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.

27 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).

28 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.

29 Dell International Services India (P.) Ltd [2008] (305 ITR 37) (AAR), CIT vs. Estel Communications P. Ltd [2008] (318 ITR 185) (Delhi HC), etc.

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

- Sale of business information reports[31];
- Sale of industry information[32];
- Access to a web-based journal containing views, opinions and news[33];
- Providing grading and certification reports[34];
- Data processing services in cases where it is a standard facility[35];
- Assignment of rights in a contract[36];
- Cost contribution towards basic R&D activities[37].

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

31 Dun & Bradstreet Espana S A [2004] (272 ITR 99) (AAR) and Abc Ltd. (Xyz Ltd.) [2005] (284 ITR 1) (AAR).
32 CIT vs. HEG Ltd [2003] (263 ITR 230) (Madhya Pradesh HC).
33 Wipro Ltd vs. ITO [2004] (92 TTJ 796) (Bangalore ITAT).
34 Diamond Services International (P.) Ltd vs. UOI [2007] (304 ITR 201) (Bombay HC).
35 Standard Chartered Bank (Mumbai ITAT) (unreported).
36 Abc Ltd. [2006] (289 ITR 438) (AAR).
37 Abb Ltd [2010] (322 ITR 564) (AAR).

FTS – Scope of the Term

Provisions of the Act

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

The terms "FTS" has been defined under section 9(1)(vii) of the Act.

This section also provides for taxability of "FTS" under "deeming" circumstances.

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'".*

In other words, FTS is the consideration payable for rendition 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".

The terms "managerial", "technical" and "consultancy" appearing in the definition of the term "FTS" have not been specifically defined in the Act. Accordingly, their generally understood meaning would have to be examined while interpreting the ambit of the term "FTS". Further, these concepts have been examined in detail in certain past judicial precedents as well.

There apart, the definition of the term "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"). These would have to be kept in perspective while interpreting this term.

Some judicial precedents on these exclusions

- Income from services rendered in connection with seismic surveys cannot be regarded as FTS[38] 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*[39].

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

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[40]; or
  - — for the purpose of making or earning any income from any source outside India[41].
- Where the FTS is payable by a non-resident to the non-resident recipient, only if -

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38 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) and Bergen Oilfield Services AS vs. DIT (AAR No. 857 of 2009) (AAR) (unreported).

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

40 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).

41 Held that the "source" (i.e. for the payer) is in India - Ranbaxy Laboratories Ltd. vs. DCIT [2002] (91 TTJ 831) (Delhi ITAT).

— 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.

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[42] if the agreement is made before 1st April, 1976[43].

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

Provisions of the DTAA

Each specific DTAA would have a definition of the term "FTS" / "FIS"[44] in most cases (barring a few exceptions – which are discussed later)[45].

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

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42 Proviso 1 to section 9(1)(vii) of the Act.

43 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.

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

45 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

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 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)

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".

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

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[46] 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.

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

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

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)[46];

(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

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)[46] 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)[47] 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.

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)[48] of this Article;

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

[48] Dealing with the 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 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.

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 -

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?[49]

Analysis -

The installation assistance and initial training are ancillary and subsidiary 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.

The services of updating the operating system and providing associated training may well be ancillary and subsidiary to the sale of the computer, but they are not inextricably and essentially linked to the sale. Without the

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

upgrades, the computer will continue to operate as it did when purchased, and will continue to accomplish the same functions. Acquiring the updates cannot, therefore, be said to be inextricably and essentially linked to the sale of the computer.

Let us consider yet another example –

Facts -

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?[50]

Analysis -

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).

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)[51].

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

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

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)

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.

The AAR and ITAT have held[52] 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.

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.[53]

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.[54]

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.

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.

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[55].

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

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52 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).

53 Raymond Ltd vs. DCIT [2002] (86 ITD 791) (Mumbai ITAT).

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

55 MOU to the India-US DTAA.

Facts –

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"?[56]

Analysis –

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 –

A US manufacturer operates a wallboard fabrication plant outside India. An Indian builder hires the US company to produce wallboard at that plant for 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?[57]

Analysis –

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

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 rate lower or a scope more restricted 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

[56] Example 3, MOU to the India-US DTAA.

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

under the present DTAA (with effect from the date on which the present DTAA or the said DTAA is effective, whichever date is later).

