No FTS if no technical knowledge was made available by AE to assessee

Summary – The Ahmedabad ITAT in a recent case of Seal For Life India (P.) Ltd., (the Assessee) held that where assessee made various payments to its US AE on account of MIS Services, Cost Allocation, Corporate Allocation Charges and Legal Expenses without AE making available technical skill, knowledge and know-how to assessee, no TDS obligation arose

Ad hoc disallowance in respect of use of vehicles by directors of assessee-company was unjustified

Once assessee had produced reasonable evidence establishing a particular quantum of interest income in his hands, he could not be taxed on some other figure merely because tax deductor stated said other figure

Facts

- During scrutiny assessment proceedings, the Assessing Officer noticed that the assessee had made various payments, on account of MIS Services Cost Allocation, Corporate Allocation Charges and Legal Expenses, aggregating to Rs. 2.47 crore to its US based associated enterprise. The Assessing Officer was, of the view that these amounts are not deductible in computation of business income, as the assessee had failed to deduct tax at source from the same, and, disallowance under section 40(*a*)(*i*), therefore, comes into play.
- Aggrieved, assessee carried the matter in appeal before the Commissioner (Appeals) but without any success. It was argued by the assessee at length, as evident from the detailed extracts from the written submissions as reproduced in the impugned order, that the income embedded in these payments were not taxable in India under the Indo US tax treaty, and, as such, no disallowance under section 40(*a*)(*i*) can be made in the present case, it was submitted that the make available clause, which is well settled in tax jurisprudence in the context of fees for technical services in the context of Indo US tax treaty, is not satisfied in respect of these payments. The Commissioner (Appeals), not only upheld the taxability under the domestic law but he briefly observed that the managerial, professional and technical services being provided by the (US based) holding company were to the appellant was specific to it and customized as per the needs and these also fulfil the 'make available' clause. The impugned disallowance was thus upheld.
- On appeal:

Held

- The only reason as to why these payments are said to satisfy the make available clause is, as noted in the Commissioner (Appeals)'s order, that the services are customised and made to order. That aspect is wholly irrelevant. In *DIT* v. *Guy Carpenter & Co. Ltd.* [2012] 20 taxmann.com 807/207 Taxman 121/346 ITR 504 (Delhi) and Karnataka High Court in the case of *CIT* v. *De Beers India*

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Minerals (P.) Ltd. [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467. The Technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. 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 that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service. Similarly, the use of a product which embodies technology shall not *per se* be considered to make the technology available. In other words, payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

- There is no dispute on the legal position that unless the technical services payment for which is sought to be taxed as fees for technical services (termed as fees for included services in the Indo US tax treaty) 'make available' the technical skill, knowledge and know-how, the same cannot be brought to tax as such. It is also beyond dispute that the provisions of the Income Tax Act, 1961, in a case covered by a double taxation avoidance agreement entered into under section 90 - as is admittedly the present case, apply only to the extent these provisions are more favourable to the assessee. Once the assessee is out of the ambit of Indian taxability thus, there is no occasion to deal with the taxability requirements under the Income Tax Act. Viewed thus, and given the fact that the reasons for holding that these services satisfy 'make available' clause have been specifically and unambiguously rejected, the authorities below have not made out any case for application of tax deduction requirements on these payments. In any case, the material on record and nature of each payment do not show any situation in which services can be said to have made available technical skill, knowledge and know how in the legal sense of 'make available' clause as discussed above.
- Once there is no material to hold the taxability of these amounts in India, there can be no tax withholding liability under section 195 either, and, as a corollary thereto, the very foundation of impugned disallowance under section 40(*a*)(*i*) ceases to hold good in law.
- In view of the above discussions, as also bearing in mind entirety of the case, the plea of the assessee is to be upheld, and having noted that no case has been made out for satisfaction of make available clause - as is the *sine qua non* for Indian taxability of such payments to US residents, the Assessing Officer is directed to delete the impugned disallowance.

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