

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS
(INCOME TAX) NEW DELHI**

12th Day of January, 2016

A.A.R. No1152 of 2011

PRESENT

**Justice Mr V.S. Sirpurkar (Chairman)
Mr. A.K. Tewary, Member (Revenue)
Mr. R.S. Shukla, Member(Law)**

Name & address of the applicant Cummins Limited,
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United Kingdom

Present for the applicant Mr. Rajan R Vora, CA
Mr. Ronak Sethi, CA
Mr. Arvind M Gaggar

Present for the Department DR(AAR),ND Ms Sukhvinder Khanna,CIT-
Mr. S.S Negi, JCIT-DR (AAR), ND
Mr. Satish Solanki, JCIT
Mr. Sachin Dhania, DCIT DR(AAR),
ND

RULING

(by A.K Tewary)

The applicant, Cummins Limited, UK is a company incorporated in the UK. Cummins Technologies India Limited (CTIL) is a company incorporated in India. CTIL is engaged in the business of manufacture and sale of turbochargers. CTIL purchases turbocharger components directly from third party in UK and US and in relation to such purchases, Cummins Limited provides supply management services vide Material Suppliers Management Service Agreement dated 7th December, 2010. The agreement is effective from 1st July, 2010. As per the agreement CTIL pays supply management service fees calculated at 5% of the base prices from the suppliers.

2. The applicant has requested for ruling on the following questions:-

1) *Based on the facts and circumstances of the case, whether the supply management service fees received by Cummins Limited, UK from Cummins Technologies India Limited (hereinafter referred to as 'CTIL') pursuant to Material Suppliers Management Service Agreement dated 7 December 2010 between Cummins Limited and CTIL, is in the nature of "Fees for Technical Services" or "royalties" within the meaning of the term in Article 13 of the India-UK double tax avoidance agreement ('India-UK treaty')?*

2) *Based on the answer to Question (1) above, and in view of the fact that Cummins Limited does not have a permanent establishment ('PE') in India in terms of Article 5 of the India-UK treaty, whether the payments received by Cummins Limited are chargeable to income-tax in India?*

- 3) *Based on the answer to Question (1) to (2) above, and in view of the facts and circumstances of the case, if the supply management service fees received by the Cummins Limited from CTIL are not liable to income-tax in India, then whether the provisions of Section 92 to Section 92F of the Act relating to transfer pricing are applicable to the Applicant in respect of supply management service fees?*
- 4) *Based on the answers to Questions (1) to (2) above, and in view of the facts and circumstances of the case, whether CTIL, the payer of supply management service fees, which are not liable to income-tax in India, is required to withhold tax in accordance with the provisions of section 195 of the Act?*

3. The relevant clauses of the agreement are as under:-

“4. Pricing:

- 4.1 *CTT, UK will lead and maintain global Cummins Direct Supply agreement with suppliers and make sure suppliers will follow the agreement.*
- 4.2 *CIT, UK is responsible for finalization of supply annual price to Cummins Turbo Technologies worldwide including CTT, India from UK and US supply base and communicating to CTT, India.*
- 4.3 *Product pricing will be applicable for whether the Products are supplied for original equipment or aftermarket production and sales.*

4.4 *CTI, UK will be responsible for getting supplier agreement revised on the basis of agreed annual cost reduction by the supplier.*

4.5 *CTT, India will work closely with CTT, UK to ensure market competitive pricing from suppliers. If alternative suppliers for the product(s) which offer more competitive pricing, CTT, UK will work with suppliers to match or counter the competing offer for the applicable products. If Suppliers is unable to meet the competitive threat, CTT, India shall have the right to terminate, in whole or in part, at the earlier of the end of the 60 day period or an acknowledgement by Supplier that it cannot match or counter the competing offer. A partial termination under this Section shall consist of the removal/termination of Suppliers non-competitive Product(s) from purchasing contract with suppliers.*

5. Tools and Equipment

5.1 *CTT, UK will ensure that the Supplier funds all tooling, gauging and facilities necessary for the Products, whether standard or unique for manufacturing of the Products.*

5.2 *CTT, UK will be responsible for carrying out the approval activities including the engineering approval for development of new/replacement tool.”*

4. The applicant has mentioned that it does not have a permanent establishment (PE) in India in respect of the supply management services as per the provisions of the India-UK Treaty. The applicant has further mentioned that supply management services do not qualify either

as Fees for Technical Services (FTS) under Article 13(4) of India-UK Treaty or Royalty under Article 13(3) of India-UK Treaty.

