IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : NEW DELHI

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI I.C. SUDHIR, JUDICIAL MEMBER

ITA Nos. 5364 /Del/2010
Assessment Years: 2007-08

The Bank of Tokyo- Mitsubishi UFJ Ltd., Jeevan Vihar Bldg., 3, Parliament Street, New Delhi. **PAN No. AABCT3880D** (Appellant)	Vs.	ADIT, Circle 1(1), International Taxation, New Delhi. (Respondent)

&
ITA Nos. 5104/Del/2011
Assessment Years: 2008-09

The Bank of Tokyo- Mitsubishi UFJ Ltd., Jeevan Vihar Bldg., 3, Parliament Street, New Delhi. **PAN No. AABCT3880D** (Appellant)	Vs.	ADIT, Circle 1(1), International Taxation, New Delhi. (Respondent)

Appellant by: Sh. Percy Pardiwala, Sr. Adv. With Sh. Nishant Thakkar, Sh. Nageshwar Rao
Respondent by: Sh. D.K. Gupta, CIT(DR),Sh. Sanjeev Sharma, CIT(DR) & Sh. Vivek Kumar, Sr. DR

O R D E R

PER S.V. MEHROTRA, A.M.

ITA No. 5364/Del/2010:

These appeals filed by the assessee are directed against the order of ld. DRP u/s 144C(5) of the I.T. Act, 1961 dated 24.09.2010 for A.Ys. 2007-08 and 2008-09.

2. Brief facts of the case are that the Bank of Tokyo Mitsubishi UFJ, Ltd. (assessee/bank), is a company incorporated in Japan and is resident of Japan within the meaning of Article 4 of the Double Taxation Avoidance Agreement between India and Japan. In the relevant assessment year under consideration, the assessee was engaged in wholesome banking operations in India, mainly catering to the requirement of Japan based corporate and individual clients (for e.g. Japanese Companies and Joint Ventures in India and the Japanese expatriates working in those companies and deputed in India). The assessee operated in India under license from the RBI and was governed by the Banking Regulation Act, 1949. The branches of the assessee in India constituted a permanent establishment in India, within the meaning of Article 5 of the DTA. Therefore, the profits earned by such PE of the assessee in India were computed in accordance with the provisions of Article 7 of the DTA by assessee.

3. The assessee e-filed its return of income on 31st October, 2007 declaring total income at Rs. Nil. The AO passed draft order, dated 23/12/2009, determining the total income at Rs. 118,28,68,119/- and book profits as per MAT provisions at Rs. 860946889/-. Since the tax payable under normal provisions of Income-tax Act was more than tax payable under MAT, AO computed the tax liability in the draft assessment order using normal provisions of the Act.

4. The assessee filed objections before ld. Dispute Resolution Panel – II dated 03/02/2010. Ld. DRP gave directions u/s 144C(5) vide order dated 24th September, 2010 which were subsequently rectified vide order dated 28/10/2010. Consequent to the directions given by ld. DRP, the AO passed the order u/s 144C(1) determining the total income at Rs. 1125604140/- as under:

"Normal Computation

(Interest from ECB has been considered separately)

Particulars	*Amount (In Rs.)*
Income shown in the computation before allowing expenses u/s 44C	*73,53,68,963*
Add:	
Salary paid to expatriate employees	*9,92,36,315*
Interest expenses disallowed	*13,34,97,526*
Interest income on a/c of Indian operations	*13,34,97,526*
Interest earned by PE for deposits kept with HO/Overseas Branches	*2,76,59,232*
Total after above additions	*1,12,92,59,562*
Total business income before deduction u/s 44C	*1,12,92,59,562*
Deduction u/s 44C allowable	*5,64,62,978*
Net taxable business income	*1,07,27,96,583*
Income from other sources	*5,36,08,557*
Total Income	*1,12,56,04,140*
Tax @ 41.82%	*47,07,27,651*

Interest from ECBs: (After Grossing up)

(Taxable as per Article 11 of the DTAA at the rate of 10%)

Considered separately, as these are not part of the books of accounts of the assessee used for the purposes of MAT Computation."

4.1 Being aggrieved with the order of AO, the assessee is in appeal before us and has taken following grounds of appeal:

1. *"Disallowance of salary paid overseas to expatriates of the appellant working in India by the Head Office and the Indian taxes paid thereon by the Head Office: Rs. 99,236,315.*

That on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ("DRP") erred in confirming the addition, as proposed in the draft assessment order, in respect of a sum of Rs. 99,236,315 paid as salaries by the Head Office overseas, in foreign currency, to the expatriates working in India exclusively for the permanent establishment ('PE') of the appellant in India, on which taxes have been duly deducted/deposited in India, and accordingly the order of the AO, based on the DRP's directions is erroneous in law as well as on facts on the following counts:

a) *That theHon'ble DRP and AO have failed to appreciate that the salary has been paid to the expatriates who are stationed in India and are working exclusively for business operations of the Indian PE of the appellant and is thus an allowable expenditure as per Article 7(3) of DTAA;*

b) *That the Hon'ble DRP and AO have erred in observing that the nature of expense is covered u/s 44C of the Act read with clause (b) of Explanation (iv) to the section, even though, the said amount is incurred exclusively and for direct benefit of Indian operations of the appellant;*

c) *That the AO has, while complying with the directions of the Hon'ble DRP, erred in relying on then order of the CIT(A) for earlier years wherein the CIT(A) has erred in not following the decision of the Third Member, Kolkata Tribunal in the case of ABN Amro Bank NV vs. JCIT (96 TTJ 1041) by incorrectly*

stating that the said decision was rendered in the context of section 40(a)(i) and not u/s 44C of the Act.

2. ***Addition on account of Interest paid to Head Office and other overseas branches of the Bank amounting to Rs. 133,497,526***

That on the facts and circumstances of the case and in law, the Hon'ble DRP erred in confirming the addition proposed by the AO in the draft assessment order by holding that the appellant was required to deduct tax at source u/s 195 of the Act on the payment of interest to overseas branches/head office, and accordingly, the order passed by the AO on the basis of DRP's directions, is bad in law on the following counts:

a) *That the Hon'ble DRP and AO have erred in placing reliance on the CBDT Circular No. 740 dt. 17th July, 1996 in order to disallow the interest paid to overseas branches/head office, without comprehending the true import of the circular.*

b) *That the Hon'ble DRP and AO have erred in not following the direct judgment of Kolkata Special Bench in case ABN Amro Bank NV vs. ADIT [280 ITR (AT) 0117] and disallowing interest of Rs. 133,497,526 as deduction, by invoking provisions of section 40(a)(i) of the Act.*

3. ***Addition on account of income of the assessee pertaining to receipt of interest from Indian branches amounting to Rs. 133,497,526***

That on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the separate

addition of Rs. 133,497,526, as proposed in the draft assessment order, with respect to the interest paid by Indian branches of the appellant to head office/overseas branches, and accordingly the order of the AO based on DRP's instructions is incorrect, unjustified and bad-in-law as well as on facts, on the following counts:

a) *The AO has erred in not examining the ground independently and has blindly relied on the order passed by CIT(A) for AY 2001-02, 2003-04 and 2004-05, while making then disallowance.*

b) *The Hon'ble DRP and AO have erred in making addition in respect of the receipt of interest from Indian branches by making the following observations:*

- *That provisions of section 9(1)(v)(c) of the Act are applicable.*
- *That the CBDT circular No. 740 is applicable to the appellant's case.*

c) *The Hon'ble DRP and AO have erred in not appreciating that the receipt of the interest by the Indian branches is not taxable under the provisions of the Act, being 'receipt from self'.*

d) *The Hon'ble DRP and AO have erred in not appreciating the contention of the appellant that it has opted to be governed by the provisions of the DTAA (so far as they are more beneficial) and has wrongly applied the provisions of the Act.*

e) *The Hon'ble DRP and AO have erred in not appreciating that in terms of the provisions of Article*

11 of the DTAA, dealing with the taxability of interest, the interest received by the appellant from the Indian branches is not in respect of a 'debt claim' as contemplated under Article 11 of the DTAA.

f) Without prejudice to ground no. 2, the Hon'ble DRP and AO have erred in not appreciating that separate addition of Rs. 133,497,526 relating to interest paid on borrowings from HO/overseas branches would tantamount to double taxation, which is against all canons of taxation.

