

Tax Hotline

November 14, 2008

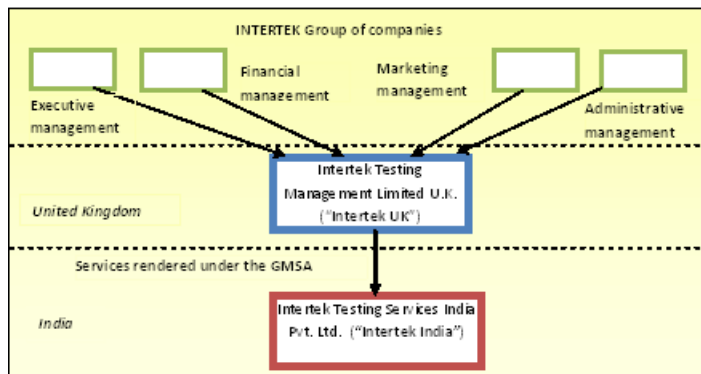
AAR ANALYSES INTERPRETATION OF 'FEES FOR TECHNICAL SERVICES' WITH RESPECT TO SERVICES PROVIDED BY INTERTEK UK TO INTERTEK INDIA

On November 5, 2008, the Authority for Advance Rulings ("AAR") pronounced its judgment, while considering the application of Intertek Testing Services India Pvt. Ltd. ("Intertek India"). The primary question for adjudication before the AAR was regarding the service fees paid by Intertek India to Intertek Testing Management Limited U.K. ("Intertek UK") under a Global Management Service Agreement.

FACTS OF THE CASE

Intertek India is a subsidiary of Intertek Holding U.K. The Intertek Group of companies operate in several countries, with their head office situated in London. Certain companies in the Intertek Group have special knowledge and/or capabilities in the field of executive, commercial, financial, marketing and administrative management systems and techniques. It was considered advantageous to pool the requisite resources and skills available among Intertek Group of companies, and therefore the Global Management Services Agreement ("GMSA") was entered into between Intertek U.K. and the other group companies of Intertek. The services provided under the GMSA are categorized as 'corporate head office services' and 'divisional global services' both of which include executive, financial, marketing and administrative management systems and techniques. The cost of the services plus markup of 7.5% is billed by Intertek UK to Intertek India. The costs are calculated at the beginning of a financial year based on budgeted figures.

Facts in Picture



ARGUMENTS

Intertek India admitted that the service fees paid to Intertek U.K. under the GMSA were taxable under Sec. 9(1)(vii) of the Income tax Act, 1961, ("ITA"). However Intertek India sought to invoke the benefit under Article 13 of the India-United Kingdom Double Taxation Avoidance Agreement ("India-U.K. DTAA"). Article 13 of the India-U.K. DTAA deals with "Royalties and fees for technical services", wherein paragraph 4(c) provides that, for any fees received for services rendered to be considered as "fees for technical services", *it should make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

Under Article 13 of the India-U.K. DTAA rendering of 'technical or consultancy services' is followed by a pronoun "which", and it was argued that this has the effect of qualifying the services. This means that the technical or consultancy services rendered should be of such a nature that "makes available" to the recipient technical knowledge, know-how etc., which should equip the recipient in the future to provide the same without the aid of the service provider. Further the term 'fees for technical services' was analyzed with respect to the MOU appended to the India-USA Double Taxation Avoidance Agreement, which is *pari materia* with the India-U.K. DTAA. The MOU by way of example explains *that 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.* The AAR discussed at length the meaning of the term 'make available' and also drew reference to the scope of "make available" as interpreted by the AAR in its recent rulings in **Anapharm** and **ISRO Satellite Centre**.

Further, it was urged by Intertek India that the word 'managerial' which earlier found its company with technical and consultancy services was omitted by the new India-U.K. DTAA entered into in the year 1993. It was contended by

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Intertek India that by reason of such omission the receipts from managerial services should no longer be considered as fees for technical services. However, since no further endeavor was made by Intertek India either in the application or during the arguments to show that the services rendered fall within the scope of managerial services, the AAR observed that considering the bouquet of services rendered under the GMSA many such services may not appropriately fall within the purview of managerial services, and the classification of such services may have to be taken in an appropriate proceeding.

It was argued by the Indian Income Tax Department (“**Revenue**”) that Intertek U.K. was a mere conduit and the beneficial owners of the fees were other related companies to whom the fees received by Intertek U.K. were passed over. It was urged that since the beneficial owners are companies other than Intertek U.K., the legal position must be tested in light of the relevant treaties entered into with the jurisdictions in which such beneficial owners of the fees are situated. The AAR however negated this argument due to lack of complete clarity regarding the details of the services provided by Intertek U.K. and did not allow Intertek India’s omission to clarify to be stretched to their detriment.

RULING AND ANALYSIS

The AAR held that the question argued by Intertek India defies a precise answer, either in the affirmative or negative. Though some of the services catalogued in the GMSA are technical or consultancy services which do not ‘make available’ technical knowledge, experience etc. and therefore do not fall within the ambit of clause (c) of Article 13(4). There are other services such as implementation and managerial services for which further information and description was required to determine whether these could satisfy the test of ‘make available’ technical knowledge and may be taxable under Article 13(4)(c) of the India-U.K. DTAA.

While this ruling provides a good academic discussion, it fails to provide a definite answer with respect to whether certain services fall within the category of ‘make available’. This ruling is extremely important, especially in the context of globalization wherein standardization of process and procedures results in provision of a whole gamut of services by a foreign entity to its group companies in India.

Another important aspect is the issue of beneficial ownership which was brought up by the Revenue in this case. The benefits of Article 13 (the beneficial ownership clause exists in most tax treaties) are available only in the event that the recipient of the payment is the beneficial owner of the fees earned. While this issue has not been debated at length in India, it is extremely important to ensure that this is kept in mind while structuring service agreements.

Advance rulings are generally available to non-residents and foreign companies for providing clarity with respect to their Indian tax liability in connection with transactions undertaken or proposed to be undertaken. These rulings are binding on the applicant and the revenue, but are not binding on others. However, they do carry persuasive value. Statutorily advance rulings are to be provided within 6 months.

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