Fees for Technical Services (FTS)

Definition:
As per article 12(4) of the DTAA between India - USA, "fees for included services" (hereafter referred as FIS/FTS) 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 :

(*a*) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 of article 12 (i.e., paragraph on definition of royalty) is received; or

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

Therefore from above, under FIS Clause:

Service should be Technical/Consultancy	**(Plus)**	Service should satisfy further condition as per the relevant definition.

Note: DTAA with other countries like Singapore specifically brings in 'development and transfer of a technical plan or technical design' into the ambit of FIS definition.

Service even if technical may not be FIS: Such technical service fee is business income of recipient, taxable in the country of residence of foreign entity (FE).

E.g. USA, U.K., etc.,

Exclusions from FIS:

Commonly FIS does not include amounts paid for:

(*a*) services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(*a*) which deals with royalty related payments;

(*b*) services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

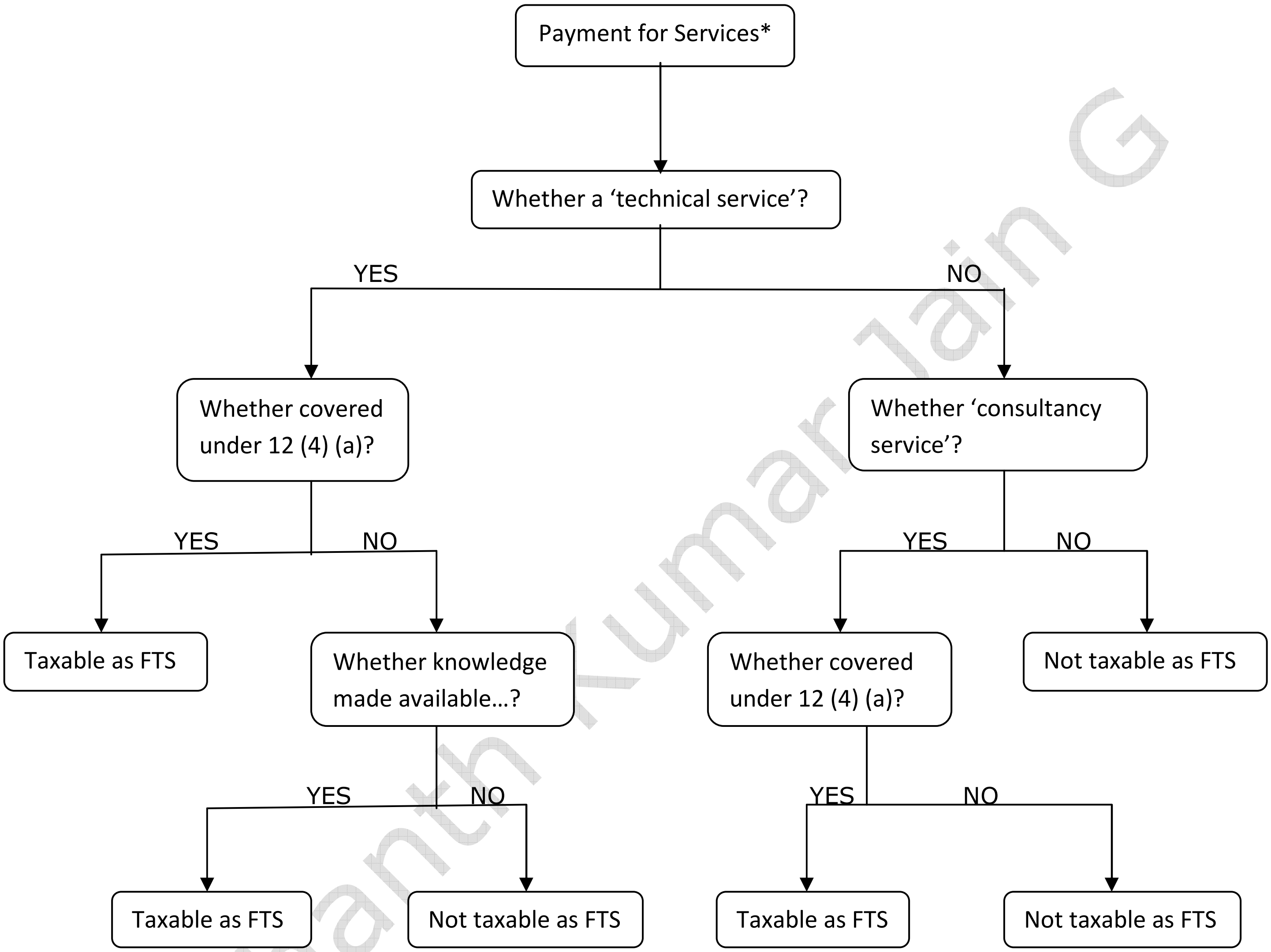
(*c*) teaching in or by educational institutions;

(*d*) services for the personal use of the individual; or

(*e*) services of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

(f) FIS services which arise in the other country through a permanent establishment (PE) situated therein and FIS are attributable to such PE, then provisions of Article 7 (Business Profits) shall apply.

Summary:



*Service receiver being an Indian Concern.

*Rate of tax varies among different countries depending on the DTAA. However generally it is 10/15%

Meaning of term 'Make Available':

To understand the above definition of FIS its necessary to understand what the term '*make available'* under 12(4)(b) means in detail.

It's not like something which Non-resident (NR) provides the other party physically; it actually refers to the transfer of knowledge which NR possesses. Generally speaking, knowledge will be considered as 'made available' or 'transferred' when the person acquiring the services is enabled to apply the technology/knowledge which is possessed actually by the service provider.

It's like that the recipient of service (say an Indian Co.) is in a position to apply the knowledge of the foreign Co. (say a USA Co.) after such services are rendered by the later.

Example: A foreign Co. provides annual maintenance for software to an Indian Co. and as a part of the AMC contract the former sends mails/phone calls for clarifying the query/trouble/bug in software. So next time when the same query/trouble/bug is faced by the Indian Co., they do not need the help of the NR, as they already know what needs to be done. Hence here in this case some knowledge is transferred from the NR.

However, the mere fact that the provision of the service may require technical input by the service provider does not per se mean that technical knowledge, skills, etc. are made available by the service receiver, within the meaning of 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make technology available."

Taxability:

As per the explanation added to Sec 9(2), income – FTS of a NR shall be deemed to accrue or arise in India whether or not,-

(a) the NR has a residence or place of business or business connection in India; or

(b) the NR has rendered services in India.

Therefore practically any FTS payable to a NR shall become taxable in India unless DTAA provides for any specific exemptions. Rate of tax may again vary case to case basis.