4. ***Interest amounting to Rs. 27,659,232 accrued/received by the Indian PE from its HO/overseas branches.***

That on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the addition, as proposed in the draft assessment order, for an amount of Rs. 27,659,232 being the interest accrued/received by the Indian PE of the appellant on funds lying with the Head Office/overseas branches outside India, and accordingly the order of the AO based on DRP's instructions is bad in law as well as on facts, on the following counts:

a) The Hon'ble DRP and AO have erred in not appreciating that the interest received by the Indian branches is not chargeable to tax in India in accordance with the provisions of the Act, being 'receipts from self'.

b) The Hon'ble DRP and AO have erred in not appreciating that in terms of the provisions of Article 11 of the DTAA, dealing with the taxability of Interest, the interest received by the Indian branches from the head

office/overseas branches is not in respect of a 'debt-claim' as contemplated under Article 11 of the DTAA.

c) *Without prejudice to the above, on the facts of the case and in law, the AO erred in making an addition of Rs. 27,659,232, to the returned income of the assessee, ignoring the fact that such amount is already included in the returned income, thus making a double addition in respect of the same item. The AO has also erred in not complying with the revised directions of the Hon'ble DRP in this regard dated 28.10.2010, which are legally binding on the AO under the provisions of the Act.*

5. ***Non-applicability of the provisions of Sec. 115JB of the Act relating to Minimum Alternate Tax ('MAT')***

That on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the action of the AO of invoking the provisions of 115JB of the Act, as proposed in the draft assessment order, and accordingly the order of the AO based on DRP's directions is bad in law on the following counts:

a) *The Hon'ble DRP & AO have erred in not appreciating the contention of the appellant that operations of its Indian PE are taxable in accordance with provisions of Article 7(3) of the DTAA and in view of the provisions of sec. 90 of the Act, the provisions of section 115JB of the Act cannot be applied.*

b) *The Hon'ble DRP & AO have erred in distinguishing the relevant binding judgments referred to by the appellant, which substantiates the view of the appellant that provisions of section 115JB of the Act cannot be applied*

on the facts of the appellant's case and have further erred in relying on the decision of the Advance Rulings Authority (AAR), which is distinguishable on facts and is not applicable at all.

c) *Without prejudice to above, the Hon'ble DRP and AO have erred in holding that the provisions of sec. 115JB of the Act are applicable to the appellant even though, the appellant prepares its accounts in India in accordance with the Banking Regulations Act, 1949, and it is not required to prepare its accounts as per Parts II & III of Schedule VI of the Companies Act, 1956, and is not required to place its accounts before an Annual General Meeting (AGM) as per section 210 of the Companies.*

d) *The Hon'ble DRP and AO have erred in not appreciating the legislative intent behind the introduction of the said provisions and holding that the provisions of section 115JB of the Act were applicable to the appellant's case.*

6. ***Addition on account of interest received on External Commercial Borrowings ("ECBs") given to Indian Borrowers***

That on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the addition, as proposed in the draft assessment order, in respect of interest received by then appellant on ECBs given to Indian borrower parties, and accordingly the order of the AO based on DRP's direction is bad in law as well as on facts on the following counts:

a) *the Hon'ble DRP & AO have erred in making an addition on account of interest received on ECBs, by not*

appreciating that since the ECBs given are effectively connected with the PE of the appellant, the taxability of such interest is governed by Article 7 of the DTAA in terms of Article 11(6) of the DTAA.

b) *The Hon'ble DRP & AO have erred in not appreciating that under the provisions of Article 7 of the DTAA, an amount, commensurate with the role played by the PE, has been already been offered to tax by the appellant, in computation of its income taxable in India as per the provisions of the DTAA; and, therefore, nothing further could be brought to tax in India.*

c) *The AO has, while complying with the direction of the Hon'ble DRP, has erred in enhancing the amount of actual interest received by the appellant, by applying an adhoc rate of 20%, in order to arrive at a figure of 1,391,607,202, which is without any basis.*

d) *The AO has erred in observing that the interest would continue to be taxable under Article 11 of the DTAA, even though it has been acknowledged by the AO himself that the ECBs may be partially connected with the PE. Such an observation is contrary to the express provisions of Article 11 of the DTAA, which clearly provides that in the event debt-claim is connected with the PE, the taxability of the interest shifts from Article 11 to Article 7 of the DTAA completely, and not partially, and accordingly, the findings of the AO are incorrect and bad in law.*

e) *Without prejudice to ground no. 6(a) to (d) above, the AO has erred in levying tax @ 10% on amount of interest*

allegedly received (grossed up), by ignoring the fact that by grossing up the interest in the first place, the AO acknowledged that the said interest was subject to TDS, and the interest shown to have been received by the appellant was net of TDS, and, therefore, since the appellant has received only net interest, no recovery can be made from the appellant as per the provisions of sec. 205 of the Act.

f) *Without prejudice to the above, the Hon'ble DRP & AO have erred in not allowing the credit for the TDS, deducted by the Indian borrower parties before making the payment of interest to the appellant, as per the details filed with the AO.*

g) *Without prejudice to the above, the AO has erred in charging interest u/s 234B of the Act in respect of the aforesaid interest on ECB, even though it has been held in the assessment order that such interest is subject to TDS.*

7. ***Deduction u/s 44C of the Act***

Without prejudice to grounds 1 to 6 above, on the facts and circumstances of the case and in law, the AO has erred in not determining the correct amount of deduction u/s 44C of the Act, by ignoring the addition made to the total income on account of interest received by the appellant on ECBs.

8. ***Treatment in respect of Deferred Bank Guarantee Commission***

a) *That on the facts and circumstances of the case and in law, the Hon'ble DRP & AO have erred in treating the commission received on guarantees as taxable on*

receipt basis in the year in which the commission is received.

b) *That on the facts and circumstances of the case and in law, the Hon'ble DRP & AO have failed to appreciate that the appellant follows mercantile method of accounting according to which, the commission falling due for the relevant previous year on accrual basis can only be taxed.*

c) *That on the facts and circumstances of the case and in law, the Hon'ble DRP & AO have erred in not following the decision of the Hon'ble Calcutta High Court in the appellant's own case for the AY 1981-82.*

d) *Without prejudice to the above, on the facts and circumstances of the case and in law, the Hon'ble DRP and AO have erred in not appreciating that if the guarantee commission were to be taxed on receipt basis, it would result an additional deduction of Rs. 3,926,300 since the guarantee commission offered to tax on accrual basis was more than the guarantee commission received during the year.*

9. ***Applicable Rate of Tax***

a) *That on the facts and circumstances of the case and in law, the Hon'ble DRP& AO have erred in not adjudicating that under the provisions of Article 24 of the DTAA, the applicable rate of tax on the income of the appellant attributable to its PE in India cannot exceed the applicable rate of tax (as per the Finance Act for the subject assessment year) in the case of Domestic*

Companies and consequential directions may kindly be issued in this regard.

10. That on the facts and in the circumstances of the case and in law, the AO has erred in initiating penalty proceedings, being against the provisions of the Act."

5. The first issue pertains to disallowance of salary paid overseas to expatriate of the assessee working in India by the head office and the Indian tax paid there on by the head office aggregating to Rs. 9,92,36,315/-.

6. Brief facts apropos this issue are that from the computation of income filed by the assessee, the AO noticed that the assessee during the year under consideration, had claimed a deduction of Rs. 9,92,36,315/- on account of salaries paid in Japan to expatriates over and above the salary paid in Indian Rupees by the branches in India which were routed through profit and loss account. He noted that this expenditure had not been debited to profit and loss account of the branch i.e. had not been incurred in India, but had been claimed by way of a deduction in the computation of income. The assessee had claimed this deduction on the ground that the payment was directly attributable to the business operations of the assessee in India. The assessee pointed out that these expatriates were working in India wholly and exclusively with the assessee bank. The assessee pointed out that the expenses were allowable in view of Article 7(3) of the Indo-Japan treaty as these expenses had been incurred in connection with the Indian business of the assessee bank. The assessee further pointed out that the provisions of

section 44C were not attracted to these payments. The assessee's submissions before AO were as under:

> *"The Head Office of the assessee situated in Japan has deputed several of its employees to work in the branches situated in India. A portion of their salaries are paid by the Head Office of the bank in foreign currency (in Japanese Yen) outside India. The salaries so paid by the Head Office in Japanese Yen are credited to the bank accounts of the individual employees maintained in Japan. Balance of their salaries was paid in Indian Rupees by the branches of the assessee situated in India. The assessee also bears the Indian tax payable on such salaries, therefore, there is grossing up of tax. The consequential taxes are thus deducted and deposited with the Indian Government treasury. Whole of the salary paid (comprising of both the salary paid outside India as well as the amount paid in India) to such expatriate employees is duly taxed in India in the hands of such expatriates.*
>
> *The Profit and Loss Account prepared by the assessee in respect of its Indian branches for the relevant assessment year was debited, inter-alia, with only that portion of the salary which was paid in Indian rupees by the branches in India. In other words, the salary paid in foreign currency by the Head Office was not routed through the profit and loss account of the Indian branches. Therefore, while computing the profits attributable to the Permanent Establishment ('PE') of the assessee in India, in the return of income filed, a separate deduction is*

claimed in respect of salaries paid by the Head Office and taxes thereon, as the said sum represented expenditure incurred for the Indian operations of the assessee (being the rupee equivalent of the total salaries paid by the assessee in foreign currency to the expatriates working in India and the income-tax borne and paid by the assessee thereon)."

