आयकर अपीलीय अधिकरण "L" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 1619/Mum/2011

(**निर्धारण वर्ष** / Assessment Year : 2010-11

Idea Cellular Limited, 5th floor, Windsor, Off. CST Road, Near Vidyanagari, Kalina, Santacruz (East), Mumbai – 400 098.	Vs.	Asst. Director of Income Tax (International Taxation) – 3(1), Mumbai- 400 001 PAN : AAACB2100P
(Appellant)		**(Respondent)**

Assessee by : Shri Yogesh A. Thar &
Shri Deepak Jain

Revenue by : Shri Vivek A. Perampurna

Date of hearing	**31-03-2015**
Date of pronouncement	10-06-2015

O R D E R

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the assessee against the impugned order dated 14-12-2010 passed by the ld. CIT(A) -10, Mumbai in the appeal filed by the assessee u/s 248 of the Income tax Act, 1961 ("the Act), denying the liability to make deduction of tax u/s 195 in respect of payment towards "Arranger's fee" payable to HSBC, Hongkong.

2. In the grounds of appeal, the assessee has raised the following grounds:-

> "1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the arranger's fee paid to the Hongkong and Shanghai Banking Corporation Ltd.,Hongkong for arranging loan facility is taxable as interest income within the

meaning of section 2(28A) of the Act and withholding of tax is required on the same.

2. The Appellant prays that it be held that the arranger's fee is not interest income within the meaning of section 2(28A) of the Act.

GROUND 2:

1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that holding that the arranger's fee paid to the Hongkong and Shanghai Banking Corporation Ltd., Hong Kong for arranging loan facility is fees for technical services as per section 9 (1) (vii) of the Act and withholding of tax is required on the same."

3. Brief facts of the case are that, the assessee (Idea Cellular Limited) had entered into "Term Loan Facility Agreement" dated 10th September, 2009, as borrower, with Finnish Export Credit Ltd., who is the lender. The HSBC, Hongkong had arranged for the loan as "Arranger" and UK based Company, HSBC Bank, PLC acted as a facility agent. The draw-down amount of the facility for the relevant previous year was as under:-

Date of drawdown	Drawdown Amount (USD)
1-February 2010	24,749,935
2-March 2010	21,661,799
2-March 2010	10,072,293
30-March 2010	3,005,851
TOTAL	59,489,878

3.1 Pursuant to the said agreement dated 10-9-2009, the assessee was liable to pay Arranger's fees to HSBC, Hongkong ("Arranger") amounting to Rs. 2,64,75,645/-. The assessee, out of abundant caution remitted the said amount payable as Arranger's fees after deducting tax @21.12% amounting to Rs. 55,91,645/- u/s 195 of the Act and deposited the same in the Treasury of Govt. of India on 5-2-2010. At the time of deduction of tax, the assessee considered the amount as "interest" and deducted the tax at the applicable rate of 21.12%. Thereafter, the assessee filed appeal before the ld. CIT(A) u/s 248 denying its liability to deduct tax at source on such "Arranger's fee", as the said amount does not come within the

definition "interest" u/s 2(28A) of the Act and therefore, such a remittance does not require tax deduction at source. The ld. CIT(A) called for the remand report from ADIT (International Taxation) –I, Mumbai, on written submission filed by the assessee giving detail reasoning as to why such "Arranger fee" cannot be termed as "interest". In the remand report, the ld. ADIT admitted that the amount payable as "Arranger fee" is not interest and to that extent he accepted the contention of the assessee. However, he was of the opinion that the payment to the Arranger for arranging finance is taxable in India as "fees for technical services" u/s 9(1)(vii) as the same is in the nature of "managerial" or "consultancy services". He referred to the provisions of section 9(1)(vii) and also the Explanation below sub-section 2 of section 9, which was brought in the statute with retrospective effect from 1-6-1976. Thus, according to the A.O., such payment of Arranger fee is taxable as fees for technical services u/s 9(1)(vii) of the Act.

