

Tax Hotline

September 30, 2005

INDIA'S AUTHORITY FOR ADVANCE RULINGS HOLDS PAYMENTS FOR CONSULTANCY AND MARKETING FEES TAXABLE IN INDIA

In a recent ruling in the case of an Indian company, Wallace Pharmaceuticals Pvt. Ltd. ("**Company**"), India's Authority for Advance Rulings ("**AAR**") has held that payments made by the Company to a US consultant for availing of consultancy and marketing services are taxable in India as "fees for technical services".

In the instant case, the Company was engaged in the business of manufacture and sale of pharmaceutical products and for the purpose of business expansion, entered into an agreement with a US consultant i.e. Penser Group ("**US Consultant**") to avail of specified services which included inter-alia advising for development and promotion of its business, entry into new markets, development of distribution and marketing channels, attending meetings as requested by the Company and identifying target pharmaceutical and biotech companies within and outside the US for a monthly consulting fee. In addition to its monthly consulting fee, the US Consultant was also entitled to a commission on the orders it procured. Furthermore, the US Consultant also used the services of an advocate and paid him an amount that was reimbursed by the Company.

The questions dealt with by the AAR pertained to whether the Company was required to withhold tax on the payments it made for the services (as stated above) it availed of from the US Consultant. The Company submitted before the AAR that the services it availed of from the US Consultant were rendered outside India (i.e. in the US) and was therefore not obligated to deduct any withholding tax in India on the payments it made to the US Consultant.

The AAR observed that the consultancy fees payable by the Company to the US Consultant were connected to a business or profession carried on by the Company in India. Accordingly, the AAR ruled that such fees were subject to tax in India as fees for technical services under section 9(1)(vii) of Indian Income Tax Act, 1961 ("**ITA**"). The AAR further ruled that the commission payable to the US Consultant and the reimbursement of advocate fees were also subject to withholding tax in India under section 195 of the ITA.

This ruling has come as a big surprise since it only considered the provisions of the ITA and ignored the provisions of Article 12 on "Royalty and Fees for Included Services" of the India-US tax treaty, even though the AAR categorically noted in this ruling that US Consultant is a tax resident of the US. The conclusions could have been different had the AAR considered the provisions of the India-US tax treaty before pronouncing this ruling.

Source: Tax Notes International (September 21, 2005)

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