7. The AO was, however, of the opinion that the impugned amount was covered under the provisions of sec. 44C for the following reasons:

3.4 "Assessee's submissions have been carefully examined. A deduction u/s 37 can normally be allowed only in respect of the expenditure incurred by the assessee itself. However, as per the principles of taxation of multinational enterprises, expenses which may be incurred by such multinational enterprise as a whole, for the exclusive and direct benefit of the assessee branch, could be allowable as deduction, such deduction, nevertheless, would be subject to the restriction imposed by the Indian Tax Act. The nature of expenses to be incurred make it clear that the same are to be in the nature of administrative or executive, which fall within the definition of Head Office expenses as provided in sec. 44C of the Act. The assessee has submitted that sec. 44C deals with executive and general administrative expenditure incurred outside India. Further, the salaries paid to the expatriates, is incurred exclusively for the Indian operations and are directly allocable as such. The assessee's contentions are not found to be tenable. The definition of Head Office expenditure as given in sec.

44C, in particular. Clause (b) of Explanation (iv), as relied upon by the assessee, shows that it means all executive and general administrative expenditure incurred outside India including expenditure in respect of salaries, allowances rent etc. paid or allowed to any employee or any other person employed in or managing the affairs of any office outside India, thus, demolishing the argument advocated by the assessee, that salaries wherever payable, are not to be regarded as Head Office expenditure. It is, therefore, very clear that sec. 44C is applicable not only in respect of general administrative expenditure incurred by the Head Office for the commonand mutual benefit of all branches, but also in respect of expenditure incurred in any office outside India, which may be for the exclusive and direct benefit of the Indian branch. The scope of Head Office expenditure, as provided in sec. 44C is very wide, and all such expenses of an administrative nature incurred outside India would come within the ambit of the definition of Head Office expenditure, subject to the limit of 5% of the total income as provided by sec. 44C. The impugned expenditure of Rs. 127,955,895/- has been incurred by the Head Office situated outside India, and has been debited to the accounts of such Head Office. The head office has not raised any debit notes on the assessee. There has been no settlement of accounts with the Head Office. The head office has not raised any debit notes on the assessee. There has been no settlement of accounts with the Head Office. From these facts, it is

clear that even if these expenses are made in respect of Indian Branch, the liability in respect of such expenses is borne by the Head Office and the same is not passed on to the assessee bank. Also, these expenses are incurred outside India and cannot be subjected to verification.

3.5 The assessee has also argued that the provisions of section 44C are not attracted to these salary payments. Section 44C was introduced with a view to getting over difficulties in scrutinizing and verifying claims in respect of general administrative expenses incurred by the foreign Head Office, in so far as such expenses can be related to their business or profession in India, having regard to the fact that foreign companies operating through branches in India, sometimes try to reduce the incidence of tax in India, by inflating their claims in respect of Head Office expenses. The objective behind the legislation is also clear from a bare perusal of the earlier portion of the section which provides, inter-alia, the manner in which the disallowable amount is to be computed. The expenditure to be disallowed, is the difference between the expenditure in the nature of Head Office expenditure and the least of the following three computations: (a) an amount equal to 5% of the adjusted total income; (b) an amount equal to the average Head Office expenditure (now omitted) and (c) the amount of so much of the expenditure in the nature of Head Office expenditure in question should be incurred, not only in connection with the business in India, but also business outside India. In other words, a part of the expenditure,

at least must not be attributable to the business operations carried on in India, but also business outside India. In other words, a part of the expenditure, at least must not be attributable to the business operations carried on in India. Where an assessee doesnot have any business overseas, and the entire operations are carried out by it in India only, the question of allocating of part of the expenditure in question to the business carried on Indian cannot arise."

8. He also pointed out that similar disallowances had earlier been made. He, accordingly, made an addition of Rs. 992,36,315/- on account of salaries paid in Japan to expatriates.

9. Ld. Sr. Counsel Shri Percy Pardiwala submitted that AO disallowed the salary to expatriate employees for the following reasons:

a) No entry in respect of expenditure in books of account maintained by PE;
b) Expenditure covered by sec. 44C;
c) Expenditure was not subject to verification;

9.1 Ld. Counsel referred to para 5.1 of ld. DRP's order and pointed out that ld. DRP agreed with the findings of AO and distinguished the decision of ITAT in the case of ABM Amro Bank vs. JCIT on the ground that the Bench had examined the issue of allowability of claim of deduction of remuneration with reference to provisions of section 40(a)(i), whereas, in the case under consideration, the disallowance of salary had been made u/s 44C of the Income Tax Act. Ld. Counsel referred to page 295 of paper book, wherein

the details of expatriate employees working for the Indian branches during the year are contained to demonstrate that the employees had been sent on deputation from the head office for rendering services to the Indian branches on whole time basis. Ld. Counsel referred to detailed reply filed before AO in this regard contained at pages 266 onwards of paper book. In regard to the objections regarding verifiability of expenditure, ld. Counsel referred to page 297 of paper book, wherein form no. 16 in respect of Mr. Kita Aeb whose name appeared at page 295 of paper book, containing details of expatriate employees is contained, to demonstrate that from form no. 16, the salary paid to expatriate was verifiable.

9.2 Ld. Counsel referred to section 44C and pointed out that the said section has been incorporated in the statute to allow deduction of head office expenditure attributable to Indian PE in computing the income chargeable under the head "profits and gains of business and profession". He submitted that the expenditure contemplated u/s 44C should be in the nature of 'head office expenditure' and the amount should be attributable to the business or profession of the assessee in India. He referred to Explanation 4 to section 44C defining head office expenditure and pointed out that head office expenditure means 'executive and general administration expenditure' incurred by the assessee outside India, but since salary to expatriates is directly chargeable to the business operations in India, therefore, it falls

outside the ambit of section 44C. He pointed out that the salary to expatriate was not for managing affairs of any office outside India.

9.3 Ld. Counsel submitted that this issue is squarely covered by the decision in the case of ABM Amro Bank vs. JCIT, 97 ITD page 1 and pointed out that the only issue before ld. third member was regarding applicability of section 40(a)(i) and not regarding section 44C. In this regard ld. Counsel referred to page 13 onwards of the judgment, wherein Tribunal has, inter alia, observed as under:

> *"It is evident from the above order of the Tribunal that the claim of the assessee in regard to the payment of remuneration to the expatriate employees rendering whole time services in India throughout the accounting year has been accepted in principle as allowable deduction in computing the profits of the PE. This is, however, with the rider that such payment is not taken into account in working out the deduction under S. 44C. We adopt the above direction in regard to the remuneration paid to the expatriate employees for the whole time services rendered in India, subject to further rider placed under provisions of S. 40(a) of the IT Act, 1961. We direct the oiAO to consider the claim of the assessee for asst. yrs. 1992-93, 1993-94 and 1994-95 as under:*
>
> *In principle, the remuneration paid to expatriate employees for the services rendered in India is to be accepted as allowable deduction in computing the profits attributable to PE. So, however, the AO is required to*

verify that the assessee has not taken such remuneration into account in working out the head office expenses under S. 44C."

9.4 Ld. Counsel further referred to the decision in the case of British Bank of Middle East vs. JCIT,4 SOT 122, Bombay, wherein also similar view has been taken.

9.5 Ld. Counsel further relied on the decision in 13 SOT 524 (Del.) in the case of ANZ Grindlays Bank Ltd. vs. DDIT, wherein Tribunal followed the earlier years orders, wherein it was, inter-alia, held that since the benefits reaped by the Indian branch or permanent establishment in India have been accounted for as Indian income, therefore, there was no reason as to why the deduction of expenditure should not be allowed.

9.6 Ld. Counsel further referred to the decision in the case of Bank of America NT and SA vs. DCIT 27 SOT 97 (Mum.), wherein also similar view was taken and it was, inter-alia, held that the provisions of section 44C and limitations provided therein are inapplicable in respect of expenses incurred exclusively for Indian branches. Ld. Counsel further relied on the decision in the case of Bombay High Court in CIT v. Emirates Commercial Bank Ltd. [2003] **262 ITR 55**(Mum.), wherein the Hon'ble Bombay High Court approved the view taken by the Tribunal.

10. Ld. CIT(DR) Shri D.K. Gupta relied on the order of AO and submitted that these expenses were covered u/s 44C being incurred outside India for the administrative purposes of PE. He further pointed out that no debit notes

had been raised by assessee in respect of branches. No settlement of account was shown. He referred to ld. DRP's order and pointed out that it has been observed that these were not shown to be the liability of branch office.

