No auto import of 'Make Available' in India-Swiss DTAA without order effecting terms of MFN clause

Summary – The Ahmedabad ITAT in a recent case of Torrent Pharmaceuticals Ltd., (the Assessee) held that In view of MFN clause in DTAA between India and Switzerland, assessee, Indian company, could not claim its Swiss remittances for consultancy services as tax exempt, particularly when no make-available clause is used in Indo-Swiss DTAA and said protocol only postulates that India and Swiss shall negotiate either to reduce rate of tax or restrict scope of specified categories of income

Facts

- The assessee manufactured and marketed pharmaceutical products. It remitted payments to overseas payees located at Switzerland, Canada and USA without deducting any TDS thereupon for rendering consultancy services.
- The Assessing Officer passed sections 201 and 201(1A) order raising demand holding that the above remittances were in fact in the nature of fee for royalty/technical services covered by deeming fiction under section 9(1)(vi) and (vii). He rejected assessee's contention of that payees in question had not 'made available' any technical know-how as well.
- The Commissioner (Appeals) considered assessee's pleadings seeking to invoke specific clause pertaining to taxation of income arising from technical services in respective DTAA but he held that the payment made to the Swiss company was of the nature of 'fees for technical services', and was deemed to be income accrued in India under section 9(l)(vii), was also taxable in India as per India-Switzerland DTAA Agreement. Commissioner (Appeals) thereafter held that assessee was not liable to deduct TDS on its Canadian remittances.

Held

- Argument of assessee is that Indo-Swiss Double Taxation Avoidance Agreement contains a Protocol with respect to articles 10 to 12 thereof. This Protocol envisages that if after signature of the instant Protocol on16-2-2000 under any Convention, Agreement or Protocol between India and third State, which is a member of OECD, India should limit its taxation at source on dividends, interest, royalties or fee for technical services to a rate lower or scope more restricted than that provided for in this agreement on the said items of income, then Switzerland and India shall enter into negotiation without undue delay in order to provide similar treatment to Switzerland as in case of the third State. The assessee submits that India-Portuguese Republic signed a tax treaty notified on 16-6-2000 containing 'make available' clause in respect to payments made for technical services. It is contended that the assessee is very much entitled to raise 'make available' plea with regard to impugned technical services that its payee did not part with any technical knowhow which could be used independently on its own.

- There is hardly any dispute about section 90(2) envisaging that in case there exists a Double Taxation Avoidance Agreement in respect of any country, provisions of the Act apply to the extent they are more beneficial to such an assessee and not otherwise. The assessee in the instant case refers to Indo-Portuguese DTAA containing 'make available' condition to be applied in case of its Swiss remittances as per Indo-Swiss DTAA or Protocol on the ground that although such a 'make available' condition in respect of technical services is not explicitly contained in latter DTAA, same is deemed to have been applicable by virtue of Indo-Portuguese DTAA Protocol involving a specific condition to this effect. It is We make it clear that no 'make available' articles in respect to fee for technical service is used in Indo-Swiss DTAA or Protocol and said Protocol only postulates that India and Swiss shall enter into negotiation to this effect if former State enters into a DTAA with a member of OECD State either reducing rate of tax or restricting the scope of specified categories of income.
- Revenue's case seeking revival of sections 201(1) and 201(1A) demands pertains to TDS not deducted upon assessee's Canadian and American remittances. There is no dispute that India and these countries have entered into DTAAs and same contain 'make available' stipulation with respect to the impugned services to be involved in corresponding article12(4)(b) in both cases. The revenue fails to point out any evidence that assessee's payees based in Canada or USA had made available their expertise and technical know-how thereby enabling AE to use the same independently without their assistance, it transpired that these payees have merely rendered consultancy services without imparting any knowledge. There is no reason to interfere with the Commissioner (Appeals) observation.