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General Motors Overseas Corporation v ACIT – (ITAT Mumbai)

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Case Note: General Motors Overseas Corporation V ACIT – (ITAT Mumbai)[1]

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A very important concept taught in international taxation ist the interpretation of 'make-available' vis-à-vis the concept of 'Fee for Technical Services'. The term 'make available' is found in the definition of FTS in many DTAAs. The meaning of this term 'make available' is a hotly debated issue across our country – various interpretations of this term have been given by multiple High Courts and tax tribunals with absolutely no clarity on which interpretation should be considered as the ultimate and final interpretation of this term. Further, there is also no clarification on the interpretation of this term from the Indian Supreme Court or the law makers. One interpretation did, over the years, find acceptance by multiple High Courts and tribunals. In March 2020, however, ITAT Mumbai deviated from this generally accepted interpretation while deciding the General Motors case. By devising its own interpretation of the concept, ITAT Mumbai added yet another dimension to this long and complicated debate on the interpretation of 'make available'. This article provides a background to this debate and then discusses the interpretation devised in the General Motors case. The article analyzes the impact of this ITAT Mumbai decision on the taxpayers and Revenue and argues that this new interpretation seems to be unnecessarily harsh on the taxpayers. In the General Motors case, the application of Section 44D, Income Tax Act vis-à-vis FTS was also an issue which was briefly dealt with by ITAT Mumbai. Hence, this article will also look at the problems that may arise when we try to understand this entire debate on interpretation of 'make-available' in the light of the application of Section 44D, ITA. In conclusion, the article reiterates the need for a clarification from the lawmakers or the Supreme Court on all these issues highlighted in the article.

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[1] MANU/IU/0432/2020 (ITAT Mumbai).

INTRODUCTION

'Fee for Technical services' ("FTS"), or payment given for technical services rendered, as a part of various business arrangements between residents and non-residents, is an important concept in International Taxation. In this case comment, we are concerned with one kind of business arrangement where a non-resident company sends some of its employees to an associated enterprise (for example, an Indian subsidiary) that is an Indian tax resident. These employees are sent to the Indian enterprise in a secondment arrangement wherein the employees (also called 'secondees') have the responsibility of imparting technical training to the employees of the Indian company. This training is usually for quality control purposes and the secondees also perform other associated functions such as management. In such an arrangement, the salaries and other expenses of the secondees are paid to the secondees by the non-resident entity and these salaries and other expenses are then charged by the non-resident company from the Indian company. These amounts which are thus paid by the Indian company to the foreign company are then presented by the foreign company as business income or reimbursements or FTS, as per their tax planning requirements.

The situation we are concerned with in this case note is where there is such a secondment arrangement and the Revenue wishes to treat these payments as FTS and the assessee (foreign company) insists otherwise (for example, the assessee may want to treat these payments as business profits instead of FTS), because the assessee incurs a greater tax liability if such payments are treated as FTS.[2] The issue which then plagues the judiciary is whether such payments can be

[2] Usually, the Indian companies in such situations are obligated to withhold the taxes payable by the foreign companies on these payments made by the Indian companies.

classified as FTS or not. To answer that, the courts need to refer to the definition of FTS. This definition is present both in the Indian Income Tax Act, 1961 ("ITA") and in the Double Taxation Avoidance Agreement ("DTAA") signed between India and the home country of the foreign company. Section 90(2) of the ITA says that in a situation where both DTAA and the ITA are applicable, the one whose provisions are more beneficial to the assessee will apply.[3] Hence, by virtue of Section 90(2), the courts refer to the definition which is more beneficial to the assessee. In this case note, we are concerned with situations where the definition of FTS as given in DTAAs is much more beneficial to the assessee than the definition in ITA.

The '*make-available*' clause

Many DTAAs have a '*make available*' clause in their definition of FTS - this clause says that payments made in consideration of services are FTS if the services of the transferor (i.e., the foreign company) *make available* technical skill or knowledge or experience to the transferee (i.e.,the Indian company) of the services.[4] For example, Article 12(4)(b) of the India-USA DTAA contains the following '*make available*' clause:

> "*[…] "fees for included services" means 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 […]* make available *technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or technical design.*"

Now the interpretation of '*make available*' is a recurring debate in the Indian judiciary.[5] Various High Courts and Income Tax Appellate Tribunal ("ITAT") benches across the country have tried to interpret this phrase;[6] and the general understanding that has emerged is that technological skill or knowledge is said to be *made available* when the transferor imparts them to the transferee in a way that in future the transferee is enabled to use that skill or knowledge independently.[7]

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[3] ITA, s 90(2).