4. The first limb of the assessee's argument before the ld. CIT(A) was that, the payment of Arranger fee does not fall within the ambit and scope of "interest" as defined u/s 2(28A). The Arranger fee is a kind of fees payable to a third party which can be said to be akin to brokerage or commission and, hence, it cannot be regarded as interest. In support, the assessee relied upon the CBDT Circular No. F.164/18/770IT (A-I) dtd. 13-7-1978 with specifically held that brokerage or manager's remuneration payable to a broker or a middleman who help in securing the deposits is not includible in the meaning of word "interest". Further, arrangement fee is not paid to the lender but to the Arranger for the purpose of arranging the finance required by the assessee from the lenders. It is not a compensation for use of money and therefore cannot be regarded as interest. The second limb of the assessee's argument was that the income of non-residents would be chargeable to tax in India if it is either received in India or accrued or deemed to accrue in India. Here

in this case, the fees were remitted outside India by the assessee, therefore, cannot be held to be taxable in India. The assessee also made detailed submission of non-applicability of Clause (i) of section 9(1) which has been dealt with by the ld. CIT(A) in his appellate order. Lastly, it was submitted that such a payment cannot be termed as 'fees for technical services' within the meaning of section 9(1)(vii), because the services of the arranger do not constitute managerial or consultancy services. In support of his proposition also detailed submissions were made.

5. The ld. CIT(A) held that the payment of 'arranger fee' is not only in the nature of 'interest' but also it is in the nature of 'for technical services' within the meaning of section 9(1)(vii). The sum and substance of his reasoning are as under:-

(i) Arranger fee have been paid for arranging the loan which has been called as "structuring fee" as per in clause 11.2 of the Term Loan Facility Agreement dated 10-09-2009 which reads as under:-

> *"Borrower shall pay to the Arranger (for its own account) a structuring fee in the amount and at the times agreed in a fee letter."*

From this, he concluded that, Arranger fee are within the nature of interest income as the said fees had been paid in terms of agreement entered into among the lender, borrower, arranger and the agent. Arranger fee has been charged as a consideration for acting as an arranger in relation to the facilities for structuring fees as per the terms of structuring fee letter dated 11-09-2009. The fee has been charged on account of utilisation of loan and funds by the Idea Cellular. It is nothing but part of debt or loan taken by the Indian Company and utilised thereof.

(ii) After analysing the definition of interest as given in section 2(28A), he held that interest does not only mean interest payable on any money

borrowed or debt incurred but also include any service fee or other charges in respect of money borrowed or debt incurred or in respect of any credit facility which has not been utilised. The assessee has paid arranger fee after the disbursement and utilisation of loan facilities, therefore, it can be very much held that it is interest payable in respect of money borrowed or debt incurred as defined in section 2(28A).

(iii) The arranger fee has been charged from the borrower @ 0.40% of the amount of loan disbursed to the borrower who has utilised the money borrowed and debt incurred in its investment. Further, there is a direct nexus between the payment of arranger fee and loan advanced to the borrower as it is charged as per the terms of agreement after the first utilisation date and the same is linked with the amount of loan disbursed by percentage of 0.40% of 23 crores USD. Thus, the arranger has a direct nexus with the Indian borrower and, therefore, it is in the nature of interest income arising in India within the meaning of section 9(1)(v) and section 115A of the Act.

(iv) In support of his observation and conclusion, he strongly relied upon the decision of ITAT, Mumbai Bench in the case of JDIT vs. M/s Commonwealth Development Corporation in ITA No. 1987 & 1988/Mum/2001 for assessment years 1998-99 & 1999-2000 order dated 20-02-2010, wherein with regard to "front-end fees", it was held that it is in respect of debt investment at a certain percentage of proposed investment and thus it has a direct nexus with the debt claimed, therefore, it is covered within the definition of the term interest under the Act.

