



## Tax alert: Design services taxable as FTS under India-Singapore tax treaty

**3 November 2023**

The Delhi Bench of the Income-tax Appellate Tribunal, based on the facts of the case, has held that the taxpayer was making available to the Indian company (A Co) all deliverables for the use of A Co. This enabled A Co to apply all the deliverables for its business purposes. Thus, the conditions of Article 12(4)(b) and (c) of the India-Singapore tax treaty, were satisfied and the consideration was taxable as fees for technical services.

### In a nutshell



The taxpayer (viz. the principal designer), assigned and transferred all right title and interest in all deliverables to A Co from the moment of creation.



The taxpayer granted perpetual, irrevocable, non-exclusive, royalty-free, fully paid-up right, and license to use, copy, modify and prepare derivative works of the taxpayer's IPR incorporated in the deliverables for the use of the deliverables by A Co, its affiliates and the third parties engaged by A Co, in connection with the business operations of the A Co and its affiliates.



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## Background:

- The taxpayer<sup>1</sup> is a tax resident of Singapore and is in the business of providing design services to customers.
- During the Financial Year (FY) 2015-16, corresponding to Assessment Year (AY) 2016-17 the taxpayer had, amongst others, received certain money from an Indian company (say A Co) [for design services] on which tax was withheld at the rate of 10% by A Co. The taxpayer did not include the receipts in its taxable income, on the following basis:
  - The remittance being payment towards technical services received would not be categorised as fees for included services as per Article 12(4) of the India-Singapore tax treaty as the services did not make available any technical know-how, experience, skill know-how or process which enabled the person acquiring the services to apply the technology contained therein.

Hence, the income was not taxable as per the India-Singapore tax treaty.

- In the course of audit proceedings, the Assessing Officer (AO) observed the following:
  - Based on perusal of the work order with A Co, the role of the taxpayer involved development and transfer of technical plan and technical design to A Co while applying or had applied into the final making of its building. A Co also acquired the rights to apply into its project the technology enhancement in the design or blueprint.
  - The receipts were covered in the scope and ambit of the term ‘fees for technical services’ (FTS) as laid down in Article 12 of the India-Singapore tax treaty. The receipts were also covered under Article 12(4)(b) of the India-Singapore tax treaty because the taxpayer, through its work as interior designer for the project, made available a technical process to A Co as interior designs or plans also described the process by which the design or blueprint would come to actual realisation.

Thus, the AO held that the income was in the nature of FTS both under the Income-tax Act, 1961 (ITA) and the India-Singapore tax treaty.

- Aggrieved, the taxpayer filed objections / appeal and in the course of proceedings the matter reached before the Delhi Bench of the Income-tax Appellate Tribunal (ITAT).

## Relevant provisions in brief:

### Relevant extract of Explanation 2 to section 9(1)(vii) of the ITA

*“Explanation 2.—For the purposes of this clause, “fees for technical services” means 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”.”*

### Relevant extract of Article 12 of the India-Singapore tax treaty

*“4. The term “fees for technical services” as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services...*

*... (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or*

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<sup>1</sup> Gensler Singapore Private Limited vs JCIT [I.T.A Nos. 7694/Del/2019] (Delhi ITAT)

*(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein”*

### **Decision of the ITAT:**

The ITAT noted /observed the following:

- The taxpayer had entered into a contract/ work order with A Co to provide interior design consultants and associate design consultancy for a tower project of A Co in India.
- The taxpayer was required to provide/prepare designs for the interior office/business sets in the tower building. This included designs for all areas of the building such as lobby, visitors experience centre, business centre, private offices, cabins and workstations, conference meeting rooms, cafetoria, storage areas etc. For this, the taxpayer was required to work in close co-ordination with the project/building architects, engineers and other teams of experts involved in the tower project.
- From the perusal of work order with A Co, it was observed that:
  - The taxpayer (viz. the principal designer), assigned and transferred all right title and interest in all deliverables\* to A Co from the moment of creation.
    - \*Deliverables means any and all reports, analyses, tests, tables, plans, drawings or other documents to be delivered or provided by the principal designer in any form, including in electronic or printed form, under the agreement.
  - The taxpayer granted perpetual, irrevocable, non-exclusive, royalty-free, fully paid-up right and license to use, copy, modify and prepare derivative works of the taxpayer’s IPR incorporated in the deliverables for the use of the deliverables by A Co, its affiliates and third parties engaged by A Co in connection with the business operations of the A Co and its affiliates.
- Thus, the taxpayer was making available to A Co all reports, analysis, tests, tables, plans, drawings or other documents in any form including electronic or printed form for the use of A Co which enabled A Co to apply and use all the deliverables for its business purposes, thereby satisfying conditions of Article 12(4)(b) and Article 12(4)(c) of the India-Singapore tax treaty.

In view of the above, the ITAT held that the amount received by the taxpayer from A Co was taxable as FTS under Article 12(4) of the India-Singapore tax treaty.

### **Comments:**

Whether a particular service satisfies the test of make available has been a subject of litigation.

This ruling, based on the facts of the case, has held that the taxpayer was making available to A Co all deliverables for the use of A Co which enabled A Co to apply and use all the deliverables for its business purposes. Thus, the conditions of Article 12(4)(b) and (c) of the India-Singapore tax treaty were satisfied.

We have provided below link to tax alerts of earlier rulings in connection with the taxability of design services:

1. <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-Supply-of-technical-drawings-designs-noexp.pdf>
2. <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-payment-for-architectural-drawings-designs-for-a-project%E2%80%99s-development-not-taxable-as-FTS-noexp.pdf>

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.



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