[4] SC Tiwari, 'The "Make Available" Cauldron – Has Revenue Lost the Plot?' (*Taxsutra*, 22 February 2019)<https://www.taxsutra.com/experts/column?sid=1043> accessed 18 May2020.

[5] *Ibid*.

[6] *Ibid*.

[7] *Ibid*. Also *see CIT* v *De Beers India Minerals (P) Ltd*., 2012 SCC OnLine Kar 8858: (2012) 346 ITR 467; *Centrica India Offshore (P) Ltd*. v *CIT*, 2014 SCC OnLine Del 2739 and *Raymond Ltd*. v *Dy CIT*, (2003) 86 ITD 791 (Mum) (ITAT Mumbai).

The ITAT decision that we will consider in this article has deviated from this interpretation and has given a broader interpretation to this phrase. Further, after giving this peculiar interpretation, the ITAT then held that this FTS payment in the hands of the assessee foreign company will be taxed on gross basis by virtue of Section 44D(b) of the ITA. In the first part, the author will discuss the relevant facts of the case. Then, the author will discuss two key issues involved in this case, particularly focusing on the reasoning behind the ITAT Mumbai's decision and the potential negative impact of this decision on the taxpayers. Through this article, the author is challenging the peculiar interpretation of the '*make available*' clause and the reasoning adopted by ITAT to determine whether the concerned payments fall under FTS provisions or not. The author argues that the ITAT, while deviating from the previous interpretation, unnecessarily relaxed the criteria for fulfilling the '*make available*' clause and did not consider the potential negative impact this decision will have on the taxpayers. Further, the author will look into the definition of FTS as given in Section 44D, ITA and discuss its impact on the tax liability of the assessee foreign company.

BACKGROUND OF THE CASE

The Management Provision Agreement

The Appellant - General Motors Overseas Corporation ("GMOC")[8]- a US company, entered into a Management Provision Agreement ("MPA") dated 26 December 1995, effective from 16 April 1994 with General Motors India Limited ("GMIL")[9] for providing executive personnel to GMIL for development of general management, finance, purchasing, sales, service, marketing and assembly/manufacturing activities. MPA provided that salary and other direct expenses related to these personnel were to be charged by GMOC from GMIL. Two personnel were provided to GMIL during the subject year: a) 'President and Managing Director' ("PMD") and b) 'Vice President Manufacturing' ("VP"). Let's take the total payment received by GMOC from GMIL under the MPA with respect to the services of both PMD and VP as the 'total amount'.

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[8] GMOC is engaged in the business of providing management and consulting services solely to the group entities worldwide.

[9] GMIL is engaged in the business of manufacture, assembly, marketing and sale of motor vehicles and other products in India. Apart from the MPA, GMIL had a separate 'technical information and assistance agreement with M/s Adam Opel AG.

The AAR Ruling

To ascertain the tax liability on the 'total amount', GMOC filed an application before the AAR.[10] The AAR ruling held that GMOC has a permanent establishment ("PE") in India. It further held that on the facts available to the AAR, services of the personnel are 'managerial' and not 'technical or consultancy' services within the meaning of Article 12.[11] Thus, the consideration for these services should be assessable as 'business profits' under Article 7[12] read with Article 5[13] and not 'fee for included services' ("FIS")[14] under Article 12. The AAR left it open to the concerned authorities, in appropriate proceedings, to examine the situation and take appropriate action if they found the situation to be otherwise.

The AO and CIT Ruling

Pursuant to the AAR ruling, GMOC, in its income tax returns disclosed the 'total amount' as business receipts. The Assessing Officer ("AO") directed GMOC to file a copy of the service agreement of the personnel, but it was not filed. Hence, the AO taxed the entire 'total amount' as GMOC's business income under Article 7 on a gross basis and held that as per Article 7(3),[15] the PE's income must be computed as per Indian law.