10.1 We have considered the rival submissions and have perused the record of the case.

11. The facts are not disputed. The expatriates were working in India and salary had been subjected to tax for which form no. 16 was also issued to the expatriates. Therefore, there cannot be any dispute regarding verifiability of these expenses. The expenses had been incurred wholly and exclusively for the Indian branch and, therefore, no part of these expenses could be allocated to any other branch by head office. We find that this issue is now no more *resintegra* as has been demonstrated by ld. Sr. Counsel for the assessee with reference to various decisions. He has rightly pointed out that the decisions in the case of ABM Amro is squarely applicable because there was no dispute amongst the members in regard to non applicability of provisions u/s 44C. The issue before third member was not at all in regard to allowability of deduction u/s 44C and only following points of differences were before him for adjudication:

> *"(a) Whether or not, on the facts and in the circumstances of the case, the assessee is entitled to deduction of tax component of salary of expatriate employees, relating to asstt. yrs. 1990-91 and 1991-92, in*

the asst. yr. 1995-96, i.e., the year in which the tax has been paid by the assessee.

(b) Whether or not, on the facts and in the circumstances of the case, the assessee was entitled to deduction of interest levied u/s 201(1A).

(c) Whether or not, on the particular facts and in the particular circumstances of this case, the assessee was entitled to deduction on account of operational loss of Rs. 9,57,58,904/-."

11.1 Thus, ld. DRP has not correctly appreciated the facts of the case.

12. Respectfully following the decisions of Hon'ble Bombay High Court in the case of Emirates Commercial Bank Ltd. (supra), this ground is allowed.

13. Ground no. 2 is in regard to disallowance of interest paid to head office and other overseas branches of the bank amounting to Rs. 133497526/-.

14. Ground no. 3 deals with addition on account of income of the assessee pertaining to receipt of interest from Indian branches amounting to Rs. 133497526/-.

15. Ground 4 is in regard to addition on account of interest amounting to Rs. 27659232/- accrued/received to the Indian PE from its head office/overseas branches.

16. All these grounds are in regard to interest received/ payment Intra Group being between head office and assessee's PE in India for which the arguments were advanced covering all the three grounds. First we will deal with ground nos. 2 & 3 and, thereafter, separately decide ground no. 4.

However, since arguments for all the three grounds have been advanced by both sides together, we will take note of them accordingly.

17. Brief facts apropos ground no. 2 are that AO noticed that assessee had paid an interest of Rs. 133497526/- without making any deduction of tax at source. He pointed out that PE of the assessee bank is a separate entity for the purpose of taxation and on this ground assessee had claimed deduction of the interest paid to head office. He further pointed out that the interest paid by the PE to the head office was liable to tax in India and, accordingly, it was subject to the provisions of section 195 of the I.T. Act. After considering the assessee's submissions in this regard, the AO referred to Circular No. 740 dated 17/07/1996, which reads as under:

> *"It is clarified that the branch of a foreign company/concern in India is a separate entity for the purposes of taxation interest paid/payable by such branch to its head office or any branch located abroad would be liable to tax in India and would be governed by the provisions of sec. 115A of the I.T. Act, 1961, if the Double Taxation Avoidance Agreement with the country where the parent company is assessed to tax provides for a lower rate of taxation, the same would be applicable. Consequently, tax would have to be deducted accordingly on the interest remitted as per the provisions of section 195 of the Income Tax Act, 1961."*

18. He also relied on the order of ld. CIT(A) for A.Ys. 2003-04 and 2004-05 for denying deduction of Rs. 133497526/- on account of payment of interest

to head office/overseas branches on account of the failure on part of the assessee to deduct the necessary tax at source, as per the provisions of section 195 of the Act. He further made an addition of Rs. 133497526/- being interest received by head office/overseas branches from Indian branches being the income accruing to assessee in India which has been assailed by assessee vide ground no. 3 made an addition of Rs. 27659232/- in respect of interest received by Indian PE of assessee on deposits which has been assailed by assessee vide ground no. 4.

19. Ld. Sr. Counsel for the assessee referred to page 355 of paper book, wherein particulars in respect of lending or borrowing of money is contained and pointed out that it was in pursuance to financing agreement. Ld. Sr. Counsel submitted that head office and branch are part of same enterprise and, therefore, under the normal provisions of Income tax, branch is not entitled for any deduction in respect of interest paid to head office. However, under the provisions of Article 7(2) and 7(3) of the Indo Japan DTA read with paragraph 8 of the Protocol, the assessee was entitled for deduction of interest paid to head office. He submitted that as per Article 7(2), wherein enterprise of one of the states carries on business in the other state through a permanent establishment situated therein, there shall in each state be attributed to that permanent establishment the profits which it might be accepted to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing

wholly independently with the enterprise of which it is a permanent establishment. Thus, for the purpose of Article 7(2), the permanent establishment is treated as distinct and separate enterprise which implies the direct method of separate accounting by the PE. He further pointed out that the provisions of Article 7(3) of the DTA makes it amply clear that in determining the profits of the permanent establishment, there shall be allowed as a deduction expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether in the contracting state in which a permanent establishment is situated or elsewhere. Ld. Counsel further submitted that paragraph 8 of the Protocol no doubt makes it clear that no deduction shall be allowed for any payments made or amounts charged by a PE of an enterprise to its head office for the items specified therein, however, exception has been carved out and it is specified that any interest payable by a permanent establishment to the group establishment which is a banking institution, should be allowed. He, therefore, submitted that deduction in respect of interest paid by PE to the head office has to be deducted in view of the provisions contained in under DTA.

20. As regards the taxability of interest received by head office from PE, as per ground no. 3, ld. Counsel submitted that since the head office and PE are not separate entity, therefore, interest could not be paid to self and hence under the normal provisions of Income tax it was not taxable since the

transaction was between the same person. Therefore, it being not taxable there was no need to go to treaty. Similarly, as regards interest received by assessee's branch (PE) from head office as assailed vide ground no. 4 by assessee ld. Counsel submitted that since here also the transaction is between same person, therefore, it was not taxable and hence no need to go treaty. He further pointed out that under treaty provisions also this, amount is not chargeable because Protocol does not provide for taxing interest from head office and only allows for deduction in this regard. Ld. Counsel contrasted these provisions from the provisions of India Neither land Treaty where it is specifically taxable. Ld. Counsel relied on the decision of Hon'ble Calcutta High Court in the case of (i) ABM Amro Bank vs. CIT, in support of his contention that PE is to be treated as separate entity. He further relied on the decision of Spl. Bench in the case of (ii) M/s Suomoto Mitsubishi Bank Corporation vs. Deputy Director of Income-tax (IT) & Othrs. and (iii) American Express Bank Ltd. vs. DCIT.

21. Ld. CIT(DR) Shri D.K. Gupta referred to section 90(2) and pointed out that as per this section where the Central Government has entered into an agreement with the Government of any Country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of

this Act shall apply to the extent they are more beneficial to that the assessee.

22. Ld. CIT(DR) Shri D.K. Gupta submitted that as per this provision, the assessee has option either to be assessed under the domestic law or as per the provisions of DTAA. Ld. CIT(DR) further submitted that the question is whether after exercising his option under a particular scheme of taxation can the assessee go back to the other scheme of taxation, if it is more beneficial. Ld. CIT(DR) submitted that hybrid computation by adopting pick & choose method is not permissible. Once the assessee has adopted the DTA then the entire computation has to be made as per DTA. In this regard ld. CIT(DR) referred to the decision of ITAT Mumbai Bench in the case of Dresdner Bank AG vs. ACIT 2006-TII-20-ITAT-Mum.-INTL. He referred to para 78 which is reproduced as under:

> *78. "Undoubtedly, in a case where the Government of India has entered into a tax treaty with a foreign country, then in relation to an assessee on whom such tax treaty applies, the provisions of the Income Tax Act apply only to the extent these are more beneficial to the assessee. However, once assessee himself abandons his option to be assessed to tax in accordance with the provisions of the tax treaty, as is the situation before us, it cannot be open to assessee to go back for the treaty protection on one aspect of the tax assessment i.e. on applicability of minimum alternate tax u/s 115JA of the Act. Either an assessee is to be assessed to tax on the basis of the*

provisions of the tax treaty or not. In our considered view, the assessment of income cannot be split into several segments and then the applicability of treaty provisions, vis-à-vis tax law provisions, cannot be separately considered for each segment. Liability for Minimum Alternate tax u/s 115JA is an integral part of assessee's assessment of income, and, once the assessee chooses to be assessed as per provisions of the Act, in preference over the provisions of the tax treaty, it cannot be open to the assessee seek treaty protection in respect of one of the aspects of the assessment of the income i.e. applicability of minimum alternate tax u/s 115JA. We, therefore, uphold revenue's contention to the effect that the provisions of the applicable tax treaty cannot be relied upon by the assessee for the limited purposes of claim of non-applicability of section 115JA on the facts of this case."