For example – Assuming 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.

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.

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

- Advising on specific problems pertaining to production of pesticides and training technical personnel[58];
- Tests conducted to determine whether coke produced is suitable for the intended purpose[59];
- Preparation of designs, drawings and appraisal reports[60];
- Examining and improving fuel efficiency of engines[61];
- Impact tests on cars to check their quality[62];
- Services pertaining to registration and enforcement of intellectual property rights[63];
- Success fee for raising a loan[64];

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58 Union Carbide Corporation vs. IAC [1993] (50 ITD 437) (Kolkata ITAT).

59 Cochin Refineries vs. CIT [1996] (222 ITR 354) (Kerala HC).

60 Central Mine, Planning & Design Institute Ltd vs. DCIT [1997] (67 ITD 195) (Patna ITAT).

61 TVS Suzuki Ltd vs. ITO [1999] (73 ITD 91) (Chennai ITAT).

62 Maruti Udyog Ltd vs. ADIT [2009] (130 TTJ 66) (Delhi ITAT).

63 ADIT vs. Ess Vee Intellectual Property Bureau [2005] (7 SOT 38) (Mumbai ITAT).

64 G.V.K Industries Ltd & Another vs. ITO & another [1997] (228 ITR 564) (Andhra Pradesh HC).

- Engineering data and personnel services for establishing a furnace[65];
- Advertising, marketing promotion and other special services[66];
- Data processing services depending on the specific needs of the client[67].

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

- Assistance in making stray purchases[68];
- Standard cellular telephone service[69];
- Interconnect charges paid to telecom service providers[70];
- Provision of bandwidth/internet facilities[71];
- VSAT charges, Demat charges, etc. paid by members to the stock exchange for use of facilities[72];
- Construction/assembly of a conveyor belt[73].

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)[74];
- Architectural services[74];
- Computer software development[74];
- Bio-technical services[74];

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65 Elkem Technology vs. DCIT [2001] (250 ITR 164) (Andhra Pradesh HC).
66 International Hotel Licensing Company [2006] (288 ITR 534) (AAR).
67 Dr. Hutarew & Partner (India) P. Ltd vs. ITO [2008] (123 TTJ 951) (Delhi ITAT).
68 Linde A.G. vs. ITO [1997] (62 ITD 330) (Mumbai ITAT).
69 Skycell Communications Ltd and Another vs. DCIT and Another [2001] (251 ITR 53) (Madras HC).
70 Idea Cellular Ltd vs. DCIT [2008] (313 ITR 55) (Delhi ITAT).
71 CIT vs. Estel Communications P. Ltd [2008] (318 ITR 185) (Delhi HC).
72 DCIT vs. Angel Broking Ltd [2009] (35 SOT 457) (Mumbai ITAT).
73 ITO vs. National Mineral Development Corporation Ltd [1992] (42 ITD 570) (Hyderabad ITAT).
74 MOU to the India-US DTAA.

- Food processing [74];
- Environmental and ecological services [74];
- Communication through satellite or otherwise [74];
- Energy conservation [74];
- Exploration or exploitation of mineral oil or natural gas [74];
- Geological surveys [74];
- Scientific services [74];
- Technical training [74];
- Consulting services in relation to review of hydrocarbons, analysis and review of data maps[75];
- Training in the use of simulators[76];
- Technical assistance and training to enable the recipient to manufacture aluminium foils[77];
- Technical plans, designs and information to enable the recipient to execute and install water features[78].

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[79];
- Standard telecom service[80];
- Quality assurance assessment and certification activities[81];
- Reviewing project documentation and providing expert opinion[82];
- Providing commercial and industrial information[83];

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75 No. P/6 of 1995 [1995] (234 ITR 371) (AAR).
76 Sahara Airlines vs. DCIT [2002] (83 ITD 11) (Delhi ITAT)
77 Hindalco Industries Ltd vs. ACIT [2005] (94 TTJ 944) (Mumbai ITAT).
78 Gentex Merchants (P.) Ltd vs. DDIT [2005] (94 ITD 211) (Kolkata ITAT).
79 Raymond Ltd vs. DCIT [2002] (86 ITD 791) (Mumbai ITAT).
80 Wipro Ltd vs. ITO [2003] (80 TTJ 191) (Bangalore ITAT).
81 NQA Quality Systems Registrar Ltd vs. DCIT [2004] (92 TTJ 946) (Delhi ITAT).
82 C.E.S.C. Ltd vs. DCIT [2003] (275 ITR 15) (Kolkata ITAT).
83 McKinsey & Co., Inc. & others vs. ADIT [2005] (99 ITD 549) (Mumbai ITAT).