Aggrieved, GMOC appealed to the Commissioner of Income Tax (Appeals) ("CIT(A)") which decided the issue against GMOC. The CIT(A) examined the MPA and the work profiles[16] of the personnel to hold that services rendered by PMD don't *make available* any technological, experience, skill, know-how or process which enable the person obtaining the services to apply the same; and thus, PMD's services are not in the nature of FIS as per

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[10] Authority for Advance Rulings ("AAR"): Advance Ruling means a written opinion or authoritative decision by an Authority empowered to render it with regard to the tax consequences of a transaction or proposed transaction or an assessment in regard thereto. It has been defined in section 245N(a) of the ITA as amended from time-to-time; refer to <https://www.incometaxindia.gov.in/Pages/international-taxation/advance-ruling.aspx> accessed 19 June 2020.

[11] India-USA DTAA, art 12–this article explains the taxing provisions with respect to royalties and fees forincluded services.

[12] India-USA DTAA, art 7 - this article contains taxing provisions with respect to 'business profits' of Indian and American enterprises.

[13] India-USA DTAA, art 5-this article explains the concept of a 'permanent establishment'.

[14] Alternatively, I will be using the term 'Fee for Technical Services' ("FTS").

[15] India-USA DTAA, art 7(3).

[16] Work Profile of PMD - Chief Executive and Operating Officer of GMIL, and responsible for overall management and direction of GMIL operations. Work Profile of VP - responsible for overall management of GMIL facilities to manufacture and assemble products of GMIL according to required standards and for production of such products according to those standards.

Article 12. Hence, the payment received by GMOC from GMIL under the MPA in connection with PMD's services is to be taxed as business income. However, the VP being a qualified, well-experienced technical personnel, the VP's services were *made available* to GMIL and VP's technical experience was utilized by GMIL in its production activities and hence, the payment received by GMOC from GMIL with respect to VP's services will be FIS under Article 12. Aggrieved, GMOC appealed to ITAT.

KEY ISSUES

1. Does the payment for VP's services qualify as FIS under the India-USA DTAA?
2. Does Section 44D, ITA apply here?

ANALYSIS

ISSUE 1: Payments made to GMOC: Whether Fee for Included Services or not?

On this issue, GMOC argued that technology wasn't '*made available*' by GMOC to GMIL because the services rendered by the secondees were neither technical nor consultancy services; they were only 'managerial' in nature; hence no FIS/FTS (within the meaning of DTAA) arose.[17] To counter this, the Revenue argued that perusal of Memorandum of MPA shows that PMD and VP were not performing 'managerial' functions.

A. ITAT'S Ruling

On this issue, the ITAT, firstly, noted that the revenue has not appealed against CIT(A)'s finding that services rendered by PMD are 'managerial' in nature and thus payments for the same are not FIS under Article 12. Hence this issue survives only to the extent of payments made by GMIL to GMOC for services rendered by the VP.

The ITAT, in its decision, took the following facts into consideration:

a) That the VP was working with GMOC before being sent to GMIL.

[17] The definition of FIS under article 12 of the India-USA DTAA does not include managerial services. Hence, if an assess*see* successfully proves that the services rendered were 'managerial' in nature, then the assess*see* is able to escape the FIS provisions of the DTAA.

b) That the VP had sufficient knowledge, exposure and experience of the technology and its standards used by GMOC in USA.

c) That the VP also had the expertise to ensure that these same standards are implemented in India as well. The VP, thus, was not only managing but also ensuring adherence to the standards of GMOC, by continuously monitoring and mentoring the production in India.

Considering all the above facts, the ITAT then went on to hold that:

a) the expertise, experience, and knowledge of technology of an expert lies in his/her technical mind.

b) Hence, when such an expert, having the requisite expertise and knowledge, is transferred from one tax jurisdiction to another, it is *not* a mere transfer of employees. Rather, it is a transfer of the technology itself. Thus, it results in technology being *made available* (by transfer on deputation of expert technical employees) by an entity situated in one tax jurisdiction (i.e., GMOC in USA) to another entity in another tax jurisdiction (i.e., GMIL in India).

The AO and CIT(A) were thus held by ITAT Mumbai to be correct in concluding that payment received from GMIL in connection with the VP was covered under FIS provisions.

B. '*Make available*': General understanding versus ITAT's deviation

There has been a lot of discussion on the interpretation of the '*make available*' clause by ITAT benches and High Courts across the country.[18] High Courts and ITAT benches have usually conducted a deeply factual inquiry in each case so as to determine whether the nature of income is that of FTS or business income, etc. Thus, we are left with a bunch of decisions on both sides with no clarification from the Supreme Court.

