



Global Business Tax Alert Sharp Insights

Managerial services are not covered in the definition of FTS under Indo-UK Tax Treaty. Further for technical or consultancy services to fall under the definition of FTS, it must meet the condition of 'make available' technical knowledge, experience, etc.

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Synopsis

AAR in this case has analyzed the concept of FTS under the Indo-UK Tax Treaty (DTAA). It has observed that post amendment to the FTS clause in 1994, managerial services are not covered in the definition of FTS. Further, technical or consultancy services, if they do not meet the criteria of 'make available', cannot be treated as FTS. On the issue of royalty, AAR held that since services do not create any intellectual property, they also do not qualify as royalty under India-UK Tax Treaty.

Facts

- Measurement Technology Ltd. (a U.K. company or Applicant), entered into following two service agreements with its affiliated company, MTL Instruments Private limited ('MTL India'):

Agreement 1:

- As part of such services, UK company provided general guidance as regards the business of MTL India.
- While sitting in the UK, one of the employees of Applicant based in UK and designated as Group Operations Director (GD) monitors financial and operational progress of activities of MTL India.
- Applicant also renders services as regards human resource matters of MTL India such as hiring new personnel, setting up individual performance targets, assisting in performance appraisal etc. It is also involved in Quality and Design reviews of the Indian affiliate
- The above services are provided by means of telephone calls, e-mails, occasional visits to India for review of operations of MTL India and giving general guidance.

Agreement 2:

- Providing procurement services with a view to reduce cost and to avoid duplication of procurement efforts within MTL Group.

Issues for consideration before AAR

- Whether the amount received by the applicant for the services rendered, is chargeable to tax in India as per the provisions of Indo-UK Tax Treaty?
- If yes, than what is the rate of tax applicable on both services agreements for computing the amount of Income tax chargeable?

Applicant's Contention

- For services rendered under the First Agreement, the Applicant argued that services are not taxable in India since:
 - Article 13 of the Treaty FTS does not include 'Managerial Services' and for technical or consultancy service to fall under the definition of FTS, it must meet the condition of 'make available' technical knowledge, experience, skill, know-how and processes etc.
 - The India-UK Tax Treaty was amended w.e.f. 11.02.1994 and in the Pre-amendment India- UK Tax Treaty while 'Managerial Services' was specifically covered within definition of FTS, however, post amendment of Treaty, 'Managerial Services' are not included with the definition of FTS
- In respect of Second Agreement the applicant took the view that procurement services do not meet the criteria of 'making available' and are not taxable as FTS.
- As regards PE, the applicant contended that it does not have any fixed place of business in India.

Revenue's Contention

- The revenue argued that the term 'technical' ought not to be confined only to technology relating to engineering, manufacturing or other applied science but sharing knowledge and experience also falls within the purview of technology. Revenue relied on various rulings to support this contention¹.
- It further contended that as the services provided to MTL India are in the nature of managerial services provided to manage day to day administrative functions by sharing knowledge and experience of global standardization, such services are to be regarded as technical services.
- Without prejudice of the stand taken of FTS, the revenue also mentioned that the strategy developed by the applicant and implemented by MTL India also partakes the character of Royalties being payment made for use of plan or information concerning industrial and commercial experience.
- As regards applicability of 'make available' clause, the Revenue contended that the applicant renders the consultancy services by analyzing the project and submitting a detailed report thereon which contain technical details and plans which are made available to MTL India. Hence 'make available' conditions are satisfied in the instant facts.

AAR's Ruling

- The AAR observed that India – UK Tax Treaty was amended w.e.f 11th February, 1994 and post amendment managerial services was not covered under the definition of FTS and even technical or consultancy services, if do not meet the criteria of 'make available', cannot be treated as FTS.
- In the instant case, the services provided by both agreements were managerial in nature.
- The services under agreement No.1 relate to review by GD and general guidance on financial, operational, human resource, setting up targets and performance appraisal related matters. GD is providing these services primarily from the UK and visits are for short duration with aggregate number of days in a year never exceeding 30 days. These

¹ Intertek Testing Services (2008) 307 ITR 418 & GVK Industries (228 ITR 564)

are routine managerial activities and cannot be classified as technical or consultancy services.

- The authority relied on its earlier decision in the case of *Invensys Systems*² wherein it was held that even though some services are of technical or consultancy service, looking at the predominant nature of services, they would primarily fall under the category of managerial service.
- Moreover, by providing such services the applicant is not making available any technical knowledge of enduring benefit in nature which would enable employees of MTL India to apply them on their own in future. Hence, the aforesaid services do not fall under the purview of FTS as per India UK Tax Treaty.
- As regards to the services provided in Second Agreement, the AAR held that providing procurement services with a view to reduce cost and to avoid duplication of procurement efforts can never be classified as technical or consultancy in nature and surely not making available any technical knowledge, experience, know-how etc.
- As regards to the PE, the revenue has not offered any comments but the applicant has stated that the GD has never visited India for more than 30 days in a year and, therefore, a 'service PE' does not get constituted in the instant facts.
- On the argument of the Revenue that these services may qualify as Royalties, AAR held that argument of Revenue was far-fetched as the said services provided under both agreements are general and routine in nature and do not create any intellectual property.
- The AAR ruled with the following conclusions:
 - The amount received by the applicant for services rendered is not chargeable to tax in India as per the provisions of the India-UK Tax Treaty.
 - In view of the answer of question above, this question does not arise.

² 183 Taxmann 81 (2009) (AAR)

Comments

This decision has reiterated the principles laid down by various courts that managerial services are not covered under the definition of FTS under India-UK tax treaty and even technical or consultancy services, if do not meet the criteria of 'make available', cannot be treated as FTS under the Treaty.

This is a welcome ruling wherein AAR has interpreted the term 'make available' in line with international commentary and has not been influenced by few rulings rendered by it in past³ wherein the term 'make available' has been understood very widely to even include rendition of services which make the recipient able or wiser in the subject matter.

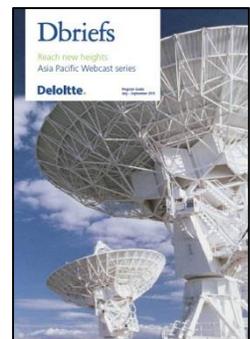
Source: Authority for Advance Ruling in the case of Measurement Technology Limited (AAR No 966 of 2010)

Upcoming Dbriefs - Register

India's New Export Incentive Schemes: A Real Boost for Exporters of Goods and Services

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As a step further to raise the global competitiveness of the Indian manufacturing and service sectors, the new FTP has revamped various export incentives available to the exporters of goods and services. The two new schemes under the FTP, namely Merchandise Export from India Scheme (MEIS) and the Service Exports from India Scheme (SEIS), aim to provide benefits to all exporters doing business in India. For more information, visit the [Dbriefs](#) page.



Register now

³ Perfetti Van Melle Holding B.V. (AAR); Shell India Marketing P. Ltd (AAR)

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