

Indian Court Holds Managerial Service Fees Do Not Satisfy 'Make Available' Clause Under India-UK Tax Treaty

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Report from our correspondent Urvi Asher, Chartered Accountant, India

On 26 May 2023, the Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Infobip Limited v. Assistant Commissioner of Income Tax (ITA No. 820/Del/2022)*, ruled that services rendered by the taxpayer to its associated enterprise (AE) do not satisfy the "make available" clause as envisaged under article 13(4)(c) of the India-UK Income Tax Treaty (the Treaty) to fall within the scope of fees for technical services (FTS).

(a) Facts. The taxpayer was a tax resident of the United Kingdom (UK) and opted to be governed by the beneficial provisions of the Treaty. The taxpayer provided services to its AE, namely bSmart Tech Pvt. Ltd. (BTPL) under the Business Cooperation Agreement. The taxpayer rendered centralized services to BTPL, which were in the nature of financial support services, technical support services, sales support services and legal support services, based out from London, the UK.

(b) Issue. The consideration received for providing services to BTPL was not offered to tax by the taxpayer. However, the tax authorities sought to tax the said fees as FTS under section 9(1)(vii) of the Income Tax Act, 1961 (the Act) and article 13 of the Treaty.

(c) Decision. The ITAT rejected the tax authorities' arguments and held as follows:

- The services provided by the taxpayer includes administrative services, accounting services, legal services and other support services that are ancillary to the functioning of the corporate management function of BTPL. These services are provided by the taxpayer year after year on a continuous basis, which shows that the taxpayer cannot perform these services on its own without recourse to the taxpayer. These services are thus, essentially in the nature of managerial services which are outside the scope of the meaning of FTS under article 13(4) of the Treaty.
- Even if the above services are considered to be FTS, being technical, managerial and consultancy services, as per the provisions of section 9(1)(vii) of the Act, these services will not fall within the meaning of FTS under article 13(4) of the Treaty as the services provided by the taxpayer to BTPL do not make available any technical knowledge/experience, skill, know-how or processes or transfer any technical plan/design enabling BTPL to apply the embedded technology.
- Mere rendering of services is not considered as "make available" unless the person utilizing the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of services in the future.
- Thus, the services rendered by the taxpayer to BTPL do not satisfy the "make available" clause under the Treaty and hence, the said fees are not taxable in India under the Treaty.

The full text of the decision pronounced by the Delhi ITAT is available [here](#) (as a pdf in English).

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