However, despite there being multiple decisions on both sides of this issue, there has been a general acceptance by High Courts and ITAT benches across the country of one particular interpretation of the '*make available*' clauses found in various DTAAs in connection with FTS.[19] This interpretation is that for technological skill or knowledge or knowhow to be *made available* to the recipient, it must be transferred to the recipient in a way that in future, the recipient is able to apply that technological skill or knowledge

[18] Tiwari (n 4).
[19] Tiwari (n 4).

or knowhow without being dependent on the transferor.[20] In other words, the secondees having the requisite technical knowledge/skill/expertise (i.e., the VP in present case) must impart his/her knowledge/skill/expertise to the recipient (i.e., GMIL/its employees in the present case) in a way that in the future, once the secondment arrangement is over, the recipient should be able to independently use the imparted knowledge/skill/expertise in the business to ensure that the expected quality standards are maintained.

Such abovementioned transfer of technological knowledge/knowhow/skill has been generally considered and accepted to be the basic element of any arrangement which fulfills the *make available* clauses.[21] In fact, the explanatory MoU to the India-USA DTAA also supports this interpretation in these following words: -

> *"[…] Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b) […]".*[22]

However, in the present case, the ITAT has gone much beyond this interpretation to say that the mere transfer of a skilled employee (having the requisite technical skill/expertise/knowledge) itself, from one tax jurisdiction to other will result in the '*make available*' clause being fulfilled and result in FTS implications.

It's very strange ITAT didn't give reasons on why it adopted such a broad interpretation and didn't even consider the previous interpretation by examining the actual work done by the VP. The ITAT could have examined the material available on record to decide this issue as per the previous interpretation, without having to develop a new interpretation. For example, without going into the new interpretation given by the ITAT and in the absence of the service agreement with the VP, one can also look at the approval letter issued by the Ministry of Industry (approving the MPA), extracted in para XIX[23] of the decision which says that GMOC is to depute some of its employees to provide management and technical service to the joint venture

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[20] *See* (n 7).

[21] Tiwari (n 4).

[22] Protocol, Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

[23] *See* page no 14, MANU/IU/0432/2020 (ITAT Mumbai).

and to train the personnel of the joint venture so that service of seconded employees could eventually be replaced by Indian personnel, and argue that the previous, generally-accepted interpretation of *make available* is fulfilled here. The impact of such interpretation by itself and vis-à-vis Section 44D(b) is discussed in the next part of this article

ISSUE 2: On Applicability of Section 44D(b), ITA: Taxation on Gross basis versus Net basis

GMOC argued before ITAT that it constituted a PE in India as per Article 5, and that the AO and CIT(A) should have taxed GMOC on net profit basis rather than on gross receipts. Further GMOC had charged GMIL on cost-to-cost basis hence there was no income/profit left to be taxed in GMOC's hands. The Revenue, on the other hand submitted that Article 7(3) of India-USA DTAA clearly provides that only if domestic laws allow deduction, then they would be allowed to calculate the net profit; thus, no deductions would be allowed to calculate net profit if the domestic laws don't provide for the same. It is not in issue here that GMOC had a PE in India.

C. Understanding Article 7(3), India-USA DTAA vis-à-vis Section 44D(b), ITA

The ITAT considered both Article 7(3) of the India-USA DTAA and Section 44D of the ITA and held that a conjoint reading of these two provisions shows that benefit of Article 7(3) is subject to the limitation provided under the domestic law, i.e., Section 44D. To understand this reasoning of the ITAT, let us first understand Article 7(3). Article 7(3) of the India-USA DTAA states:

> "*In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses incurred for the purposes of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State.*"

Article 7(3) says that certain expenses are allowed as deductions while calculating the profits earned by an Indian PE of a US company, regardless of

whether those expenses arose in India or elsewhere. However, these deductions are allowed only as per the provisions of and subject to the limitations of the Indian taxation laws.

