



## Global Business Tax Alert Sharp Insights

If the services do not enable the recipient to utilise the knowledge in future - No 'make available' and hence, not 'Fees for technical services' under India-US tax treaty

If the Associated Enterprise ('AE') is remunerated at arm's length price – No profit attribution, even where AE is considered to be a Permanent Establishment

**Issue no: GBTA/37/2015**

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# Synopsis

The Bangalore Tribunal in the case of ABB Inc., has held that if provision of business development and marketing services does not involve transfer of technology and do not enable the recipient of the services to utilise the knowledge or know-how on his own in future without the aid of the service provider, the same would not satisfy the 'make available' condition and hence cannot be taxed as 'Fees for technical services' as per India-US tax treaty.

The Tribunal further held that where the AE is remunerated at an arm's length price then even if the AE is considered to be a Permanent Establishment ('PE') in India, there would not be any taxable profit attribution to the PE.

## Facts

- ABB Inc. ('the assessee') is a company incorporated and fiscally domiciled in the USA. The assessee is engaged, *inter alia*, in providing business development, market services and other support services to its Indian Associated Entities (AEs), i.e. ABB Limited and ABB Global Industries & Services Limited.
- Assessee earned fees towards support services provided to its AEs. The respective AEs had withheld taxes on such payment.
- The assessee in its return of income claimed that the services provided to Indian AEs do not 'make available' any technical knowledge, experience, skill etc and hence, not taxable as 'fees for technical services' in India under India-US tax treaty.
- The Assessing Officer ('AO') rejected the claim of the assessee on 'make available' stating that a person without technical knowledge cannot provide sales and marketing, pricing, product development strategy and are mostly covered by consultancy services.
- Further, the AO reasoned that once Indian AEs have withheld taxes on the payments made to the assessee, then the assessee cannot take a different view in its tax return.

- On appeal, DRP confirmed the AO's contention and on a without prejudice basis held ABB Global Industries & Services Limited to be a Dependent Agency PE ('DAPE') of the assessee in India and directed the AO to tax the profit attributable to the DAPE.

## Issue before the Tribunal

- Whether income earned by the assessee from providing business development, market services and other support services to its Indian AEs would tantamount to 'Fees for technical services' as per Article 12(4)(b) of the India-US tax treaty?
- Whether the arrangement between the assessee and ABB Global Industries & Services Limited (Indian AE), would make the latter company to be a DAPE of the assessee in India?

## Ruling of the Bangalore Tribunal

### Fees for technical services

- Relying on the decision of the Hon'ble Karnataka High Court in the case of De Beers India (P.) Ltd<sup>1</sup> the Tribunal held that unless there is a transfer of technology involved in technical services extended by the US company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 12(4)(b) of India-US tax treaty.
- Even if the services are technical services in nature but what is really the decisive factor for taxability is to see whether the services results in transfer of technology.
- In the given case, the services do not enable the recipient of the services to utilise the knowledge or know-how on his own in future without the aid of the service provider. Therefore make available condition is not satisfied.
- Accordingly, the Tribunal directed the AO to delete the additions made on account of 'Fees for technical services'.

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<sup>1</sup> CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467

## DAPE

- In connection with DAPE, the Tribunal held that, on the facts of the case, when the PE is admittedly in respect of the trading transactions only, no part of the earning from rendering of services to the AE can be related to the nature of the PE activities, the consideration for these services can be brought to tax in the source jurisdiction, i.e. India.
- Further, in connection with taxability of the profit of the DAPE in the hands of the assessee, the Tribunal relied on Bombay High court decision of SET Satellite (Singapore) Pte Ltd<sup>2</sup> and held that even if there is a DAPE, it will have no taxable income in the hands of the assessee in the absence of the finding that the DAPE has been paid a remuneration less than arm's length remuneration. In view of the same, the Tribunal has not examined the aspect regarding existence of the DAPE.
- In view of the above, the Tribunal directed the AO to delete the additions made on account of DAPE.

## Comments

The Bangalore Tribunal's decision is an addition to the plethora of decisions on what constitutes 'make available' and its taxability as 'fees for technical services'.

Further, the Tribunal upheld the important principle laid down by Bombay High Court in the case of SET Satellite (Singapore) that when the AE is paid arms' length remuneration, there should not be any further attribution of profits to the PE, even where the AE is considered to be a DAPE.

**Source:** ITAT Kolkata in the case of ABB Inc vs. Deputy Director of Income-tax – International Taxation (IT (TP) A No.: 1613/Bang/12)

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<sup>2</sup> SET Satellite (Singapore) Pte Ltd Vs DDIT [(2009) 307 ITR 205 (Bom)]

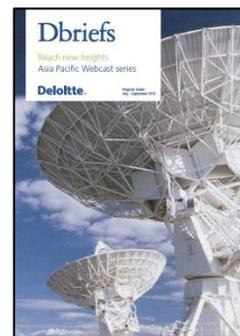
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## India's Finance Act and Recent Developments: The Road Ahead

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**Tuesday, 28 July, 2:30 PM – 3:30 PM IST**

The proposals of the Indian Finance Act 2015 are now in force and there are significant developments for foreign investors. In addition to the amendments in law by the Finance Act, there have been several other developments on the tax front. What are the amendments in law and recent developments you need to be aware of? Stay up to date with the latest international tax developments in India.



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