- Updation of a market study[84];
- Project monitoring services[85];
- Grading and certification reports[86];
- Referral services[87];
- Clinical or bio-analytical studies[88].

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

84 Bharat Petroleum Corporation Ltd vs. JDIT [2007] (14 SOT 307) (Mumbai ITAT).

85 Worley Parsons Services Pty Ltd [2008] (301 ITR 54) (AAR).

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

87 Cushman and Wakefield (S) Pte. Ltd [2008] (305 ITR 208) (AAR).

88 Anapharm Inc. vs. DCIT [2008] (305 ITR 394) (AAR).

Tax Treatment for Royalty and FTS as per Provisions of the Act[89]

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[90] / fixed place of profession in India or not.

Section 115A of the Act

Applicability –

- Where the non-resident does not have a PE / fixed place of profession in India to which the royalty / FTS income is effectively connected.
- The royalty / FTS is received by the non-resident from the Government / an Indian concern (under agreements approved by Central Government / relating to matters included in the Industrial Policy[91]).

In such a scenario, the royalty / FTS would be taxable on gross basis (i.e., without allowing any deduction for expenses incurred). The applicable tax rates are as under –

- 30% of the gross amount (plus applicable surcharge and education cess), if the underlying agreement (pursuant to which royalty is paid) is entered into on or before 31st May 1997;
- 20% of the gross amount (plus applicable surcharge and education cess), if the underlying agreement (pursuant to which royalty is paid) is entered into after 31st May, 1997 but before 1st June, 2005;

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89 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%.

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

91 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).

- 10% of the gross amount (plus applicable surcharge and education cess), if the underlying agreement (pursuant to which royalty is paid) is entered into on or after 1st June, 2005.

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).

Section 44DA of the Act

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[92] 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[93] 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[94] and get the accounts audited.
- The tax rate applicable under section 44DA of the Act is 40% (plus applicable surcharge and education cess).

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 taxation may not be available.

A general principle to be kept in perspective is that provisions of sections 9(1)(vi) and (vii) of the Act deal specifically with royalty and FTS, respectively. Accordingly, given that a specific provision would override a

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

93 i.e. in accordance with section 28 to section 44C of the Act.

94 In accordance with the provisions contained in section 44AA of the Act.

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[95] as well.

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

Tax Treatment for Royalty and FTS as per Provisions of the DTAA[89]

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

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.

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%[96]. In such a scenario, the assessee 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[97].

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).

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

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.

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

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96 Surcharge and education cess would not be leviable on such a rate.

97 Section 90 of the Act.

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.

In such cases, based on past judicial precedents[98], 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). Further, a recent judicial precedent[99] has 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".

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. There are quite a few judicial precedents[100] as well which support this principle.