23. Ld. CIT(DR) further referred to the decision of ITAT Mumbai Bench in the case of M/s Lloyd Registrar vs. DCIT (2013)-TII-85-ITAT-Mum.-INTL. He referred to para 15 page 11 of this order which is reproduced hereunder:

15. "Section 90(2) of the Act provides that where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more

beneficial to that assessee. The Hon'ble Supreme Court in CIT vs. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC) = (2004-TII-01-SC-INTL) has held that the provisions of sections 4 & 5 are subject to the contrary provision, if any, in DTAA. The crux of the matter is that the provision of the Act or that of the DTAA, whichever is more beneficial to the assessee, shall apply.

16. It is observed from the assessment order that the AO computed the income of the assessee under the domestic law and in this process he made disallowance of Rs. 4.23 crore by invoking the provisions of section 40(a)(i) of the Act. The ld. CIT(A) too followed the suit by considering the domestic law alone in holding that the payment of Rs. 4.23 crore by the PE to the HO is a payment to self and hence cannot be allowed as deduction in the hands of PE. As a result thereof, the provisions of section 40(a)(i) were held to be not applicable. Since the assessee is a non-resident governed by the provisions of the DTAA, it is entitled t the benefits of DTAA, if the quantum of income or the overall tax liability turns out to be less as per the DTAA vis-à-vis the domestic law. In the absence of any discussion about the computation of the business profits of the permanent establishment as per the DTAA, it is not possible to determine as to whether or not the computation under the DTAA is more beneficial to the assessee. In our considered opinion that ends of justice would adequately meet if the impugned order is set aside and the matter is restored to the file of AO for

computation of income of the assessee as per the DTAA as well after allowing a reasonable opportunity of being head to the assessee. We order accordingly. After such computation, the AO will compare the income of the permanent establishment as per domestic law and the DTAA. The liability to tax on the assessee in respect of the income of the PE would be fastened by only such of the two computations which is more favourable to the assessee as per the mandate of sec. 90(2) of the Act."

24. With reference to the above decisions, ld. CIT(DR) submitted that assessee is required to make separate computation under domestic law and DTA and then compare as to which computation is more beneficial to assessee.

25. Ld. CIT(DR) referred to the case law paper book filed by the Department and referred to the following observation contained at page 163 (internal page 17) in the case of Asstt. CIT vs. Clough Engineering Ltd. (Spl. Bench) (2011) 9 ITR (Trib.) 618 which is reproduced hereunder:

"We may deal with the question from the stand point of section 90(2) of the Act. The provision reads as under:
"(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are beneficial to that assessee."

The gist of the provision is that in case where the provisions of the Double Taxation Avoidance Agreement apply to an assessee, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. According to us, it will become necessary to have proper appreciation of the words "more beneficial". Although this point has not been elaborated upon by any of the contending parties, it is clear to us that application of the provision can be made after ascertaining – (i) tax payable by the assessee under the Double Taxation Avoidance Agreement, and (ii) tax payable by the assessee under the Act. If tax payable under the Act is less than the tax payable under the treaty, it can be concluded that the provisions of the Act are more beneficial to the assessee. However, if the tax payable by the assessee under the treaty is less than the tax payable under the Act, he shall have the benefit of the Double Taxation Avoidance Agreement. If we compute the income of the assessee under the head "Other sources", the net income by way of interest received from the Income-tax Department shall amount to Rs. 61,04,944/-. This amount will be taxed at the rate applicable to a foreign company, which is more than 15 per cent. Therefore, on making the assessment of tax under the treaty and under the Act, it will be found that tax payable under the Act is more than the tax payable under the treaty. Accordingly, the aforesaid provision will come to the aid of the assessee to come to an automatic conclusion, without exercise of any option,

that it should get the benefit under the Double Taxation Avoidance Agreement. No other consideration is material for this purpose as ultimately what is to be seen is whether the provisions of the Act are more beneficial to the assessee or not. Accordingly, it is held that the assessee is entitled to the benefit under the treaty."

25.1 He, therefore, submitted that Spl. Bench has approved the view taken in M/s Lloyd Registrar (supra). He further relied on the decision in the case of Deputy Director of Income Tax (Mum.) vs. M/s Tokyo Engineering Corporation (2012)-TII-55-ITAT-Mum.-INTL and referred to para 11.2 at page 15 & 16 of the said order, which is reproduced here under:

11.2 "A bare perusal of the above provision indicates that where the Central Government has entered into DTAA with the Government of any other country for granting of relief in respect of income on which tax is payable both in India as well as the other country or for the purposes of avoidance of double taxation of income under this Act or under the corresponding law in force in that other country, then the assessee to whom such agreement applies shall be entitled to be governed by the provisions of DTAA or the provisions of the Act, whichever is more beneficial to the assessee. A plain language of this provision indicates, firstly, that the DTAA is entered into between two countries 'for granting relief of tax. Secondly, the manner of granting relief is also enshrined in the provision itself which states that 'the provisions of this Act shall apply to the extent they are more beneficial to that assessee'. Ordinarily, but for

such provision, an assessee to which the DTAA applies shall be subjected to tax in India as per the provisions of the Act. If, however, the provisions of the DTAA are more beneficial to the assessee, then such provisions, shall override the corresponding provisions of the Act. On the other hand, if the provisions of the Act are more beneficial to the assessee, these are such provisions which shall apply notwithstanding less beneficial provision in the DTAA. The logic behind it is simple that the DTAA is intended to grant relief of tax and not create any fresh tax liability, which is not provided under the Act. To state simply, if a particular income falls under the tax net as per the Act, the same shall be chargeable to tax in the hands of the assessee to whom DTAA applies, unless it is shown that the provisions of DTAA provide for some relief in this regard. If there is a beneficial provision under the DTAA, then such provision as contained in the DTAA shall prevail over the provision under the Act. It shows that the legislature has given an option to the assessee to be governed by the provisions either of the Act or of the DTAA, which is more beneficial to it. The corollary that follows is that one needs to firstly examine as to whether the particular sum is chargeable to tax under the Act or not. If such income is chargeable to tax in India under the Act but the provisions of DTAA exempt it or provide a beneficial treatment, then the assessee will have the option to be ruled by such beneficial treatment provided by DTAA. The essence is that an assessee, to whom the DTAA

applies, has been given option to be governed by the Act or DTAA, whichever is more beneficial to it."

25.2 Thus, in sum and substance, ld. CIT(DR) submitted that assessee can be assessed either under DTA or domestic law, whichever is more beneficial but once the option is exercised to be assessed under a particular scheme of taxation then the said option cannot be reverted back for adopting the other scheme. Ld. CIT(DR) submitted that assessee had opted to be assessed under domestic law. In this regard he referred to page 327 of the paper book dated 18.1.2012, wherein the copy of Return of Income is contained and also to pages 333 and 334, wherein the statement of computation of taxable income/loss is contained and pointed out that assessee itself had computed income under the head "profit and gains of business or profession" at Rs. 695920087/- which was set off against the brought forward business losses. Ld. CIT(DR) also referred to page 336 of paper book, wherein the computation of taxable income as per ITAT u/s 115JB is contained. He, therefore, submitted that once the assessee had opted for being assessed under domestic law then assessee could not take shelter of the provisions of Article 7(3) of DTA between India and Japan for claiming deduction.

26. Ld. CIT(DR) referred to the decision of Spl. Bench in the case of Suomoto Mitsubishi Banking Corporation (supra) and referred to page 35 & 36 of the said judgment to submit that the payment to self is not allowable but for the provisions contained under DTA under Article 7(2) & 7(3) read

with paragraph no. 8 of the Protocol. Ld. CIT(DR) submitted that Spl. Bench is sub silentio on the issue whether the computation was under domestic law or under treaty. He submitted that Spl. Bench decision of Clough Engineering (supra) had not been considered by Suomoto Mitsubishi Banking Corporation. Ld. CIT(DR) further referred to the decision of ITAT Mumbai Bench in the case of M/s Societe Generale vs. DCIT (2013)-TII-27-ITAT-Mum.-INTL contained at page 23 of case law paper book filed by Department, wherein it has been observed at page 28 of paper book (internal page 6) as under:

> *4. "Ground no. 2 is against the tax neutrality in respect of interest income of Rs. 5,48,15,653/- received by the assessee on funds placed with its Head Office/Overseas branches and interest of Rs. 1,43,929 paid by the assessee in respect of funds placed by it with its Head Office/Overseas Branches.*
>
> *5. After considering the rival submissions and perusing the relevant material on record, we find that the Special Bench of the Tribunal in the case of ABN Amro Bank NV vs. ADIT (2005) 95 ITD 89 (Kol) (SB) = (2005-TII-22-ITAT-KOL-SB-INTL) has held that there cannot be transactions with self and as such branch of the assessee bank cannot be treated as a separate entity insofar as the transactions between the Head Office and the Indian branch resulting into interest income or interest expenditure are concerned. A later Special Bench of the Tribunal in the case of Sumitomo Mitsui*

Banking Corporation vs. DDIT [(147 TTJ 649 (Mum.)] = (2012-TII-24-ITAT-MUM-SB-INTL) has also held that there can be neither any income in respect of interest earned by the assessee branch from its HO/overseas branches nor there can be any deduction for interest paid by the Indian branch to the HO/ other overseas branches on the basis of principle of mutuality. We want to make it clear that the Special Bench in Sumitomo (supra) also considered the deductibility of interest expenditure and interest income under the relevant DTAA. However, the ld. Counsel for the assessee has not adverted to the relevant clauses of the relevant Treaty and has thus restricted himself only to the principle of mutuality. Respectfully following the principle of mutuality arising from the above special bench orders, we overturn the impugned order on this issue and direct that neither the interest income should be charged to tax nor the interest expenditure be allowed as deduction. This ground is accordingly allowed."

