

आयकर अपीलिय अधिकरण, “एल्”खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI - ‘L’ BENCH.
सर्वश्री डी.मन्नमोहन, उपाध्यक्ष एवं राजेन्द्र, लेखा सदस्य
Before S/Sh.D.Manmohan, Vice-President & Rajendra, Accountant Member
आयकर अपील सं./ITA No.1798/Mum/2009, निर्धारण वर्ष/Assessment Year-2005-06

Antwerp Diamond Bank NV 2 nd Floor, Engg. Centre, 9 Mathew Road, Opera HO use Mumbai- 400004	The Additional Director of Income-tax (International Taxation), Range 1, Mumbai.
PAN: AADCA2713J	

(अपीलार्थी / Appellant)

(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by

: Mr. S.E. Dastur & Nitesh Joshi

प्रत्यर्थी की ओर से/Respondent by

: Mr. Neeraja Pradhan

सुनवाई की तारीख / Date of Hearing

: 04/07/2013

घोषणा की तारीख / Date of Pronouncement

: 04/09/2013

आयकर अधिनियम, 1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

Per Rajendra, A.M:

Challenging the order dt.26-12-2008 of the CIT(A)-XXXI, assessee-company has raised following Grounds of Appeal:

“1.The learned CIT(A) erred in not holding that the order passed by the learned Additional Director of Income tax (International Taxation), Range 1, Mumbai (“ADIT”) was served on appellant beyond the time prescribed and therefore ought to be cancelled.

2.Head office expenditure

i)General administrative expenditure

a.The learned CIT(A) erred in confirming the order of the learned DDIT disallowing the payment of Rs. 8,856,354/- made by the branch to the Head Office being in the nature of specific tasks performed by the Head Office.

b.He erred in not appreciating that the said payments are reimbursement of costs and expenses incurred in relation to Credit analysis and administration, Head Office control, software implementation (including implementing any upgrade, patches or mods etc. to software) and Head office support activities performed by the Head Office for all the branches including Mumbai branch.

c.He erred in not appreciating in the correct perspective the submissions made by the appellant.

d.He erred in not appreciating that payment to Head Office for credit analysis and administration, Head Office control, software implementation (including implementing any upgrade, patches or mods etc. to the software) and Head Office support activities is in the nature of general administrative expenditure and therefore allowable upto the limits specified under section 44C of the Act.

e. Without prejudice to the above, he erred in not appreciating that the expenditure relating to credit analysis and credit administration was only Rs. 1,689,204 and other expenditure like office control, software implementation and Head Office support are not in the nature of credit analysis services.

f. The appellant therefore prays that the learned DDIT be directed to grant deduction for the general administrative expenditure of Rs. 8,856,354 in accordance with section 44C of the Act.

3. Interest paid to head Office

a. The learned CIT(A) erred in confirming the order of DDIT disallowing the interest paid to Head Office of Rs. 85,715,525 while computing the income from business of the India branch.

b. The learned CIT(A) erred in relying on the decision of Kolkata Tribunal, Special Bench in the case of ABN AMRO Bank. The learned CIT(A) erred in not considering Circular No. 740 dated 17 April 1996 issued by the Central Board of Direct Taxes.

c. The learned CIT(A) erred in not appreciating in the correct perspective the submissions made by the appellant. The learned CIT(A) erred in not appreciating that the appellant and the head office in Belgium constitute separate legal entity for the purpose of taxation in India and, therefore, interest paid by branch to Head Office was fully allowable as a deduction.

e. The appellant, therefore, prays that the learned ADIT be directed to grant deduction in respect of interest of Rs. 85,715,525 paid to Head Office as claimed by the appellant.

- 3.Each one of the above grounds of appeal is without prejudice to the other.
4.The appellants reserves the right to amend, alter or add to any of the above grounds of appeal.”

Following additional grounds were also filed by the assessee :

“1.Interest income not taxable in the hands of the Head Office

a.The appellants submits that the interest of Rs. 85,715,525 received by the Head Office from the branch on subordinated debt and term borrowings is not taxable in the hands of the Head Office.

b.Reliance in this connection is placed on the following decisions:

- Decision of the Calcutta High Court in the case of ABN AMRO Bank (198 Taxman 376)
- Decision of the Larger Special Bench of the Mumbai Tribunal in the case of Sumitomo Mitsui Banking Corporation (ITA Nos. 5402 and 5458/Mum/2006)

2.The above ground of appeal is without prejudice to the grounds filed by the appellants vide letter Ref No.115605/12317 dated 19 March 2009.

3.The appellants reserves the right to amend,alter or add to any of the above grounds of appeal.”

2.Assessee-company,engaged in the business of financing of Diamond Trade,filed its return of income on 30.10.2005 declaring a total income of Rs.21,91,10,834/-.Assessing Officer(AO) finalised the assessment on 28.12.2007 determining the total income of the assessee at Rs. 23.87 Crores.