Section 44D(b), ITA is particularly important here because it says "*Notwithstanding anything to the contrary contained in Sections 28 to 44C, in the case of an assessee, being a foreign company, no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of … fee for technical services received from … an Indian concern in pursuance of an agreement made by the foreign company with … the Indian concern after 31*st *day of March, 1976 but before the* 1st *day of April, 2003…*"

There are certain deductions available to companies under Sections 28 to 44C of the ITA. Section 44D(b) disallows foreign companies from availing these deductions in case income by way of FTS is received by such foreign company (from an Indian concern). However, this disallowance is only when such FTS arises from an agreement signed between the foreign company and the Indian concern in the period between 31 March 1976 and 1 April 2003. In case the concerned agreement is not made in this particular time period, then deductions are allowed to the foreign company, subject to other relevant provisions of the ITA or DTAA. The MPA in this case was dated 26 December 1995, effective from 16 April 1994. Thus, this MPA fell squarely within this time period given in Section 44D(b).

D. ITAT's Ruling

Having observed that the benefit under Article 7(3) is subject to Section 44D, the ITAT held that Section 44D(b) clearly disallows any deduction to GMOC for computation of FTS. Hence, the ITAT noted,the AO and CIT(A) were right in holding that GMOC was liable to be taxed on gross basis and not on net basis. Further, the ITAT observed that taxing GMOC on a gross basis wouldn't violate Section 90, ITA[24] because the India-USA DTAA, in Article 7(3), itself provides for applicability of domestic law (i.e., Section 44D) and Section 44D doesn't permit any deductions to GMOC in this situation. Hence, GMOC's appeal to the extent of above two key issues was dismissed.

[24] Section 90(2) of the ITA says that DTAAs override ITA to the extent they are more beneficial than the ITA.

E. Impact of ITAT's new interpretation in light of Section 44D(b)

As discussed above, the ITAT did not properly explain its reasoning behind adopting such a flexible interpretation of the '*make available*' clause. Even more surprisingly, the ITAT does not seem to have considered the potential negative impact of this decision on the taxpayers, especially when we have a harsh provision like Section 44D(b) operating against taxpayers. If this ITAT decision is followed, the taxpayers who would have ordinarily escaped FTS provisions, including the rigors of Section 44D(b), are now caught under this interpretation. For example, suppose in one such secondment arrangement, the '*make available*' clause was not being fulfilled as per the previous interpretation, then the foreign company in that situation wouldn't have to worry about Section 44D(b), even if the agreement signed in that situation was made in the time period given in Section 44D(b). But now because of this decision, such an arrangement, provided it fulfills the criteria of transfer of technical expert from one tax jurisdiction to another, would be considered as giving rise to FTS and the foreign company in that situation will lose its deductions if the concerned agreement falls foul of Section 44D(b).

By extension this decision has imposed further withholding tax requirements on Indian entities which are responsible for making such payments to foreign entities. This decision and the peculiar interpretation don't require Revenue to even look into the nature of the actual work done by the secondees. This decision has considerably relaxed the criteria needed to fulfill the '*make available*' clauses. This decision will enable the Revenue to capture any such secondment arrangement into its net of FTS provisions and apply Section 44D(b) (wherever applicable) to disallow deductions and impose tax on gross basis, regardless of whether the secondees have actually imparted their knowledge/skill to the recipients in a way that the recipients can independently apply that skill/knowledge in future. If this decision and its reasoning is followed, then it will be especially tricky for the taxpayers to get any relief from the increased tax liability because they lose the benefits of deductions merely due to the fact that the dates of their concerned agreements fall under the timeline given in Section 44D(b) and there is no way for them to change the dates of these agreements at this point of time.

F. Impact of definition of "FTS" under Section 44D, ITA

Another important aspect which the ITAT didn't properly discuss in this decision is the definition of "FTS" as given in Section 44D and the impact

of this definition on the Indian tax liability of the assessee foreign company involved in a similar situation as GMOC. As discussed above, Article 7(3) clearly provides that deductions are to be allowed as per the provisions of and subject to the limitations of the Indian taxation law. Because of this, Section 44D(b) is triggered in this particular fact situation leading to the foreign company being taxed on gross basis on the FTS received.

Now, Explanation (a) to Section 44D says that the term "FTS" as used in this Section is to be understood as defined in the ITA, i.e., in Explanation 2 to Section 9(1)(vii), ITA. This means that for Section 44D to apply, the payments being considered as "FTS" must firstly satisfy the ITA definition of FTS. The ITA definition given in Explanation 2 to Section 9(1)(vii) says:

> *"…[FTS]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"."*

Hence, we see that the ITA definition is much wider than the DTAA definition of FTS because the ITA definition accounts for even managerial services (which are not considered at all under the DTAA definition) and mere *rendering* of services is enough for a payment to be considered as FTS under the ITA definition.