(v) Regarding such a payment falling within the meaning of fees for technical services u/s 9(1)(vii) as contended by the A.O., he held that the arranger fee is in the nature of service fee for managing and arranging the finance for the assessee borrower from the various lenders. The

arranger had rendered services by way of arranging the loan which is nothing but in the nature of fees for technical services as any fees which has been paid for rendering any managerial or consultancy services is to be reckoned as for technical services. Accordingly, he held that such payment also fall within the purview of fees for technical services u/s 9(1)(vii). In support, he strongly relied upon the decision of ITAT, Mumbai Bench in the case of Ashapura Minechem vs. ADIT in ITA No. 2500/M/2008 for A.Y. 2008-09 order dated 21-05-2010.

5.1 His final conclusion are as under:-

> "In view of the above, I am of the considered view that the remittance made by the Indian company by way of structure fees falls under fees for technical services is deemed to accrue or arise in India u/s. 9(l)(vii) of the Act. The tax withholding liability of the appellant u/s.95 being in the nature of vicarious liability, therefore, did extend to the deduction of tax at source from the payments being made to HSBC Hongkong, the Arrnager. Therefore, remittances are to be made by the appellant after making TDS u/s.194 of the Act as per prescribed tax rate.
>
> 1.5.11 In view of the aforesaid discussion I hold that the Arranger fee amount is taxable as interest income within the meaning of section 2(28A) r.w.s. 9(1)(v) of the Act as per section 115A of the Act and as well as fees for technical services being managerial and consultancy in nature u/s.9(1)(vii) and 9(1)(1) of the Act. Accordingly, the withholding of tax is required on the same. Therefore, the appellant is directed to make payment after withholding of tax thereon u/s.195 of the Act. Accordingly, the ground raised by the appellant are treated as dismissed."

6. Before us, the ld. Counsel for the assessee, Shri Yogesh A. Thar after explaining the entire facts of the case, submitted that, the ld. CIT(A) has wrongly treated the payment of arranger fee as 'interest' and also completely misdirected himself by treating the same as 'fees for technical services' u/s 9(1)(vii). Regarding the treatment of interest, he submitted that the duty of the arranger has been contained in clause 25.3 of the agreement which reads as under:-

> **"Role of the Arranger**

> Except as specifically provided in the Finance Documents, the Arranger in its capacity as Arranger, under this Agreement has no obligations of any kind to any other Party under or in connection with any Transaction Document."

The Arranger has merely arranged the finance from the lender and the payment has been made as fee for arranging loan from the borrower. It is a kind of brokerage given to the third party. It is not the case of Department that Arranger fee has been paid to the lender if, that is so, then it cannot be said that it falls within the ambit of 'interest' as defined in section 2(28A). The second limb of definition of interest as given in the Act, he submitted that service fees or other charge levied by the person from whom the money have been borrowed or the person in whose favour the debt has been credited/incurred is also not applicable as Arranger is not lender. Merely because the Arranger fee have been paid in relation to borrowing, that itself does not mean that the said fees are paid in respect of the said borrowing. Arranger fee is in the nature of normal business receipt in the hands of the HSBC, Hongkong and in the absence of any establishment in India taxing of the business receipt in the hands of the Arranger does not arise in India. Regarding treatment of Arranger as fees for technical services, he submitted that ITAT, Mumbai Bench in the case of Credit Lyonnais vs. ADIT (International Taxation) reported in [2013] 35 taxmann.com 583 (Mumbai – Trib) held that Arranger's fee for arranging the funds does not amount to fees for managerial or consultancy services within the ambit of 'fees for technical services' as defined in Explanation to section 9(1)(vii). This proposition has been reiterated and followed in the case of DDIT (IT) vs. Abu Dhabi Commercial Bank Ltd. Reported in [2013] 37 taxmann.com 15 (Mumbai-Trib). Thus, the issue that Arranger fee cannot be held as fees for technical services, is squarely covered by the aforesaid decisions.

8. On the other hand, the ld. D.R. submitted that the definition of interest as given in the Act is wide enough to cover the service fee or

other charges in respect of money borrowed. This will include Arranger fee, because it is in relation to borrowing of the funds by the assessee. He strongly relied upon the reasoning and conclusion given by the ld. CIT(A) from pages 10 to 14 of the appellate order. Regarding treatment of fees for technical services, he again reiterated the finding and conclusion given by the ld. CIT(A) and submitted that the Arranger fee had been paid for rending the services for obtaining the loan and host of other services for getting the credit facility, which are nothing but in the nature of managerial and technical services. Thus, he submitted that the order of the ld. CIT(A) should be upheld.