2.1.First effective ground of appeal is about disallowance of Rs. 88,56,354/-under the head payment made by the Branch Office to the Head Office(HO).During the assessment proceedings,AO found that assessee had claimed expenses of Rs. 1.54 Crores incurred by the HO as directly related to business carried out in India, that out of the said expenses of Rs. 1.2 Crores were incurred for general administration whereas Rs. 33.37 lacs were incurred for Data Processing. He directed the assessee to file details in this regard.After considering the submissions of the assessee,he held that expenses attributable to credit analysis and connected services provided by the HO amounted to Rs. 88.56 lacs, that for computing business profit of the Permanent Establishment (PE) of the non-resident assessee in India Article 7 of the Tax Treaty between India and Belgium had to be applied,that no deduction was allowable in respect of amounts which were in the nature of charges for specific services performed to the PE,that no deduction was allowable if any sum was paid by the PE to the HO by way of royalties, fees or other similar payments in the return for the use of patents other rights or by way of commission or other charges for specific services performed or for the management.Finally,AO disallowed the said expenditure.

2.2.Assessee preferred an appeal before the First Appellate Authority(FAA). After considering the submissions of the assessee and the assessment order, FAA held that expenditure amounting to Rs. 88.56 lacs pertained to credit analysis and connected services, that credit proposals were submitted by the Mumbai branch to the HO that of this had not incurred by the assessee for the first time, that the credit proposals submitted by the assessee to its HO were analysed in accordance with the policies and procedures in lying with the group standards, that the HO had provided specific services to Indian branch in form of credit analysis and risk mitigation, that the local branch depended on the International Credit Department of the Bank for the world wide information Data base, that based on the number of man hours devoted by the personnel of HO credit department levied a charge on Mumbai branch, that the expenditure attributable to credit analysis and connected service provided by the HO was covered by Article 7 of Indo-Belgium DTTA,that no deduction was allowable in respect of amounts which are in nature of charges for specific services performed to the permanent establishment (PE) that out of total general administrative expenditure of Rs. 1.20 Crores,that the AO had allowed expenditure to the tune of Rs.32.10 lacs related to reimbursement of executive and general administrative expenditure incurred by the HO,that the assessee had claimed that only sum of Rs. 16.89 lacs pertained to credit analysis service that could be disallowed u/s.40(a)(i) of the Act,that the total expenditure amounting to Rs. 88,56,354/- pertained to credit analysis and connected services as per bifurcation supplied by the assessee itself, that the expenditure incurred by the HO was in nature of specific services performed by the HO, that the cases cited by the assessee were not relevant

to the facts of the case under consideration, that the expenditure incurred by the assessee was not in the nature of reimbursement but for specific services provided and covered by Article 7 of the Indo-Belgium DTTA.

2.3. Before us, Authorised Representative (AR) submitted that the payment was by way of reimbursement, that AO had not given any finding about the nature of the expenditure as whether it was reimbursement or not, that in subsequent years AO had accepted the expenses as HO expenses. He referred to page Nos. 9, 10 and 19 of the Paper Book (PB) specially the certificate issued by Ernst and Young. He relied upon the order of the Special Bench of Mumbai Tribunal delivered in the case of Sumitomo Mitsui Banking Corporation. (ITA 5402/Mum/2006-AY.2003-04, dated 30.03.2012). He also referred to order of the L Bench of Mumbai Tribunal delivered in assessee's own case for the AY 2004-05 (ITA 7224/Mum/2007-dated 28.02.2013). Departmental Representative (DR) supported the order of the AO and FAA. He relied upon the cases of Mersen India Private Limited (249CTR345-AAR), Perfetti Van Melle Holding B.V. (342ITR200-AAR), Shell India Markets Pvt. Ltd. (342ITR223-AAR), Danfoss Industries Ltd. (268ITR1-AAR)

2.4. We have heard the rival submissions and perused the material before us. We find that while deciding the issue AO/FAA had not gone in the full details of expenditure incurred under the head credit analysis. Details of expenditure incurred on account of Head Office control, software implementation (including implementing any upgrade, patches or mods etc. to software) and Head office support activities have not been considered. Terms and conditions of agreement, if any, to carry out credit analysis job have not been discussed in the orders of the AO and FAA. We are not aware whether as such details were called for or not and whether such pieces of information were provided or not by the assessee. In our opinion these are vital factors to decide the taxability of the amount in question. We find that the certificate issued by Ernest and Young had been issued for the information of and assistance to the Bank's management in connection with the review by 'local tax authorities'. It was 'not to be used', circulated quoted or otherwise referred to 'for any other purposes'. (Pg. 12 of PB). FAA has not inquired into the relevance of the said certificate as per the Indian tax laws. Assessee itself has disallowed an expenditure of Rs. 16.89 lacs incurred under the head for the year under consideration and similar expenditure in subsequent years has been allowed by the AO. What were the circumstances for such diverse course of action is not clear from the order of the Revenue Authorities. FAA has held that expenditure incurred by the assessee was not reimbursement, but the basis for arriving at this conclusion has not been mentioned. It is accepted principle of taxation that if any payment is only reimbursement it cannot be taxed-but if profit is embedded in it same has to be taxed. A clear finding based on facts has to be given as how a payment can be treated a sum embedded with profit and not a mere reimbursement payment. Considering the above, we are of the opinion that matter needs further verification. Therefore, in the interest of justice matter is restored back to the file of the FAA for fresh adjudication. He is directed to afford a reasonable opportunity of hearing to the assessee .