27. He, therefore, submitted that under domestic law since concept of mutuality applies so neither deduction nor taxation of the same amount can be made. However, as regards the taxability aspect, ld. CIT(DR) relied on AO's order and pointed out that AO applied the deeming provisions contained u/s 9(1)(v) and did not apply the concept of mutuality.

28. Ld. CIT(DR), further illustrating this issue, with reference to position under treaty, submitted that there is no dispute that in view of Article 11(6) Article 7 applies because assessee was operating through PE and,

therefore, the deduction of interest paid to head office by PE is to be allowed as per Article 7(2),7(3) read with clause (c) of para 8 of Protocol. He submitted that as regards the taxability of the interest received by assessee from PE and the interest earned by PE from the deposits held with head office, the taxability has to be considered as per Article 11(6). The submission of ld. CIT(DR) is that as per Article 11 interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other contracting state. Therefore, interest received by assessee was taxable and its computation only is to be done as per Article 7 on account of debt claim being effectively connected with PE. Ld. CIT(DR) further submitted that Treaty nowhere specifically bars the taxability of interest. On the contrary Art. 7(2) requires the assessee to include all the profits attributable to PE. He submitted that there is no separate charge by implication as it is already included under Article 7(2). There is no specific exemption for amounts received from HO. The assessee itself included this in P&L Account. He submitted that a holistic view is to be taken and by implication the taxability of interest has to be read in Article 7(3). In order to further buttress his submissions ld. CIT(DR) referred to Art. 7(3)(b) of Indo Nether lands treaty which reads as under:

> *Article 7 – Business profits – 1. The profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of*

the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

3(b) However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise, or any of its other offices."

29. Ld. CIT(DR) further referred to para 8 of Indo Japanese Treaty Protocol which reads as under: -

8. "With reference to paragraph 3 of article 7 of the Convention, no deduction shall be allowed in respect of amounts paid or charged (other than reimbursement of actual expenses) by a permanent establishment of an enterprise to the head office of the enterprise or any other offices thereof, by way of :

(a) royalties, fees or other similar payments in return for the use of patents or other rights, or for the use of know-how;

(b) commission or other charges, for specific services performed or for management; and

(c) interest on moneys lent to the permanent establishment; except where the enterprise is a banking institution."

30. With reference to above, ld. CIT(DR) pointed out that the last part from "Likewise to other offices" of Art. 7(3)(b) of Indo Nether land Treaty is missing in Indo Japanese Treaty. Thus, taxability is missing but there is no bar on taxability in treaty. So the entire interest is taxable in the hands of PE.

31. The second limb of argument of ld. CIT(DR) was that in view of decision of Sumitomo Corporation, the interest that was earned by PE is to be excluded then it should be net interest and not gross interest. In this regard ld. CIT(DR) further referred to para 89 of the Spl. Bench in the case of M/s Sumitomo Mitsui Banking Corporation and pointed out that SB specifically clarified that this issue was not before Spl. Bench. He submitted that interest received should be netted against payments by applying the matching principle. No issue of netting of interest received from Head Office by PE and vice versa was before the Spl. Bench.

31.1 He pointed out that since in view of Sumitomo Mitsui Banking Corporation (SB) interest received by PE is not taxable, therefore, interest received should be netted against payments made for earning interest. In this regard ld. CIT(DR) referred to the decision of ITAT, Mumbai Bench in the case of Oman International Bank SAOG (2013)-TII-64-ITAT-Mum.-INTL and pointed out that it has been held in this case that the income, which does not form part of the total income, shall also be the net income after considering

the expenditure directly or indirectly incurred in relation of earning the said income. He, therefore, submitted that deduction of expenses u/s 14A has to be considered. Ld. CIT(DR) submitted that he is raising this additional ground relying on the decision in the case of Oman International (infra). In this regard ld. CIT(DR) has referred to following observations from the decision in the case of Oman International Bank (supra):

> *2.2 "The revenue has also raised common additional ground in all the appeals vide application dated 26.2.2013 as under:*
>
> > *"Whether provisions of section 14A of the I.T. Act will be applicable in the event it is held that the interest received by the assessee from its head office is not taxable in the hands of Indian branch office?"*
>
> *4.1 The revenue has raised on additional ground regarding the disallowance u/s 14A with respect to the interest received by the assessee from the HO which has been held by the Special Bench as not taxable in the hand of the Indian Branch of assessee."*
>
> *5. We have considered the rival submissions as well as the relevant material on record. Having held that the interest income received from the HO is not taxable in view of principle of mutuality, the question arises whether such income which has to be excluded from the total income, shall be the gross receipts or net income after deduction of the expenditure incurred in relation to earning of such income. The aspect of*

total income under the scheme of Income Tax is understood as the earning of the assessee from all the sources as classified under different heads of income reduced by the expenditure directly and indirectly incurred in relation to the earning of the income and further deducting all the allowable claims and the exemption/deduction while computing the total income. Thus, the total income chargeable to tax means the net income computed from the gross receipts after the deduction of the allowable expenditure and other deductions. As per the scheme of the Income Tax, the income which is chargeable to tax is computed after the deduction of the expenditure which has been incurred for earning such taxable income. Therefore, the expenditure incurred for other than the income chargeable to tax, is not permitted to be reduced from the income for computation of the total income. This aspect of allowing the expenditure incurred in relation of the taxable income is embedded in the provisions of sec. 14A to ensure that the expenditure incurred in relation to the income which is not chargeable to tax shall not be allowed as deduction against the income which is chargeable to tax. In other words, the income, which is chargeable to tax is taken as net income after deduction of the allowable expenditure and similarly the income which is not chargeable to tax is also taken net and the expenditure incurred in relation to such income is reduced from it. Thus, the income, which does not

form part of the total income, shall also be the net income after considering the expenditure directly or indirectly incurred in relation to earning the said income. (emphasis supplied by us)

5.1 The term "income" itself under the provisions of the I.T. Act denotes the net income and not gross receipt. Therefore, whether it is the income chargeable to tax or an exempt income, the expression of income remains the same as net after deduction of the allowable expenditure and claims."

8.2 In the case of M/s Societe Generale, the Tribunal has upheld the applicability of section 14A in respect of the interest which was held to be exempt on principle of mutuality. The Tribunal has given the finding in para 44 of the order as under:

> *"44. We have considered the rival submissions and perused the relevant material on record. We have held above that the amount of interest at 3.97 crore received by the assessee on funds placed with head office/ overseas branches is exempt from tax on the principle of mutuality. Similar view has been consistently taken for the earlier years as well. Once interest income is exempt from tax, it is but natural that the expenses incurred in relation to such exempt income cannot be allowed as deduction u/s 14A. Sub-section (1) of section 14A unambiguously provides that no deduction shall be allowed in respect of expenditure incurred by the assessee in*

relation to income which does not form part of the total income under this Act. When we hold that the interest earned by the assessee from placement of funds with its head office/other overseas branches is exempt from taxation, the natural and logical conclusion which therefore has to follow is that no deduction should be allowed towards expenses incurred in relation to such exempt income. We, therefore, hold in principle that the provisions of section 14A are attracted on the interest earned by the assessee from placement of funds with its head office/overseas brandies which has been claimed and allowed as exempt on the principle of mutuality. The ld. AR unsuccessfully tried to argue that the funds for such placement with head office/overseas branches were made available from the assessee's own kitty of interest free available funds. This argument runs contrary to the specific submission made by the assessee before the AO, which has been reproduced above, by which the assessee submitted that its "placement with the head office" Overseas branches are funded by way of deposits in the foreign currency maintained in India such as EEFC and FCNR deposits". Once the assessee is specifically admitting the placement of funds with head office/overseas branches out of interest bearing deposits, it

cannot be argued that the source of such funds was different. We, therefore, hold that the source of the funds placed by the assessee with its head office/overseas branches is the deposits received by it. Since interest income from placement of such funds is exempt from taxation, any interest paid by the assessee on such deposits and other expenses cannot be allowed as deduction u/s 14A. We want to make it clear that this conclusion is based on the appreciation of the provisions under the Act. The question of allowability or otherwise of such expenses under the governing Treaty was not argued by the ld. AR and hence the same has not been considered. Thus, it is held in principle that the provisions of sec. 14A are applicable on the exempt interest income earned from the head office/overseas branches."

