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Tribunal holds that Arranger fees are neither in the nature of interest as per section 2(28A) nor fees for technical services under section 9(1)(vii)

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Synopsis

The Mumbai Tribunal in the case of Idea Cellular Ltd., has held that arranger fees can neither be termed as interest as defined in section 2(28A) nor as payment for 'managerial, or consultancy services within the meaning of section 9(1)(vii). Accordingly, the Tribunal held that no tax is required to be deducted at source on the payment of 'arranger fees'.

Facts

- The taxpayer company, has entered into a Term loan facility Agreement as borrower with Finnish Export Credit Ltd. (the lender). HSBC Hongkong had arranged for the loan as 'Arranger' and UK based company, HSBC Bank, PLC acted as facility agent.
- The taxpayer considered the arranger fees to be in the nature of interest and deducted tax at source at 21.12%, and remitted net fees after deducting tax at source.
- The taxpayer filed an appeal before Commissioner of Income-tax (Appeals) (CIT(A)) denying its liability to deduct tax at source on such arranger's fees as the said amount did not fall within the definition of 'interest' under section 2(28A) of the Act and hence claimed that such remittance did not require deduction of tax at source.
- The Assessing officer (AO) submitted a reply in response to the remand report called for by CIT(A), affirming the taxpayers submissions that the Arranger fees were not in the nature of interest. However, the AO submitted that the services of arranger were in the nature of managerial or consultancy services and hence arranger fees should fall under the category of 'fees for technical services' as per section 9(1)(vii) of the Act.
- As per the taxpayer, Arranger fees were paid to arranger and not to the lender. The purpose of paying arranger fees was for arranging finance from the lenders. The taxpayer further submitted that the Arranger fees was payment to third party and in the

nature of brokerage or commission and hence should not be construed as interest.

- The taxpayer relied on the CBDT circular¹ clarifying that the brokerage or manager's remuneration payable to a broker or a middleman who help in securing deposits is not includible in the meaning of the word 'interest'.
- The taxpayer submitted that arranger fees were remitted outside India and therefore not taxable in India. The taxpayer made detailed submissions for non-applicability of provisions of section 9(1)(i) of the Act.
- The taxpayer submitted that services provided by the arranger were not in the nature of consultancy or managerial services and hence the payment for arranger fees was not in the nature of 'fees for technical services' under section 9(1)(vii) of the Act.
- The Commissioner of Income tax (Appeals) (CIT(A)) held that the arranger fees were taxable as it constituted interest within the meaning of section 2(28A) read with section 9(1)(v) of the Act as per section 115A as well as fees for technical services under section 9(1)(vii) of the Act.

Issue before the Mumbai Tribunal

- Whether payment of arranger fees for arranging loan facility is taxable as interest income within the meaning of section 2(28A) of the Act and withholding tax is required on the same.
- Whether payment of arranger fees for arranging loan facility is fees for technical services under section 9(1)(vii) of the Act and withholding tax is required on the same.

¹ Circular No. F.164/18/770IT (A-I) dated 13-07-1978

Ruling of the Mumbai Tribunal

- The Tribunal observed that the role of the arranger was to obtain the required information / details from the borrower and the lender, forward the duly filled loan application document and submit the same to the lender, negotiate the terms and conditions of the loan as agreeable to both parties and assess and exchange information between the parties on terms and conditions of the agreement.
- The Tribunal observed that the Arranger is a third party who acted as a middleman between the borrower and the lender to achieve / negotiate the terms and conditions agreeable to both the parties.
- The Tribunal held that arranger through the borrower and the lender cannot create any binding obligation on them.
- The Tribunal observed that as per the definition of interest under section 2(28A) of the Act, interest covers an amount payable in respect of any money borrowed or debt incurred and includes any service fee or other charge in respect of money borrowed or debt incurred or in respect of any credit facility which has not been utilized.
- The Tribunal held that interest payment should be in respect of money borrowed or debt incurred.
- The Tribunal held that as per the definition, interest covers, service fee or other charge in respect of money borrowed only i.e. by the lender to the borrower.
- The Tribunal held that arranger fees is not in the nature of interest as per section 2(28A) in view of the below reasons:
 - Arranger is a facilitator/intermediary who brings the lender and borrower together for facilitating the loan /credit facility and arranger fees is not paid in respect of borrowings, as no debt has been incurred by the assessee in favour of the arranger vis-à-vis the money borrowed.
 - Arranger fee is not in the nature of service fee or other charge in respect of money borrowed or debt incurred, as the payment is to be made to a third party who has not given any money i.e. who is not a lender.
- The Tribunal referred to the decision of the Bombay High Court², wherein it has been held that upfront appraisal fees for preparing appraisal report of applicant for loan, did not constitute income from debt claim, but it was debt itself and hence not in the nature

of interest as defined in section 2(28A) of the Act.

- The Tribunal held that the arranger was not involved in providing control, guidance or administration of the credit facility or the day-to-day functioning of the taxpayer in overseeing the utilization of the credit facility and the arranger did not provide any advisory or counselling service. Accordingly the Tribunal held that arranging for a loan / credit facility was not in the nature consultancy or managerial services and hence arranger fees did not fall within the purview of fees for technical services under section 9(1)(vii) of the Act.
- The Tribunal referred to its decisions in case of Credit Lyonnais³ and Abu Dhabi Commercial Bank Ltd.⁴ wherein it has been held that arranger fees paid for mobilizing the deposits, were not in the nature of fees for technical services under section 9(1)(vii).

Comments

This decision of the Mumbai Tribunal has clarified that the element of relationship between the borrower and the lender is a key factor to bring the payment within the ambit of definition of interest under section 2(28A) of the Act.

Source: Idea Cellular Ltd. v. ADIT (2015) 58 taxmann.com 101 (Mumbai – Trib.)

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³ Credit Lyonnais v. ADIT (IT) (2013) 35 taxmann.com 583 (Mumbai – Trib.)

⁴ Abu Dhabi Commercial Bank Ltd.(2013) 37 taxmann.com 15 (Mumbai –Trib.)

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