Ground no. 1 is partly allowed in favour of the assessee .

3. Next ground of appeal is about disallowance of interest paid by the assessee to HO amounting to Rs. 8.57 Crores. During the assessment proceedings, AO found that interest of Rs. 8,56,15,525/- was paid by the assessee to HO on subordinate debts and term borrowing. That it had claimed the interest as an expense of the branch. However, the said interest was offered for taxation in the hands of the HO as per the Article 11 of the Indo-Belgium DTTA. Relying on the decision of special bench of Kolkata delivered in the case of ABN AMRO Bank (97 ITD 89), he disallowed the interest paid to HO.

3.1. Assessee preferred an appeal before the FAA. After considering the submission of the

assessee, he held that AO had followed the decision of special bench of ITAT Kolkata, that he was inclined to agree with the stand taken by the AO, that such disallowances were upheld by his predecessor for the earlier assessment years, that assessee himself has disallowed an amount of Rs. 43.68 lacs for failure to deduct tax at source u/s. 40(a)(i) of the Act. Finally, relying upon the order of the special bench delivered in the case of ABN AMRO Bank (Supra), he confirmed the disallowances made by the AO.

3.2. Before us, AR submitted that order of the special bench of Kolkata in the case of ABN AMRO Bank had been overruled by the Hon'ble High Court of Kolkata. He further relied upon the judgment of Sumitomo Mitsui Banking Corporation (ITA Nos. 5402 and 5458/Mum/2006) DR supported the order of the FAA.

3.2. We have heard the rival submissions and perused the material before us. AO and the FAA had relied upon the order of the special Bench of Kolkata for disallowing the claim of the assessee, but now the said order has been reversed. We further find that issue in question has been dealt extensively in the case of Sumitomo Mitsui Banking Corporation (supra). While deciding the appeal filed before it, Tribunal has held as under:

“Keeping in view all the facts of the case and the legal position emanating from the interpretation of the relevant provisions of the domestic law as well as that of the treaty as discussed above, we are of the view that although interest paid to the head office of the assessee-bank by its Indian branch which constitutes its permanent establishment in India is not deductible as expenditure under the domestic law being payment to self, the same is deductible while determining the profit attributable to the permanent establishment which is taxable in India as per the provisions of article 7(2) and (3) of the Indo-Japanese treaty read with paragraph 8 of the protocol which are more beneficial to the assessee. The said interest, how-ever, cannot be taxed in India in the hands of the assessee-bank, a foreign enterprise being payment to self which cannot give rise to income that is taxable in India as per the domestic law. Even otherwise, there is no express provision contained in the relevant tax treaty which is contrary to the domestic law in India on this issue. This position applicable in the case of interest paid by Indian branch of a foreign bank to its head office equally holds good for the payment of interest made by the Indian branch of a foreign bank to its branch offices abroad as the same stands on the same footing as the payment of interest made to the head office. At the time of hearing before us, the learned representatives of both sides have also not made any separate submissions on this aspect of the matter specifically. Having held that the interest paid by the Indian branch of the assessee-bank to its head office and other branches outside India is not chargeable to tax in India, it follows that the provisions of section 195 would not be attracted and there being no failure to deduct tax at source from the said payment of interest made by the permanent establishment, the question of disallowance of the said interest by invoking the provisions of section 40(a)(i) does not arise. Accordingly we answer question No. 1 referred to this Special Bench in the negative, i.e., in favour of the assessee and question 2 in affirmative, i.e., again in favour of the assessee.

Respectfully, following the same, we reverse the order of the FAA.

Ground no 2 is decided in favour of the assessee-bank.

4. As far as additional grounds of appeal are concerned, they pertain to taxability of interest paid of HO. While deciding the ground No.2 we have already reversed the order of the FAA. So, the additional grounds filed by the assessee become academic in nature and are allowed for statistical purpose.

As a result appeal filed by the assessee stands partly allowed.
परिणामस्वरूप निर्धारिती द्वारा दाखिल अपील आंशिक स्वीकृत की जाती हैं।

Order pronounced in the open court on 4th September, 2013
आदेश की घोषणा खुले न्यायालय में दिनांक 4 सितंबर 2013 को की गई।

Sd/-

(डी.मन्नमोहन/ D. Manmohan)

उपाध्यक्ष /Vice-President

मुंबई/Mumbai,दिनांक/Date:04 .09 .2013

SK

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. Assessee /अपीलार्थी
2. Respondent /प्रत्यर्थी
3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5. DR "L" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि एल्.खंडपीठ,आ.अ.न्याया.मुंबई
6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai