

Legal consultancy fee paid to foreign lawyer wasn't taxable in absence of his base in India

Summary – The Pune ITAT in a recent case of Kirloskar Proprietary Ltd., (the Assessee) held that where assessee paid a certain sum to Foreign agent, on account of legal consultancy fee for initiating anti-counterfeiting proceeding, since agent was not having any fixed base in India, it could not be taxed in India in respect of fees paid by assessee.

Facts

- The assessee-company was engaged in the business of licensing, protection and defense of trademark.
- The assessee paid a certain sum to Saba, a trademark and patent agent, on account of legal consultancy fees for initiating and prosecuting an anti-counterfeiting proceedings before the Tribunal of Commerce at Rabat (Morocco).
- The Assessing Officer sought the explanation of the assessee why the said payment should not be disallowed under section 40(a)(i).
- The assessee submitted that as per the provisions of section 195, for deducting the tax at source, it is necessary that the income has to accrue and arise in India but in the instant case there was no accrual of income and thus, the assessee was not bound to deduct tax at source from said payment.
- The Assessing Officer concluded that though the services were rendered outside India, but since services were used in India, income of non-resident was taxable in India. The Assessing Officer also referred to article 12 of DTAA between India and Morocco which was in respect of royalty and fees for technical services and its treatment in the contracting State and finally made the disallowance by invoking the provisions of section 40(a)(i) read with section 195.
- The assessee carried the issue before the Commissioner (Appeals) but without success.
- On appeal:

Held

- Saba had given certificate certifying that the said firm did not have any permanent establishment in India.
- As per the evidence on record it is clear that Saba was involved in filing the lawsuit in the Tribunal of Commerce at Rabat (Morocco) claiming that Nice Moteurs be ordered to cancel their infringing trademark "KARLOS*CAR", and to discontinue any misuse. As per the documentary evidence in the nature of the communication and the bills/invoices placed, it was to be held that the nature of services rendered by the Saba for which the assessee has paid is towards rendering the legal services.

- As regards the issue about the applicability of Article 12 or 14 towards said services, the assessee submitted that as per the DTAA between India and Morocco, there is a specific reference in article 14 in respect of the personal services which includes the services of lawyers.
- The definition of article 4 of the said treaty is wide enough to cover any person who is liable to tax by reason of his domicile, residence, place of management etc. Article 4(3) provides in respect of a person other than an individual and condition is that income will be taxable where a place of effective management is situated. Certainly there is no ambiguity in respect of the term 'resident' as used in article 14 that it is not necessary that the independent personal services are confined to the individual only.
- Admittedly, in the present case Saba was not having any fixed base in India, condition of article 14 was not fulfilled and Saba which was a resident of Morocco cannot be taxed in India in respect of fees paid by the assessee-company for initiating and prosecuting the legal proceedings in the Morocco.