Interest paid to NR on FCCB won't accrue or arise in India if borrowed sum is utilized for overseas business

Summary – The Ahmedabad ITAT in a recent case of Suzlon Energy Ltd., (the Assessee) held that w here assessee-company paid interest on FCCBs issued by it to bond-holders outside India, said income squarely fell under exclusion clause of sub-section (1)(v)(b) of section 9, and, consequently, it could not fall within ambit of section 5(2)

Facts

- The assessee, an Indian company, issued Foreign Currency Convertible Bonds (FCCB) to non-resident under RBI permission for acquisition of shares in overseas subsidiary. The assessee-company had made payment to non-resident bond holders on account of consent incentive for change in financial covenants of FCCB and had also remitted interest on the said FCCBs but it had not deducted TDS on said remittance.
- The Assessing Officer was of the view that the bonds were issued by an Indian company and interest had been paid by an Indian company from India only and further the obligation to pay the interest rested with assessee only and, accordingly, it was chargeable under section 5(2). He was further of the view that once the income was covered under section 5(2), section 9(1)(v)(b) was not applicable; The Assessing Officer further went to establish that even if the provisions. Of section 9(1)(v)(b) were applicable the assessee's case would not be covered by the exclusions stated therein. Consequently, he passed the order invoking provisions of section 201(1)(1A).
- Commissioner (Appeals) held that interest paid by assessee on its FCCBs was covered by exception to section 9(1)(*v*)(*b*) and consequently, it fell outside the ambit of deemed income arising and accruing in India and as a result, out of section 5.
- On appeal:

Held

- The entire issue is squarely covered by the order of Co-ordinate Bench of Tribunal in case of *Addl. DIT (International Taxation)* v. *Adani Enterprises Ltd.* [2013] 29 taxmann.com 99/141 ITD 206 (Ahd. - Trib.).
- The, Tribunal in *Adani Enterprises Ltd.'s* case (*supra*) held that interest paid by assessee to non-resident investor was specifically excluded from the deeming provisions of section 9(1)(v)(b), and therefore, such interest payment cannot be covered in definition of 'income' deemed to accrue or arise in India. It was, thus, held that since the income in question fell within the ambit of exclusion clause of section 9(1)(v)(b), it cannot fall within the ambit of income accrued and arisen in India, and hence, same cannot be said to be covered under section 5(2); therefore, there was no occasion to deduct tax at source on such remittance.

- Respectfully following the said decision which is identical both in terms of the facts and laws relied upon by the Assessing Officer, since income in question is squarely falling under the exclusion clause of income deemed to accrue or arise in India under section 9(1)(*v*)(*b*), it cannot fall within the ambit of income accrued or arisen in India, and hence, the same cannot be said to be covered under section 5(2). Since the recipient non-residents are not taxable on this income in India, there was no obligation to deduct tax at source on such remittance. Hence, assessee cannot be held liable under section 201(1)/(1A).