

Sum paid on testing of ultrasonic meter wasn't FTS as it didn't satisfy make available clause of India-USA DTAA

Summary – The Ahmedabad ITAT in a recent case of Denial Measurement Solutions (P.) Ltd., (the Assessee) held that Payment made by assessee, engaged in business of manufacturing ultrasonic meters, to a US company towards calibration and testing of equipment, could not be treated as, fee for technical services' due to non-Compliance with make available cause

Facts

- The assessee was a company stated to be engaged in the business of manufacturing Ultrasonic Meters which was Gassflow Measurement Equipment.
- Assessee made payment to 'C' Inc., U.S.A. towards calibration and testing of equipment but assessee had not deducted TDS from the remittance made.
- The assessee claimed that the Services provided by the non-resident were not in the nature of "making available" hence Article 12 of India USA treaty were not applicable.
- The Assessing Officer opined that the payment made by the assessee were in the nature of technical work and related to engineering and same were utilised by the assessee and were in the nature of technical services as defined in *Explanation 2* of section 9(1)(vii) and therefore provisions of section 195 were applicable.
- The Assessing Officer finding that assessee did not deduct tax at source while making payments to US company, disallowed said payments.
- The Commissioner (Appeals), however, deleted the disallowance made by the Assessing Officer.
- On revenue's appeal:

Held

- The Commissioner (Appeals) while deleting the addition has noted that the services provided by 'C' was with respect to giving the report of correctness of calibration of assessee's meters. He has further noted that the expertise connected with testing has not been passed on to the assessee and therefore the payment cannot be treated as fee for technical services and is not covered under section 195. The revenue has not brought any material on record to controvert the findings of Commissioner (Appeals).
- The condition precedent for invoking the "make available" clause is that the services should enable the person acquiring the services to apply technology contained therein. It further held that unless there is a transfer of technology involved in technical services the "make available" clause is not satisfied. Therefore, there is no reason to interfere with the order of Commissioner (Appeals).
- In the result, the appeal of the revenue is dismissed.