9. We have heard the rival contentions, perused the impugned order and the material placed on record. The primary facts qua the issue involved are that, the assessee, who is the borrower had entered into a Term Loan Agreement on 10th Sept. 2009 with the lender, Finnish Export Credit Limited. The Hongkong Banking Corporation Limited, Hongkong (HSBC), who is the Arranger had arranged for the loan and the HSBC Bank PLC has acted as Facility Agent. The role of the Arranger was to liase with the lender and to procure the loan for the borrower as well as to negotiate the terms and conditions of the facility with the lender on behalf of the borrower. The Arranger is a third party who has acted as the middleman between the borrower and the lender to achieve/negotiate the terms and conditions agreeable to both the parties. The Arranger qua the borrower and the lender cannot create any binding obligation of any kind on them. This is evident from Clause 25.3 of the agreement as stated above. Here in this case, the Arranger had facilitated the transaction credit facility between the lender and the assessee which are agreeable to both the parties. Its activity had been; firstly, to obtain the required information/detail from the borrower and the lender, secondly, forwarding the duly filled up loan application document and submit the same to the lender, thirdly, negotiating the terms and conditions of the

facility achievement agreeable to both the parties and lastly, assessing and exchange of information between the parties on terms and conditions of the agreement. For this service, the Arranger fee has been paid by the assessee to the Arranger, HSBC. Thus, the Arranger had acted some kind of the broker or a middleman for arranging the loan for the assessee.

10. Now, the issue before us is, whether such a fees paid to the arranger can be termed as "interest" within the meaning of section 2(28A) or "fees for technical services for service" within the meaning of section 9(1)(vii).

11. The definition of "interest" u/s 2(28A) reads as under:-

> *"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;"*

From the above definition, it can be inferred that the term "interest" coveres, firstly, the interest payable in any manner in respect of any money borrowed or debt incurred and, secondly, such interest payable includes any service fee or other charge in respect of the money borrowed or debt incurred or in respect of any credit facility which has not been utilised. In the main limb of the definition, it is amply clear that interest should be in respect of the money borrowed or debt incurred. In other words, the interest is payable by the borrower who had borrowed the money from the lender or the debt has been incurred by him in favour of the lender who has given the money. The Arranger is not the lender as the person who has provided the money and any fee paid to him is not in respect of the borrowing, because no debt has been incurred by the assessee in favour of the Arranger vis-a-vis the money borrowed. He is merely a facilitator who brings lender and borrower together for facilitating the loan/credit facility. The second limb of the definition is an

inclusive definition whereby interest encompasses to include service fee or other charge and such fee is in respect of the money borrowed or any debt incurred or, for unutilised credit facility. Here also, such fee or charge is in respect of money borrowed only i.e. given by the lender to the borrower. The service fee or other charge does not bring within its ambit any third party or intermediary who has not given any money. The fundamental proposition permeating between various kinds of payments which has been termed as "interest" in the section is that, these payments are paid/payable to the lender either for giving loan or for giving the credit facility. Nowhere the definition suggests that payment of interest includes some kind of fee paid to a third party who has not given any loan or any credit facility. The ld. CIT(A) held that Arranger fee paid is nothing but a part of debt or loan taken by the assessee and utilised thereof and, therefore, it is interest payable within the meaning of section 2(28A). In our opinion, such an interpretation cannot be upheld because, it is not a part of debt or loan payable to the lender but it has been paid for facilitating the loan for the borrower from the lender. The element of relationship between the borrower and lender is a key factor to bring the payment within the ambit of definition of interest u/s 2(28A). The Arranger fee may be inextricably linked with the loan or utilisation or loan facility but it is not a part of interest payable in respect of money borrowed or debt incurred, because the relationship of a borrower or a lender is missing. Though, the fees of an Arranger may depend upon the quantum of loan or loan facility arranged but to be included within the meaning of term 'interest', it has to be directly in respect of money borrowed, i.e. directly flowing from the consideration paid for the use of money borrowed. It is a kind of a compensation paid by the borrower to the lender. Thus, Arranger is only a intermediary/third party and accordingly, any fee paid as Arranger fee cannot be termed as "interest" under both the limbs of the definition; given in section 2(28A). Therefore,

the assessee was not liable to deduct tax for such payment, as it does not fall within the ambit of interest.