5. Article 13(4) of the India-UK treaty defines FTS as:

“.....the term ‘fees for technical services’ means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary of the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.”

Paragraph 3(a) and 3(b) of Article 13 defining royalty are reproduced below:

“3. For the purposes of this Article, the term “royalties” mean:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on

films, tape or other means of reproduction for use in cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.”

6. The applicant has explained that under the agreement it is responsible for the following:

- Finalization of supplier prices from UK and US suppliers and ensuring market- competitive pricing from suppliers;
- Ensuring that the approved suppliers have the necessary manufacturing capacities and infrastructure to provide for the raw material requirements;
- Assisting in ensuring on-time delivery of components by the suppliers to Cummins India as well as resolution of delivery performance issues with suppliers, if any;
- Ensuring that suppliers maintain strict compliance with the standards, procedures and processes and support in obtaining response from supplier to any quality control violation issue; and

- Performance review of the supplier will be held by Cummins UK at least annually wherein Cummins UK will perform the regular product and process audits to check that the supplier process and controls meet the requirements.

7. According to the applicant the services rendered by them are purely managerial in nature and even if the same are held to be technical in nature, they do not 'make available' any skill, technical know-how, knowledge or design and hence cannot be construed as taxable services under the India-UK Treaty.

8. The applicant has relied on the MOU to the India-US Treaty to interpret the concept of 'make available' in respect of FTS and has stated that various judicial precedents have upheld the reliance on MOU to the India-US Treaty for this purpose:-

- Raymond Ltd (86 ITD 791)
- Intertek Testing Services India (P) Ltd (307 ITR 418)
- De Beers India Minerals Private Ltd (346 ITR 467)
- CESC Ltd (80 TTJ 806)
- Invensys Systems Inc (317 ITR 438)
- Measurement Technologies Limited (AAR No.966 of 2010)

9. The Revenue has objected to the reliance by the applicant on MOU to the India-US Treaty saying that MOU is intended to give guidance to the tax payers and tax authorities in interpretation and is not applicable in the case of the applicant where India-UK Treaty applies.

The Revenue has relied on the ruling of the AAR in the case of Perfetti Van Melle Holding BV and Steria India Limited 45 Taxman.com 281.

10. As regards the nature of services the Revenue has mentioned that turbocharger is a technical industrial product and for rendering supply management services for purchase of components of turbocharger the applicant has to use its technical knowledge and expertise. According to the Revenue the applicant is imparting its technical knowledge and experience to CTIL. In this respect the Revenue has relied on the ruling given by this authority in the case of Shell India Markets Private Limited (2012) 18 Taxman.com 46. The Revenue has analyzed services rendered as per agreement and has concluded that the technical services were made available to CTIL. The Revenue has mentioned that as per the definition of FTS in the DTAA, when imparting of suitable experience or skill possessed by the applicant to CTIL takes place it amounts to making available the FTS.

11. The Revenue has also contended that the Applicant has entered into contract with the Indian Company with an intention to take benefits of the India-UK Tax Treaty. The Revenue has mentioned that as per the explanation 2 to sec.9(1)(vii) of the I.T. Act, the FTS means any consideration (including lump sum consideration) for rendering managerial, technical or consultancy services. The phrase "Managerial Services" is not expressly included in the DTAA's with the Canada, Portugal, UK & USA only. Similarly, the concept of "make available" has been included in DTAA with country like Australia, Canada, Cyprus, Malta, Netherlands, Singapore, UK & US. According to the Revenue these provisions shows that the applicant has with an intention to take

benefits of provisions of DTAA between India and UK entered into a contract with Indian Company with an intention to avoid tax. The Revenue contends that the provision of limitations of benefits as per Article 28C of the protocol in respect of DTAA with UK is squarely applicable in the applicant's case. Article 28 C of the protocol provides as under:

Benefits of this Convention shall not be available to a resident of a Contracting State, or with respect to any transaction undertaken by such a resident, if the main purpose or one of the main purposes of the creation or existence of such a resident or of the transaction undertaken by him, was to obtain benefits under this Convention.

The Revenue has argued that the intention of the Contract entered between the applicant and the Indian entity is to obtain benefits under this convention to avoid tax incidence.

12. In its rejoinder the applicant has reiterated that the services rendered do not make available any technical knowledge to CTIL since upon termination of the agreement CTIL would not be able to make use of the specialized knowledge of the applicant by itself. As regards department's reliance on Perfetti ruling, the applicant has mentioned that in this case a writ petition challenging the ruling of this authority was filed before Hon'ble Delhi High Court which remanded the matter back to this authority for fresh consideration. As regards the ruling in the case of Steria Limited it has been stated that in this case the authority was faced with a different question in deciding whether a mere restrictive definition of the FTS clause entered into with another country could be imported

into the India-France Treaty by virtue of the most favoured nations clause which was present in the said tax treaty.