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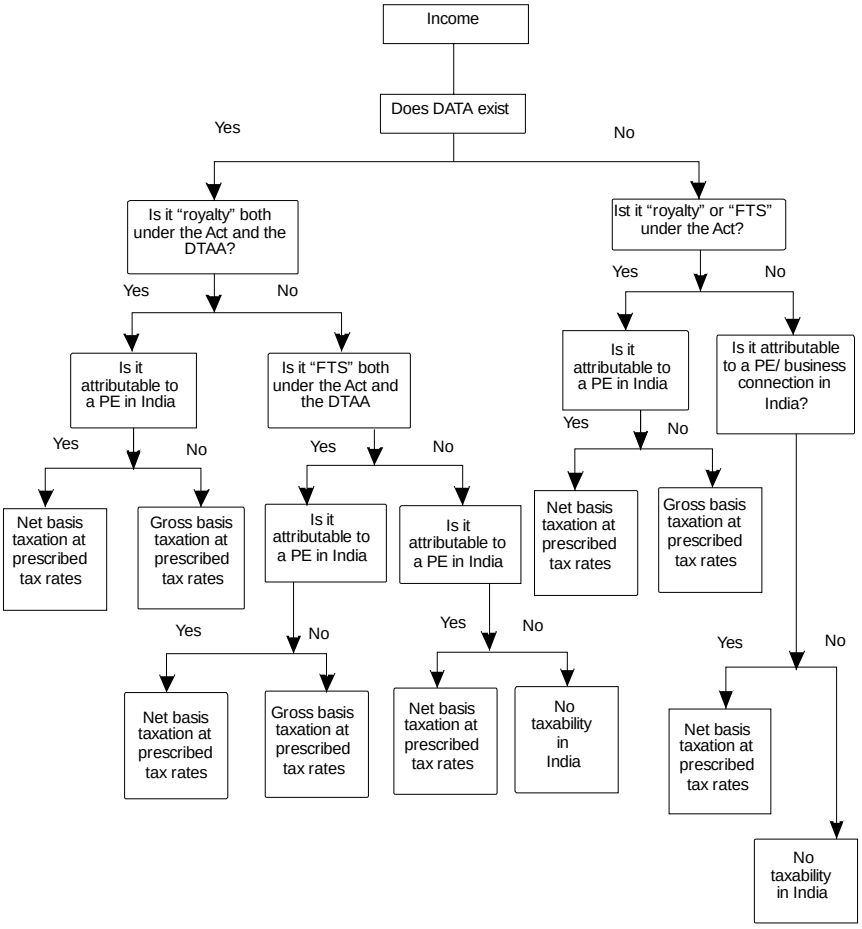
98 Tekniskil (Seniderian) Berhard vs. CIT [1996] (222 ITR 551) (AAR), GUJ Jaeger GMBH vs. ITO [1990] (37 ITD 64) (Mumbai ITAT), Christiani & Nielsen Copenhagen vs. ITO [1991] (39 ITD 355) (Mumbai ITAT) and Golf in Dubai, LLC, vs. DIT [2008] (306 ITR 374) (AAR).

99 Lanka Hydraulic Institute Limited [2011] (AAR) (unreported).

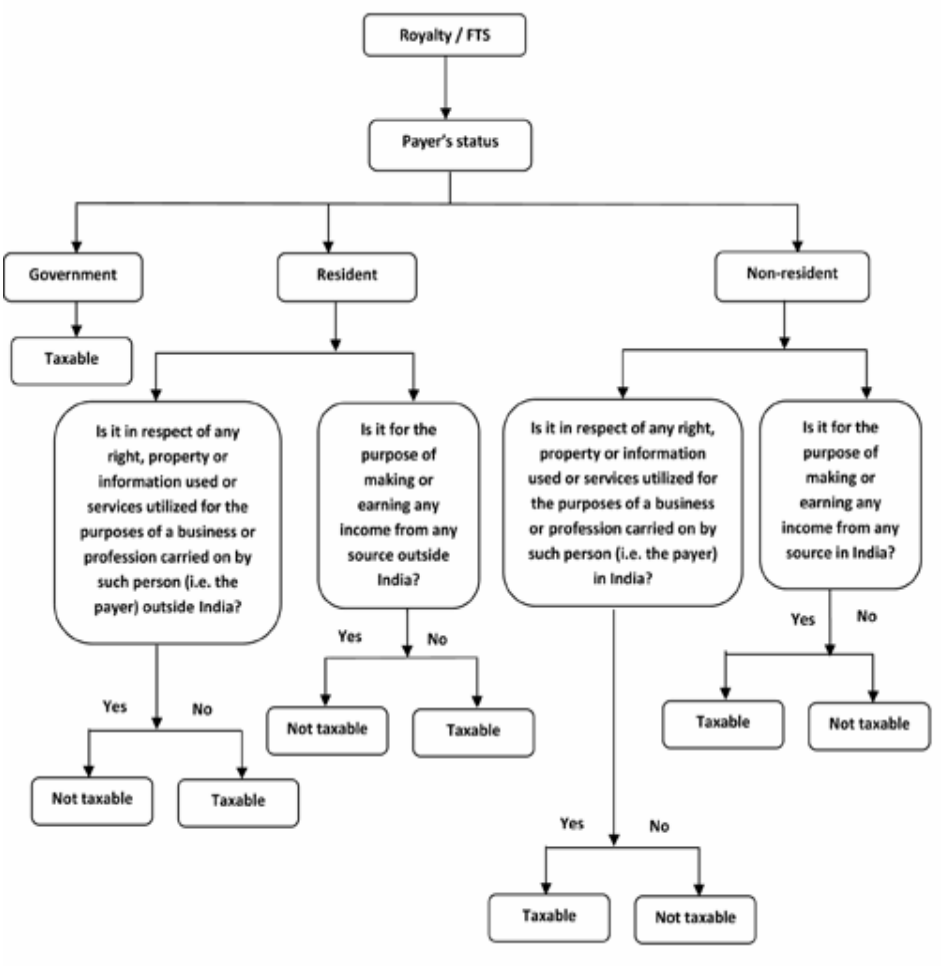
100 Ishikawajma-Harima Heavy Industries Ltd vs. DIT [2007] (288 ITR 408) (SC), Rotem Co., Mitsubishi Corporation [2005] (279 ITR 165) (AAR), etc.

