

Tax Hotline

November 28, 2006

RECENT INDIAN RULINGS ON INTERNATIONAL TAXATION IN RE AT & S INDIA PRIVATE LIMITED, AAR NO. 670 OF 2005

The recent ruling of the Authority for Advance Rulings ("AAR") in the case of AT & S India Private Limited has held that the payment by the Applicant to its Austrian parent company of the income and other related expenses of seconded employees would be characterized as fees for technical services and therefore subject to a withholding tax in India on the gross amount.

The AAR found that under the Foreign Collaboration Agreement ("FCA") in place between the Applicant and its parent, the latter was under an obligation to provide the Applicant with appropriate support, technology and 'other services'. The AAR read the FCA and the secondment agreements together, and noting that the removal/replacement of seconded personnel and the quantum of their compensation were not at the sole discretion of the Applicant, held that the Applicant could not be found to be the employer of the seconded personnel, although the control and supervision of the services of the seconded personnel. The AAR found that the role of the parent company was not limited to that of an employment agency, and that the amounts received from the Applicant was a fee for technical services, and therefore subject to withholding.

IN RE ANGEL GARMENT LIMITED, AAR NO 729 OF 2005

This case involved the question of whether the Indian liaison office of a Hong Kong company ("Company") in the textile industry, would be subject to tax in India. The activities of the proposed liaison office would primarily consist of acting as a channel of communication between the Company and the Indian exporters and following up with Indian exporters for timely export of goods ordered by the Company. The Company submitted that as the liaison office is proposed to be set up only to purchase goods for the purpose of export, the activities would fall within the exception to the deeming clause in section 9 of the Income Tax Act, 1961 ("ITA") (specifically Explanation 1(b) of Section 9(1)(i), which states that in the case of a non-resident, no income shall be deemed to accrue or arise in India through or from operations which are confined to the purchase of goods in Indian for the purpose of export. In light of the above, the AAR held that the proposed liaison office of the Company cannot be taxable in India.

IN RE IMT LABS (INDIA) PVT. LTD, AAR NO 676 OF 2005

The applicant, an Indian company called IMT Lab (India) Pvt Ltd. ("Applicant"), had entered into an agreement with Conversagent Inc., a Delaware Corporation ("Conversagent") for securing the license to use particular software. It had sought a ruling from the Authority on whether it was required to deduct tax at source under the Indo-US DTAA while making periodical payments to Conversagent for the use of software on the Internet in the absence of any office / establishment of Conversagent in India.

The Authority examined the license agreement between the Applicant and Conversagent and analyzed the relevant articles of the Indo-USA DTAA as well as the provisions of the ITA. Pursuant to the review of the license agreement, the Authority observed that the payments made by the Applicant are towards consideration for the use of, or the right to use, any industrial, commercial or scientific equipment and hence would fall within the definition of "Royalty" as per the Indo-US DTAA and the ITA. Further, the technical and consultancy services being rendered by the provision of services of technical personnel and e-mail support is covered by the description of "Fees for included services" as per the Indo-US DTAA and the ITA. In light of the above, the Authority held that the payments made by the Applicant to Conversagent qualify as 'Royalties' and "Fees for Included Services" and hence such payments are chargeable to tax in India under Article 12 of the DTAA as also under Section 9 of the ITA.

IN RE BRITISH GAS INDIA PRIVATE LIMITED AAR NO. 725 OF 2006

In this case, the applicant had sought a ruling on the tax liability on salary paid in India to two of its employees who were deputed to group companies in the U.K and had become non-resident in India. While the AAR was of the view that the salary paid in India by the applicant to the concerned employees was taxable in India under the provisions of the domestic law relating to chargeability to tax and ascertainment of total income, it applied the provisions of the DTAA between India and the UK, since the employees had become tax residents of the UK. Under Article 16 on dependent personal services, the AAR held that the salary paid in India to the employees deputed outside India would not be taxable in India, as the same was taxed in the U.K. in pursuance of the DTAA. Accordingly, there was no withholding tax obligations on the applicant either under section 195, regarding payment to non-residents or under 192 regarding payment of salaries. The employees are however required to make the appropriate declaration to the applicant regarding the payment of tax in the UK on this salary.

- Archana Rajaram & Annapoorna Jayaseelan

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