13. We have carefully considered the submission of the applicant and the Revenue. The objection of the Revenue that the agreement entered into by the applicant with CTIL is a scheme for tax avoidance is without any merits. To say that the applicant has entered into contract with Indian company with the main purpose to take advantage of India-UK Treaty is factually incorrect. The facts as stated by the applicant in the application show that the applicant maintains Global Cummins contract supply agreement with suppliers and is responsible for finalization of supplier prices to Cummins Turbo Technologies worldwide, including CTIL, from UK and US suppliers. There is no mandate for CTIL to source the components from the approved suppliers only and if CTIL finds a better pricing from an alternate supplier, it shall be free to source the component from them. It is incorrect to say that such arrangement has been done with the main purpose to avoid tax. Therefore, the objection of the Revenue on this count fails.

14. As regards taxability of the Supply Management Services fees as FTS, it is important to see whether the services provided under the agreement would lead to imparting of any technical knowledge and expertise to the Indian company, i.e., whether the applicant is making available any technical knowledge, experience, skill know-how or processes to the Indian company. The agreement shows that the CTIL is working with the applicant only to ensure market competitive pricing from the suppliers. The applicant maintains contract supply agreement with suppliers after identifying the products availability, capacity to

produce and competitive pricing. The applicant is not imparting its technical knowledge and expertise to the Indian company based on which the Indian company will acquire such skills and will be able to make use of it in future. Therefore, the 'make available' clause under India-UK Treaty is not satisfied. The meaning of 'make available' was clarified in the case of De Beers India Limited by Hon'ble Karnataka High Court as under:-

What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, knowhow and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. 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 that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the

service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as “fee for technology/included services” only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

15. We had also recently analyzed the concept of ‘make available’ in the case of Measurement Technologies Ltd. and concluded that the services in the nature of procurement services can never be classified as technical or consulting in nature and surely are not making available any technical knowledge, experience, know-how etc. The facts of this case are also similar and there is no reason to take a different view. It is also relevant to point out that the services rendered in this case are managerial in nature and managerial services was taken out from the ambit of FTS from India-UK Treaty w.e.f. 11th February 1994 and a clause relating to ‘make available’ was inserted. This clearly shows that the intention was to introduce such clause and exclude managerial services. The reliance of the Revenue on the rulings in the case of Perfetti and Steria would not help because in the case of Perfetti the ruling has been set aside and in the case of Steria the facts were different. In fact, this Authority had clarified the concept of make available in the case of Intertek Testing Services India (P) Ltd. as under:

“By making available the technical skills or know-how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service

provider. In other words, to fit into the terminology 'make available', the technical knowledge, skills etc must remain with the person receiving the services even after the particular contract comes to an end. The services offered may be the product of intense technological effort and lot of technical knowledge and experience of the service provider would have gone into it. But, that is not enough to fall within the description of services which make available the technical knowledge, etc. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the provider. Taking some examples, the training given to a commercial aircraft pilot or training the staff in particular skills such as software development would fall within the ambit of the said expression in clause (c). Supposing, a prescription and advice is given by the doctor after examining the patient and going through the clinical reports. The service rendered by the doctor cannot be said to have made available to the patient, the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains the students on the aspects of diagnosis or techniques or surgery, that will amount to making available the technical knowledge and experience of the doctor."

16. As regards services being royalty and covered under Article 13(3), it must be said that the nature of services related to identification of products and competitive pricing cannot qualify as royalties under the provisions of Article 13 under India-UK Tax Treaty because it is not related with the use of, or the right to use any copyright, patent, trademark, design or modal, plan, secret formula or process etc.

17. In view of above, the rulings are pronounced as under:-

Q.1 The Supply Management Services fees received by the applicant is not in the nature of FTS or royalties under the India-UK Tax Treaty.

Q.2 In view of the fact that the applicant has no PE in India, the fees received are not taxable in India.

Q.3 Not applicable.

Q.4 CTIL is not required to withhold tax under section 195 of the Indian Income-tax Act.

The Ruling is accordingly given and pronounced on this day of 12th January, 2016.

(A.K.Tewary)
Member(Revenue)

(VS Sirpurkar)
Chairman

(R.S. Shukla)
Member (Law)