Diagrammatic Summary

Broad income characterization matrix



Tests provided under the Act



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 therefor 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

Some judicial precedents on income characterization under the head "royalty"

Voice transmission charges / provision of bandwidth / cellular services	
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.
	Transponder hire charges[101]
DCIT v/s Panamsat 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"

[101] 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.

	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".
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 the decision of the Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd.
Asia Satellite Telecommunication Co. Ltd.	The Delhi High Court overruled the prior verdict of the Delhi ITAT on the

v/s DIT [2011] (Delhi HC) (unreported)	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".
	Payment for Software
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").
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".
Sonata information Technology Ltd v/s Addl. CIT [2006] (103 ITD 324) (Bangalore ITAT)	Payment for acquiring shrink wrapped software is not in the nature of "royalty" (since the payment is for acquiring a "copyrighted article" as against use or right to use a "copyright").
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 asseessee had acquired the right to use a particular software (known as "True Dial Software"). The asseessee 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 asseessee 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.
Fact Set Research Systems Inc. v/s DIT [2009] (317 ITR 169) (AAR)	In the facts of the case, the assessee was maintaining a comprehensive database which was a source of information on various commercial and financial matters of companies. The assessee's 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 assessee had to bestow its effort, experience and expertise to present the information / data in a focused and user friendly manner. For this purpose, the assessee was required to do collation, analysis, indexing and noting wherever necessary. These value additions were

	a product of the assessee's efforts and skills and they were outside public domain. In that sense, the database was an intellectual property of the assessee 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 assessee 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] (320 ITR 209) (Karnataka HC) SC order also passed – matter currently pending before Karnataka HC	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 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.
Dassault Systems K.K. [2010] (322 ITR 125) (AAR)	Income arising from the sale of a 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)	Payment for acquiring off the shelf / shrink wrapped software is not in the nature of "royalty", both as per section

(Bangalore ITAT)	9(1)(vi) of the Act as well as Article 12 of the India-Mauritius DTAA / Article 12 of the India-US DTAA.
M/s. Kansai Nerolac Paints Ltd. [2010] (134 TTJ 342) (Mumbai ITAT)	A software was being acquired which would 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.
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.

Use of business information reports	
Dun & Bradstreet Espana S A [2004] (272 ITR 99) (AAR)	The assessee 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.
Use of trademark	
DIT v/s Sheraton International Inc. [2009] (313 ITR 267) (Delhi HC)	The non-resident assessee 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 assessee 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 assessee 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 Limited v/s ITO [2006] (108 TTJ 970) (Chennai ITAT)	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").
West Asia Maritime Ltd v/s ITO [2006] (109 TTJ 617) (Chennai ITAT)	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

	("use of industrial, commercial or scientific equipment").
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.
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 an 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).

Information concerning industrial, commercial or scientific experience	
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.
Wipro Ltd v/s ITO [2004] (92 TTJ 796) (Bangalore ITAT)	As regards the term "information concerning industrial, commercial or scientific experience", the word "experience" referred to herein should be one's own experience and not a compilation of somebody else's experience. In the facts of the case, consideration received for providing access to a web based journal containing views, opinions and news (which was a compilation of someone else's experience) was held to be not in the nature of "royalty" as defined in section 9(1)(vi) of the Act as well as Article 12 of the India-US DTAA.
Diamond Services International (P.) Ltd. v/s Union Of India[2007] (304 ITR	Charges paid for grading and certification reports for diamonds and other articles cannot be construed as

201) (Bombay HC)	"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.
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 asset" 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] (Delhi HC) (unreported)	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).

