Services rendered by NR sub-arrangers to mobilise funds outside India are not 'FTS': Bombay HC

Summary – The High Court of Bombay in a recent case of Credit Lyonnais., (the Assessee) held that where an arranger of bank engaged in mobilizing deposits in India for Deposits Scheme appointed non-resident sub-arrangers for mobilizing fund outside India, services rendered by non-resident sub-arrangers would not fall within category of managerial, technical or consultancy services; assessee arranger had no TDS liability

Facts

- The respondent-assessee was appointed by State Bank of India (SBI) as an arranger for mobilizing deposits in its India Millenium Deposits Scheme (IMDS). In turn, the respondent-assessee was entitled to appoint sub-arrangers for mobilizing IMDs both inside and outside India. The respondent-assessee explained that it mobilized deposits worth Rs. 1235.8 crores and SBI accordingly provided it a long-term deposit of Rs. 617.9 crores for a period of 5 years. Besides, the respondent-assessee received a sum of Rs. 22.19 crores from SBI as arranger fees and commission. It in turn paid an amount of Rs. 37.07 crores to the sub-arrangers by way of sub-arranger fees and commission. An amount of Rs. 26.75 crores out of Rs. 37.07 crores was paid by way of sub-arranger fees and commission to non-residents. However, the respondent-assessee had failed to deduct tax at source on Rs. 26.75 crores paid to non-residents as sub-arranger fees and commission. Therefore, the Assessing Officer invoked section 40(a)(i) for failing to deduct tax under section 195 to disallow the expenditure to the extent of Rs. 26.75 crores. This on the ground that this payment to non-resident sub-arranger was in the nature of fees for technical services under section 9(1)(vii).
- In appeal, the Commissioner (Appeals) held that the amount paid to the non-resident sub-arranger was in the nature of commission/brokerage and not fees for technical services in terms of section 9(1)(vii). Consequently, he held that there was no question of deducting tax at source and deleted the disallowance of Rs. 26.75 crores paid as sub-arranger fees to non-residents.
- On revenue's appeal to, the Tribunal by relying upon the **Circular No. 786, dated 7-2-2000** held that the amount paid to the non-resident sub-arrangers was in the nature of commission/brokerage and was not chargeable to tax in their hands. Consequently, section 195 would have no application, thus upheld the deletion of the disallowance under section 40(a)(i) passed by the Commissioner (Appeals).

Held

- Section 195 obliges a person responsible for paying to non-resident any sum chargeable to tax under the Act, to deduct tax at the time of payment or at the time of credit to such non-resident. In terms of section 5, a non-resident is chargeable to tax received or deemed to be received in India or accrued or arising in India. Section 9 describes income which is deemed to accrue or arise in India. The impugned order examined the nature of fees in the context of section 9(1)(vii) to hold that it is

not a technical service as defined therein. This view of the Tribunal in the context of the services being rendered by the sub-arrangers is a factual determination and is a possible view, not shown to be perverse or arbitrary. Moreover, the services are admittedly rendered by the non-resident sub-arrangers outside India. In such a case, there is no occasion for any income accruing or arising to the non-resident in India. The services of the non-resident sub-arrangers of attracting deposit to IMDS Scheme is carried out entirely outside India. As held by the Apex Court in the case of *CIT* v. *Toshoku Ltd.* [1980] 125 ITR 525, no income can be said to accrue or arise in India where payment is made for service by non-resident outside India. No change in law has been shown which would warrant taking a view different from the view taken by the Apex Court in *Toshoku Ltd.* (*supra*). In the above view, as no income has accrued or arisen to the non-resident sub-arrangers in India, the question of deduction of tax under section 195 will not arise. This is in addition to a possible view on facts taken by the impugned order that the services rendered by non-resident sub-arrangers to the respondent-assessee would not fall within the category of managerial, technical or consultancy services in terms of the *Explanation 2* to section 9(1)(vii) so as to deemed to accrue or arise in India.

- In the above view, the instant question does not give rise to any substantial question of law.