9.2 In the case in hand, the additional ground is in relation to disallowance u/s 14A in respect of interest income held to be exempt on the principle of mutuality. Therefore, this additional plea is not a new subject matter but only an additional aspect of the same subject matter of taxability of interest income. Even otherwise, the issue of disallowance u/s 14A is consequential to the issue of taxability of interest received from the HO. Once the interest income is held to be exempt from tax on the principle of

mutuality, the issue of disallowance u/s 14A crops-up from the very issue of taxability; therefore, there is a direct nexus between the issue of taxability and disallowance u/s 14A. If an income is taxable, there is no question of disallowance u/s 14A. On the contrary, if the income is held to be exempt, then the question of disallowance u/s 14A arises from the very subject matter of interest income treated as exempt. Therefore, we find that the aspect of disallowance u/s 14A is port and parcel of the subject matter before this Tribunal regarding the taxability of the interest income received from the HO/overseas branch and cannot be said that this is an entirely a new issue/subject matter or new source of income.

9.5 Even otherwise, the issue of taxability of the interest received from the HO itself includes the issue of net or gross. Therefore, the exempt income which has to be excluded from the total income of the assessee shall be the net income and very much in separable part of the main subject matter of taxability of interest income.

10. As regards the objection of the ld. AR that the departmental representative cannot go beyond the assessment order, we are of the view that the additional ground raised by the revenue is not bringing altogether a different case thereby undoing what has been done by the AO and

accordingly, it would not go beyond the assessment order by raising a new issue or subject matter. But the issue in the additional ground is arising as a result of finding on the subject matter of taxability of interest income received from HO. The Special Bench of the Tribunal in the case of Prakash L. Shah (supra) is not applicable to the facts of the case in hand. Therefore, we do not agree with the contention of the ld. AR on this point.

14. As we have discussed above, the issue of applicability of section 14A has been covered by the decision of the coordinate Bench of the Tribunal in the case of M/s Societe Generale (supra). Accordingly by following the decision of the coordinate Bench of this Tribunal, we hold that the provisions of sec. 14A are applicable on the exempt interest income earned from the HO/overseas Branches."

32. Ld. CIT (DR) submitted that in view of above decision the disallowance u/s 14A has to be made if the interest earned by the PE is held to be non-taxable. He, therefore, submitted that matter may be restored back to AO to ascertain the expenses incurred for earning interest income.

33. Ld. Counsel for the assessee in the rejoinder submitted that all the issues raised by ld. CIT(DR) have duly been considered in the case of Sumitomo Mitsui Banking Corporation (supra). Ld. Counsel submitted that the computation has been made under treaty and not under domestic law.

In this regard referred to page 333 of paper book, wherein the computation of taxable income under normal provisions of Income Tax Act is contained and referred to following notes to the computation of taxable income contained at pages 341 and 342 of paper book:

> *7. "The Japanese expatriates who are stationed in India and are rendering services to the Indian branches of the assessee, are being paid portion of their salaries by the Head Office of the assessee outside India. The Head Office also pays for the taxes on such portion of the salaries of the expatriates. The said portion of the salary and taxes thereon amounting to Rs. 99,236,315/- has been accounted for in the books of the Head Office and accordingly, the same has not been debited in the books of the Indian branches of the assessee. The expense directly relates to the expatriate employees who are looking after the business operations of assessee's branches in India and is thus an allowable deduction for computing profit attributable to Indian branches (i.e. PE in India) in accordance with the Article 7 of the Convention between the Government of Japan and India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes income ('DTAA'). Accordingly, deduction of Rs. 99,236,315/- on account of salaries of the Japanese expatriates (including taxes thereon), has been claimed for computing income of the assessee taxable in India."*
>
> *9. "During the year, the Indian branches of the assessee have received a sum of Rs. 27,659,232 as*

interest on accounts maintained with its head office/overseas branches. The assessee claims that such interest being receipt from self and not being specifically taxable under Article 7 of the DTAA is not liable to be taxed in India."

10. During the year, the Indian branches of the assessee have paid interest amounting to Rs. 133,497,526 to its Head Office/Overseas branches on borrowings. The said interest is an allowable deduction while computing the profits attributable to the Indian operations of the assessee under Article 7(1) read with Article 7(3) of the DTAA and paragraph 8 to the Notes appended to DTAA. The assessee is not liable to deduct tax on such payments as has been held by the Hon'ble Special Bench of Kolkata Tribunal while dealing with the case of ABN Amro Bank NV and in the case of the assessee (then known as Bank of Tokyo Mitsubishi Ltd.), reported in 280 ITR 117."

34. With reference to these notes, ld. Counsel submitted that it is wrong to plead that computation had been made under the domestic law.

35. Ld. Counsel further referred to the decision in the case of IBM World Trade Corporation vs. DCIT (International Taxation) (2012) 54-SOT-39 (Bang.) and pointed out that Tribunal has considered the issue of taxation simultaneously both under domestic law as well as treaty and has upheld the same, inter-alia, observing as under:

"In the instant case on hand, the assessee has not invoked or applied the provisions of the Treaty

selectively. The assessee has computed the tax on royalty income arising from two different contracts falling under two different limbs of section 115A(1) (b) at two rates: (i) At the rate prescribed under the Treaty and (ii) at the rate prescribed under the 1.1. Act. The assessee has invoked the benefit of the Treaty only in respect of royalty income arising from the agreements entered into on or before 1.6.2005. In respect of agreements entered into on or after 1.6.2005, the assessee has offered royalty income @ 10% as per the provision of section 115JA. The concerned cOntracts are different: the source of income is different and the provisions under which)1 royalty income is taxable is different and the assessee was therefore justified in offering the royalty income arising under two different contracts at two rates-one under the LT. Act and one under the Treaty. In the instant case, it is not one of selective TrEtQ!y benefit as the case before the Mumbai Tribunal in the above referred case. The above decision is therefore, distinguishable from the instant case of the assessee."

36. With reference to above decision, ld. Counsel submitted that it was held that assessee was justified in computing the tax at a rate beneficial to it which is in accordance with the provisions of Section 90(2) of the Act. Ld. Counsel further referred to the decision in the case of Asstt. Director of Income Tax vs. M/s Credit Agricole Indosuez Ramon House ITA No. 6615/Mum./2012, wherein Tribunal in para 21 to 24 has observed as under:

21."Ground no.6 is against the direction of the learned CIT(A) that interest and commission received from HO/Branches should be charged to tax. Briefly stated the facts of this ground are that the assessee received certain amount of interest and commission from its HO and other overseas branches and at the same time also paid interest and commission to other overseas branches and HO. The assessee, in its computation of total income, reduced the interest/commission received at Rs. 33.39 lakh and added back the interest/commission paid at Rs. 20.96 lakh. The Assessing Officer held that the interest / commission earned by the assessee from its HO / overseas branches should be charged to tax. The learned CIT(A) upheld in principle the assessment order on this issue. He, however directed the AO to rectify certain inadvertent mistakes committed by the later in this regard. The assessee is in appeal against the direction that the interest / commission earned by the assessee from its HO / overseas branches should be charged to tax.

22. The learned Departmental Representative vehemently relied on the order passed by the Mumbai Bench of the Tribunal in the case of Dresdner Bank AG v. Addl.CIT [(2007) 108 ITD 375 (Mum.)} to contend that such interest / commission income was liable to tax. The learned Departmental Representative also supported his contention by relying on the order passed by the Tribunal in

assessee's own case for assessment years 1983-84 to 1985-86, a copy of such order dated 9th March, 1998 in ITA Nos.2089 to 2091/Bom/91 was placed on record. In the opposition the learned AR relied on the five Members Special Bench order in the case of Sumitomo Mitsui Banking Corpn. V DDIT [(2012) 19 Taxmann. com 364 (Mum.) (SB)} to contend that such interest / commission received from HO cannot be charged to tax. He also relied on a subsequent order passed by the Mumbai Bench of the Tribunal in the case of Oman International Bank S.A. O. G. v. ACIT In this order dated 29th June, 2012, the Tribunal, after considering the five Member Special Bench order in the case of Sumitomo Mitsui Banking Corpn. (supra), has held that the interest received from HO / overseas branches cannot be charged to tax.

23. We have heard the rival submissions and perused the relevant material on record. It is apparent from para nos.55 and 56 of the Special Bench order that under the provisions of the Income-tax Act, 1961 the taxable entity is only one i.e. overseas GE and the PE in India is a part of that entity. It is the overseas GE which has been held to be chargeable to tax in respect of income attributable to the PE in India. Once mutuality is found between overseas HO and branch in India, there can be no interest income by the Indian branch from its overseas HO or branches under the provisions of the Act. It is relevant to mention that the Special Bench of the Tribunal, while laying down this

proposition, has duly considered the case of Dresdner Bank A G in its order. The later order passed by the Mumbai Bench of the Tribunal in Oman international Bank S.A. O. G.- (supra) has also taken similar view. In view of the fact that the Special Bench of the Tribunal in the case of Sumitomo Mitsui Banking Corpn. has held that no interest / commission received by the Indian PE from the HO can be charged to tax, there can be no question of following any contrary view expressed by the division bench of the Tribunal prior to the passing of the order by the Special Bench.