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.
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.
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	Tax audit under section 44AB of the Act would not be required in a situation

ITAT)	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.
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[102] 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

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

	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 considered as payment for "use" or "right to use" equipments since the assessee did not have any "possessory rights" in relation to the equipments.
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.
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 tra nsfer 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".
ADIT v/s M/s. Universal International Music B.V. [2011] (Mumbai ITAT) (unreported)	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 Indian company) in Netherlands. 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 12 of the India-Netherlands DTAA). The ITAT held that since the Indian Tax Authorities had not doubted the tax residency certificate issued by the Dutch Tax Authorities, the Dutch

	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).

Annexure D

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 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] (57 TTJ 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) Technical services	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.

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.
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 equipments 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 equipments 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.
Maruti Udyog Ltd. v/s ADIT [2009] (130 TTJ 66) (Delhi ITAT)	The ITAT held that carrying out impact tests on cars (to check their quality) and submitting test 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.
DCIT v/s Angel Broking Ltd. [2009] (35 SOT 457) (Mumbai ITAT)	This decision was rendered in the context of section 194J of the Act. It was held that payments made by a member to a stock exchange towards VSAT charges, leased line charges, BOLT charges and Demat charges (being fees paid for use of facilities provided by the stock exchange) cannot be construed as payments for any "technical service", and accordingly, such payments cannot be characterized as "FTS" as defined in section 9(1)(vii) of the Act. In arriving at the above conclusion, the ITAT observed that the charges levied by the stock exchange are for the purpose of recovering the costs incurred by it in providing these

	facilities to its members. Further, the fact that the payment was for a sophisticated method of trading viz. screen based trading (which would result in enhancing the speed and ease with which the transactions are processed) would not by itself mean that "technical services" are being provided by the stock exchange.
CIT v/s Bharti Cellular Ltd. [2011] (330 ITR 239) (SC)	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).
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").
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.
Seismic surveys and related activities	
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.
Wavefield Inseis Asa[2009] (320 ITR 290) and [2010] (322 ITR 645) (AAR)	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).
OHM Limited v/s DIT (AAR No. 935 of 2010) 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.
Miscellaneous	
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.
G.V.K. Industries Limited & another v/s ITO & another [1997] (228 ITR 564) (Andhra Pradesh HC) Further to the HC ruling, the SC has also ruled on this matter on the limited aspect of extra territoriality (the SC ruling is unreported)	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.
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).
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.
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 examined in entirety).
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 has also been taken in the case of Steffen, Robertson & Kirsten Consulting Engineers & Scientists [1998] (230 ITR 206) (AAR).
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.
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 of the

	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".
Composite EPC contracts	
Rotem Co., Mitsubishi Corporation [2005] (279 ITR 165) (AAR)	In the facts of the case, since the consideration for 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).
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.
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.).
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.
Hindalco Industries Ltd. v/s ACIT, [2005] (94 TTJ 944) (Mumbai ITAT)	Technical assistance and training provided (under a technical assistance agreement) to enable the 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".
McKinsey & Co., Inc. & others v/s	In the facts of the case, an Indian

ADIT [2005] (99 ITD 549) (Mumbai ITAT)	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] (280 ITR 1) (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 Article 12 of the India-Singapore DTAA[103]
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 12[103] 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

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

	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 ITR 201) (Bombay HC)	Charges paid for grading and certification reports for diamonds and other articles cannot be construed as "FTS" as defined in Article 12[103] of 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).
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.
Worley Parsons Services Pty. Ltd.	Project monitoring services (i.e.

[2008] (301 ITR 54) (AAR)	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 12102 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] (323 ITR 184) (AAR)	Support services rendered by a foreign company to its group entities (including an Indian company) in

	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] (Mumbai ITAT) (unreported)	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 OutsourcePrivate Limited [2011] (AAR) (unreported)	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.
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 12103 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.
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) Christiani & Nielsen Copenhagen v/s ITO [1991] (39 ITD 355) (Mumbai ITAT)Golf in Dubai, LLC v/s DIT [2008] (306 ITR 374) (AAR)	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 recently in the case of Lanka Hydraulic Institute Limited, it has been held that in the absence of a specific Article for taxation of FTS in the India-Sri Lanka DTAA, any 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).