

## Legal charges paid to UK firm for setting-up of bank branch outside India wasn't royalty: ITAT

**Summary – The Mumbai ITAT in a recent case of Kotak Mahindra Bank Ltd., (the Assessee) held that Legal fees paid by assessee, engaged in banking business, to a firm in UK for creating/earning a new source of income outside India by way of establishment of new bank branch or acquisition of a bank, fell within exceptions of section 9(1)(vi)/(vii) and, accordingly, not taxable under domestic law**

### Facts

- The assessee was engaged in the banking business and paid certain legal fees to one legal firm situated in UK. As per the agreement, withholding tax at the rate of 20 per cent on gross amount was the liability of the assessee which was duly deposited. Subsequently, the assessee filed an appeal under section 248 before Commissioner (Appeals) and contended that the impugned payment was not liable to be taxed in India as per the Treaty provisions and also as per domestic laws and, hence, there was no liability to deduct tax at source in respect of this payment.
- The said contentions were considered but dismissed by the Commissioner (Appeals) on the ground that no new source of income even came into existence by obtaining the legal services, and hence, the impugned payment constituted 'Royalty'/'FTS' as per section 9(1)(vi)/(vii). Further, impugned payment constituted royalty as per Treaty provisions also as assessee was provided with specialized knowledge, skill and experience in the field of regulatory norms prevalent in the US which could be utilized independently by the assessee on his own without recourse to the service provider. Finally, Commissioner (Appeals) concluded that impugned payments were taxable both under domestic laws as well as under the Treaty provisions.
- On appeal:

### Held

- The assessee has remitted the impugned payments relating to education where bank officials visited USA and legal officials made presentation and discussed with them various legal/regulatory requirement of USA for setting up of Bank Branch or acquisition of banking company etc. The nature of services are nowhere disputed by the revenue and, accordingly, the perusal of documents shows that the payments are, in fact, being made for creating/earning a new source of income outside India by way of establishment of new Bank Branch or acquisition of Bank. With these objectives, the legal/professional fees have been paid to the attorney.
- Therefore, the payment has been made with a view to carry on business outside India and create a new source of income outside India, and therefore, these payments fell within the exceptions of section 9(1)(vi)/(vii) and, accordingly, not taxable under the domestic law.
- Further, as per the observations of Apex Court in *CIT v. Rajendra Prasad Moody* [\[1978\] 115 ITR 519](#), it is not necessary to show that the expenditure was a profitable one or that in fact any profit was

earned. Expenditure in the course of the trade which is un-remunerative is nonetheless a proper deduction, if wholly and exclusively made for the purposes of the trade. It does not require the presence of receipt on credit side to justify the deduction of an expense. It is nowhere necessary that the purpose must be fulfilled to qualify the expenditure for deduction and it is not necessary that the expenditure must fructify into any benefit by way of return in the shape of income. Therefore, the impugned payments are not taxable under section 9(1)(vi)/(vii).

- So far as applicability of section 9(1)(i) is concerned, the assessee produced before the Tribunal a certificate from legal attorneys. The above facts are nowhere disputed/confronted by the revenue and there is no adverse material in this respect. Therefore, the payment in question do not get covered by section 9(1)(i) due to the fact that the payee has neither business connection in India nor any permanent establishment in India.
- The next argument relates with applicability of relevant article of Treaty. Article 13 deals with 'Royalty and Fees for Technical services' whereas article 15 deals with 'Independent Professional Services'. The assessee has contended that treaty article 15 being more specific in nature applied to the present case.
- The assessee has obtained the legal services and such services find specific treatment as per treaty article 15 and, therefore, not covered by article 13 which deals with 'Royalty and Fees for Technical Services'.
- Moreover, article 15 applies not only to individual but to firms also. Therefore, in the absence of any business connection in India or permanent establishment of India and considering the fact that services are rendered outside India and no employee of the attorneys were present in India for more than 90 days, the impugned payments were not taxable in India as per treaty provisions. Hence, the assessee was not liable for tax deduction at source from impugned payment. Accordingly, the appeal of the assessee is allowed.