

SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No.
127



MAKE AVAILABLE CLAUSE

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What is MAKE AVAILABLE clause?

- ❖ Make available clause is generally a criteria mentioned in the article of fees for technical service or fees for included service wherein such service is considered to have been provided only if the make available clause is satisfied.
- ❖ Technical knowledge, experience, skill, know how or processes is said to be made available to the recipient when it can apply the technical knowledge, experience, skill, know how or processes **independently by itself without the aid of the service provider.**
- ❖ Unless the recipient of the services, by virtue of rendition of services by the assessee, is enabled to provide the same services without recourse to the service provider, the services cannot be said to have been made available to the recipient of services.
- ❖ It is not a question of enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues", but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical **factor triggering** the taxability in the source jurisdiction under **"Make Available clause" is, the transfer of skills.**

Instances of Make Available

Taxinpic

CA Naman



CA Imparts knowledge to the Article about various Income Tax forms during the period of articleship.

Miss Itisha



If Miss Itisha is not capable of addressing the other related issues or not able to teach others in future, it cannot be said that CA Naman has made available the knowledge.

If such knowledge is completely acquired by her in such a way that she can address any related issue and can teach others without recouring to the CA, it can be said to have a make available the knowledge.

Instances of Make Available

- ❖ Similarly, where a company avails services of any other company for providing know-how to the employees of the former company, then it would be considered as **Make Available** if the complete knowledge of the know how is imparted by later company and the recipient company can now independently perform the same and related activities.
- ❖ Suppose where an engineer imparts knowledge of coding to any person about a specific issue/query. This cannot be termed as Make Available since the intern would not be able to deal with the other related issues that could arise.
- ❖ Also, giving training to an employee to run a machine need not necessarily satisfy the conditions of make available clause unless the employee is able to implement the solution and solve future problems on his own.

Interpretation of Make Available in Various Case Laws

- ❖ It is not a question of enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues", but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical factor triggering the taxability in the source jurisdiction under "Make Available clause" is **the transfer of skills**.
 - Held in **NTT Asia Pacific Holdings Pte Ltd. V/s ACIT, Circle 2(1)(2)** {[2022] 141 taxmann.com 137 (Mumbai - Trib.)}
- ❖ The expression 'make available' in the context of 'fees for technical services' contemplates that the services are of such a nature that the payer of the services comes to possess the technical knowledge so provided which enables it to utilize the same in future. Thus, the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his own.
 - Held in **Sargent & Lundy, LCC, USA V. ACIT, Range-2** {[2013] 37 taxmann.com 134 (Mumbai - Trib.)}

India DTAA's in which Make Available Clause is Present

| Sr. No. | COUNTRY | ARTICLE |
|---------|--------------------------|------------|
| 1. | Australia | Article 12 |
| 2. | Canada | Article 12 |
| 3. | Netherlands | Article 12 |
| 4. | Portuguese Republic | Article 12 |
| 5. | Singapore | Article 12 |
| 6. | United Kingdom | Article 13 |
| 7. | United States of America | Article 12 |

India DTAA's where Make Available is introduced because of MFN Clauses

| Sr. No. | COUNTRY | ARTICLE |
|---------|---------------------|------------|
| 8. | Belgium | Article 12 |
| 9. | France | Article 13 |
| 10. | Hungary | Article 12 |
| 11. | Spain | Article 13 |
| 12. | Sweden | Article 12 |
| 13. | Swiss Confederation | Article 12 |
| 14. | Finland | Article 12 |

Case Laws where technical know how is made available and Income is taxable as FTS/FIS

- ❖ **Sargent & Lundy, LCC, USA V. ACIT, Range-2** {[2013] 37 taxmann.com 134 (Mumbai - Trib.)}
- ❖ **Authority for advance rulings, New Delhi V. Parfetti Van Melle Holding B.V.** {[2021] 124 taxmann.com 329 (AAR - New Delhi)}

Case Laws where technical know how is Not made available and Income is not taxable as FTS/FIS

- ❖ **Muhavoor Primary Agricultural Co-operative Society Ltd. V. ACIT, National Faceless Assessment Circle, Delhi** {[2022] 143 taxmann.com 207 (Madras)[18-07-2022]}
- ❖ **Span Design & Development (P.) Ltd. V. CIT Bangalore- III** {[2013] 33 taxmann.com 522 (Karnataka)}
- ❖ **NTT Asia Pacific Holdings Pte Ltd. V/s ACIT, Circle 2(1)(2)** {[2022] 141 taxmann.com 137 (Mumbai - Trib.)}

Our Comments

- ❖ Make Available clause is only a part of DTAA's presently and not in the Indian Income Tax Act. Thus, in order to take the benefit of such clause, one should be the resident of either of the contracting states in a DTAA.
- ❖ As it can be seen in the table above, sometimes the provision of Make Available is not directly incorporated in the DTAA but becomes part of the DTAA because of MFN clause present in the DTAA. Thus one needs to check the protocols carefully before deciding on the taxability of such service.
- ❖ In case of service of imparting training and other services it becomes very difficult to prove whether actually full knowledge was imparted or not and hence the paper work in relation to the training provided and what skill set the employee has got after that training needs to be maintained.

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