Now, we consider two possible situations: first, a situation where the payments in question qualify as "FTS" under both the DTAA and ITA.This leads to a straightforward application of Section 44D if the requisite conditions under this Section are satisfied.

Second, let's consider a situation where the payments in question do not qualify as FTS under the DTAA definition but are captured by the much wider ITA definition of FTS. In this situation, because these payments will not be treated as FTS under the DTAA, they will then be considered as 'business profits' under the DTAA. Assuming there is a PE of the foreign company in India, Article 7 of the India-USA DTAA which deals with business profits will become applicable. Hence, by virtue of Article 7(3), the deductions allowable to the foreign company will have to be considered from the lens of the ITA. This is where Section 44D (under which the ITA definition of FTS is considered relevant) will come into picture because these payments which were treated as 'business profits' under the DTAA are also simultaneously qualifying as FTS as per the ITA definition and thus Section 44D will

become applicable to this foreign company, thus impacting the deductions allowed to it, depending on the date of the concerned agreement in that situation.

Oneway for such a foreign company to escape the rigors of Section 44D - in case this foreign company has entered into such a secondment arrangement (for example, the MPA) with an Indian company - is to ensure that it has no PE in India, because Article 7 (which leads to the application of Section 44D) becomes applicable only if the foreign entity has a PE in India. However, if this foreign company has a PE in India, one way to escape the rigors of Section 44D is to ensure that the payments concerned in such secondment arrangements do not qualify as FTS under ITA definition - this will be an extremely difficult task for such foreign companies simply because of the extremely wide scope of the ITA definition of FTS.

Thus we see how even the more restrictive DTAA definition of FTS, no matter how beneficial it is to the assessee foreign company, becomes irrelevant and the tax planning of the assessee is negatively impacted, if the payments concerned qualify as FTS under the ITA and subsequently, if Section 44D becomes applicable to that assessee. Due to this, the question arises whether the entire discussion on interpretation of '*make available*' clause, with respect to the application of Section 44D, becomes moot or not. Understanding this discussion on the interpretation of '*make available*' clause, including the present ITAT Mumbai decision in the GMOC case, in light of Section 44D thus opens a can of worms; this necessitates at the very least a clarification or an appropriate amendment from the legislature.

Conclusion

The article started off with an introductory glimpse into the concept of FTS in relation to the '*make available*' clauses present in the India-USA DTAA, seeking to understand this concept as dealt with in the recent ITAT Mumbai decision in *General Motors Overseas Corpn.* v *ACIT*.[25] The article briefly went through the relevant facts, issues and arguments of both the sides and then delved into the decision given by the ITAT. The ITAT, as noted above, deviated from the generally accepted interpretation of the '*make available*' clause and went on to hold that transfer of a technical expert, having the requisite technological experience and knowledge, from one tax jurisdiction to another results in satisfaction of the '*make available*' clause and leads to FTS implications for the foreign companies. The article went on to look into

[25] MANU/IU/0432/2020 (ITAT Mumbai).

the impact of the ITAT decision on the Revenue and the taxpayers, while also keeping in mind the application of Section 44D(b) of the ITA in such a situation. The article then discussed the importance of the definition of FTS as given in the ITA for application of Section 44D and the problems which arise because of the same.

This decision seems to have unnecessarily favored the Revenue by stripping away the requirement to conduct a factual inquiry into the secondment arrangement. This decision will certainly have very harsh implications for the taxpayers. Without really clarifying the issue, this decision has added yet another dimension (to the discussion prevalent on this issue). It will be interesting to see whether there is an appeal against this particular decision in the Bombay High Court and whether the Bombay High Court supports this new interpretation or not. One also needs to keep an eye out for decisions from other ITAT benches or High Courts or even the Supreme Court which refer to this interpretation and their reasons for doing so, because the more support this new interpretation gathers, the greater will be the difficulty for foreign companies in terms of planning their Indian tax liability. It will also be interesting to see if the legislature or judiciary is able to resolve the issues which arise in this discussion on the '*make available*' clauses, because of the requirement of satisfaction of the ITA-definition of FTS for the application of Section 44D.