12. Now, coming to the decision of M/s Commonwealth Development (supra) as relied upon by the ld. CIT(A), we find that in this case, the issue was, whether the upfront appraisal fee collected by the assessee company is in the nature of interest. Appraisal fee collected was only for the purpose of verifying the debt even it is not utilised. The Tribunal held that such appraisal fee paid cannot be said to be interest payable in respect of money borrowed or debt incurred and also not in the nature of service fee or other charge. Further, the Tribunal has given relief to the assessee on the ground that under Article 12(5) of the India-UK DTAA such a payment does not fall within the meaning of interest income. The reliance placed by the ld. CIT(A) on this decision perhaps is based on misunderstanding of the ratio laid down by the Tribunal. This decision had travelled up to the Hon'ble High Court, wherein the Hon'ble High Court decided the issue in favour of the assessee under the DTAA.

13. Regarding the treatment of Arranger fees as fees for technical services, we find that the ld. CIT(A) had treated it to be in the nature of service fee for managing and arranging the finance and, hence, it is the consideration for rendering managerial and consultancy services. This precise issue had come up for consideration before the Tribunal in the case of Credit Lyonnais (supra) wherein SBI was appointed as Arranger for mobilising the deposits from the eligible depositor under "India Millennium Deposit Scheme" and collecting bank for receiving and handling application forms. The A.O. had held that payment made by the assessee toSBI is for services covered u/s 9(1)(vii). The Tribunal after considering the various kind of services rendered by the SBI and scope of work, held that it is not in the nature of managerial or consultancy services and therefore, the same cannot be brought within the ambit of fees for technical services as per section 9(1)(vii) of the Act. This ratio

was again reiterated in the case of Arranger fee paid for mobilising the deposits in the case of Abu Dhabi Commercial Bank Ltd. (supra), wherein it was held that Arranger fee cannot be treated as fees for technical services u/s 9(1)(vii). Otherwise also, the term 'managerial' essentially imply control, administration and guidance for business, day to day functioning. It includes the act of managing by direction or regulation or superintendence. Here, in this case arranging of a loan cannot be equated with lending of managerial services at all. It is also not in the nature of 'consultancy services' because, Arranger did not provide any advisory or counselling services. The Arranger was not involved in providing control, guidance or administration of the credit facility nor it was involved in day-today functioning of the assessee in overseeing the utilisation or administration of the credit facility. It was not in charge of entire or part of the transaction of arranging services, hence, it cannot be termed as managerial or consultancy services within the meaning of section 9(1)(vii). Accordingly, the Arranger fee cannot be held to be taxable u/s 9(1)(vii) also and therefore, no TDS was deductible on such payment. Thus, the finding of the ld. CIT(A) that the payment of "Arranger fees" entails deduction of tax at source u/s 195 is reversed and we hold that assessee was not liable to deduct TDS on payment of Arranger fee to HSBC, Hongkong. The grounds raised by the assessee are thus allowed.

14. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 10th June, 2015.

Sd/-	Sd/-
(D. KARUNAKARA RAO)	(AMIT SHUKLA)
ACCOUNTANT MEMBER	JUDICAL MEMBER

Mumbai, Dated 10-06-2015

RK

Copy to:
1. The Appellant
2. The Respondent
3. Commissioner of Income Tax (Appeals)- 4, Mumbai
4. Commissioner of Income Tax – II, Mumbai
5. Departmental Representative, Bench 'L', Mumbai

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