24. Here we will like to record that the learned AR has very fairly admitted that the interest paid by the Indian PE to its overseas HO / branches should also not be allowed as deduction so as to bring symmetry between interest income and interest incurred from or to HO. The impugned order is, therefore, set aside and the matter is restored to the file of A.O. to exclude the amount of interest I commission received by the Indian PE from its overseas HO I branches and also not to grant deduction in respect of interest incurred towards overseas HO/branches."

36.1 He, therefore, submitted that all the three grounds have to be decided as per the decision of Special Bench in the case of Suomoto Mitsubishi Banking Corporation (supra). Ld. Counsel further referred to the decision of Delhi Benches in the case of Foramer S.A. vs. DCIT, 52 ITD 115, wherein it has been observed as under:

"It is clear from the aforesaid sub-section that a foreign national governed by Avoidance of Double Taxation Treaty is entitled to ask for application of provision of this Act, "to the extent they are more beneficial to that assessee". The sub-section is applicable only to the cases governed by avoidance of double taxation treaty. There is thus no justification for holding that foreign nationals having selected to be governed by double taxation treaty cannot ask for application of any provision of the IT Act even when such provision is beneficial to them. The choice of selection is clearly with the foreign nationals and not with Revenue authorities. The intention of the legislature and spirit to grant benefit and choice to the foreign national is manifestly clear. In view of above provision and other reasons recorded earlier, we direct the AO to allow depreciation to the assessee as per provisions of the IT Act."

37. With reference to aforementioned decisions ld. Counsel submitted that the assessee company was being taxed as per the provisions of treaty and, therefore, the provisions of the Act were to apply to the extent that they were more beneficial to the assessee.

38. As regards the plea of ld. CIT(DR) regarding netting off of interest income, ld. Sr. Counsel pointed out that if no income arises, there is no question of section 14A. Ld. Sr. Counsel referred to page 44 of Sumitomo Corporation decision and submitted that in para 59 it is specifically noted that no income arises which is chargeable to tax. Ld. Sr. Counsel submitted that

a case of no income being arisen is to be distinguished from exempted income. He relied on the decision in the case of Commissioner Of Income-Tax vs Calcutta Discount Co. Pvt. Ltd., 116 ITR 425 (Kol.)(430). Ld. Sr. Counsel further submitted that there is no letting by assessee and, therefore, there is no direct nexus entitling netting of interest. Ld. Sr. Counsel further submitted that AO had not made any disallowance u/s 14A and made the addition of gross amount. Ld. Sr. Counsel relied on following decisions:

198 ITR 375 in the case of CIT Vs Derco Cooling Coils Ltd [1992]

248 ITR 449 in the case of Commissioner of Income-tax. vs. Dr. V.P. Gopinathan. S.P. Bharucha (SC) [2001]

38.1 We have considered the rival submissions and have perused the record of the case.

39. The decision of Spl. Bench in the case of Sumotomo Mitsubishi Banking Corporation (supra) which is a five member bench decision has elaborately considered the issue regarding deduction of interest paid by PE to head office and the interest income payable by the Indian PE of a foreign bank to its HO and branch offices abroad for the purpose of computing the income of HO liable to be taxed in India. The issue of interest received from HO by PE was not before Special Bench. It has been held that in view of the provisions contained in Article 7(2) and 7(3) of DTA between India and Japan, the interest paid by PE to head office is to be allowed as the PE is to be treated as a distinct and separate enterprise. However, as far as interest

received by head office is concerned, it has been held that the same cannot be taxed in the hands of non resident banking company on the ground of mutuality. The Department's view point is that assessee can either be assessed under the domestic law or under the treaty. The department's stand is that the assessee has to compute its tax liability separately under both the provisions and whichever course is beneficial to it, the same can be adopted by assessee. In support of its contention ld. CIT(DR) has, inter-alia, relied on the decision of Special Bench in the case of Clogue Engineering Ltd. (supra). The contention of ld. CIT(DR) is that this Spl. Bench has not been considered by the 5 member bench in the case of Sumoto Mitsubishi Banking Corporation (supra). Therefore, the first issue to be decided is whether the decision in the case of Sumitomo Mitsui Banking Corporation (supra) holds the field on this issue in the backdrop of decision in the case of Clogue Engineering Ltd. or not. We find that in Clogue Engineering Ltd. Tribunal has observed that proper appreciation of the words "more beneficial" as found u/s 90(2) needs to be appreciated for proper adjudication of the dispute before it. The Tribunal further observed, as noted earlier in the arguments advanced by ld. DR, that this point had not been elaborated upon by any of the contending parties, but Tribunal came to the conclusion that application of this provision can be made after ascertaining the tax payable by the assessee under the double taxation avoidance agreement and then tax payable by the assessee under the Act. Thus, it is

evident that this issue *per se* was not before the Spl. Bench and, therefore, these observations are only in the nature of obiter dicta and not ratio decendi. Be that as it may, Tribunal has primarily taken the same view as was taken by Tribunal in the case of Dresdner Bank AG, wherein also Tribunal had taken a similar view as is evident from para 24 to 27 of its order, which is reproduced hereunder:

> *"24. It is important to bear in mind that, in terms of the provisions of the Indian Income Tax Act while the taxable subject is the foreign GE, it is taxable only in respect of the income including business, profits, which accrues or arises to that foreign GE in India. The Indian Income Tax Act does not provide for any special mechanism for taxation of PE of a foreign enterprise, except taxation on presumptive basis for certain types of incomes such as under section 44BB, 44 BBA, 44 BBB, 44D etc. Its ironical that while the Indian Income Tax Act deals with the scope of income deemed to "accrue or arise" in India at great length and visualizing possibly all sort of deeming fictions, there is not much elaboration about the scope of income which "accrues or arises" in India in the hands of a tax entity which has fiscal domicile abroad. Since there are no specific legislative provisions to keep pace with this aspect of increased cross border commerce, by providing for mechanism to compute profits accruing or arising in India in the hands of the foreign entitles, the profits attributable to*

Indian PE of foreign enterprise are required to be computed in term; of general provisions of the Income Tax Act, and the normal accounting principles. Therefore; ascertainment of a foreign GE's taxable business profits in India involves an artificial division of the overall profits of the GE- between profits earned in India and profits earned outside India. Indian Income Tax Act can only be concerned with the profits earned in India, and, therefore, a method is to be found to ascertain profits accruing or arising in India. The only waY'1 in our humble understanding, it can be so done is by treating the Indian PE as a fictionally separate profit centre vis-a-vis the German GE. The very concept of computation of PE profits is created as a fiction of tax law in order to demarcate tax jurisdiction over the operations of a company in a country of which it is not a tax resident. Unless the PE is treated as a separate profit centre, it is not possible to ascertain the profits of the permanent establishment which, inl turn, constitute profits accruing or arising to the foreign GE in India.

25. As a first step to the computation of business profits occurring or arising in India to the German GE, therefore, we have to compute the profits of the Indian branch or India PE of the German company.

26. Learned counsel does not dispute the above proposition that business profits of the Indian PE are to be computed but he contends that in term; of the provisions of the Indian Income Tax Act, no one can

make profits by entering into transactions with oneself. It is contended that debiting or crediting one's account does not alter this legal position, and that, therefore, irrespective of the head office account being debited for interest, it cannot be said that the Indian branch has earned any income by way of interest debited to the head office. Learned counsel's emphatic submission is that an inter branch transaction is a transaction with itself and cannot lead to any income liable to be taxed or loss liable to be carried forward. According to the learned counsel, these are self cancelling transactions, and are, resultantly, profit neutral.

27. In our humble understanding, the proposition that Intra organization transactions are to be ignored for computing the business profits holds good only when profits of the organization as whole are to be computed, or when these transactions are domestic transactions within one single enterprise and within one tax jurisdiction. These intra organisation transaction, which should more aptly be termed as 'intra organisation dealings', have a significant impact on the determination of profits of the organisational units - whether termed as permanent establishment or by whatever other description."

40. We find that the Spl. Bench in the case of Sumitomo Mitsui Banking Corporation (supra) has specifically considered the decision in the case of Dresdner Banking AG and has observed as under:

82. We find that this issue is covered, in favour of the assessee, by decisions of the coordinate benches in the cases of ACIT vs. J.G. Vaccum Flasks P. Ltd. 83 ITD 242 (2002), and Maharashtra State Electricity Board vs. JCIT, 82 ITD 422 (2002) = ***(2003-TIOL-87-ITAT-MUM)****. Ld. DR, however, has vehemently relied upon the orders of the authorities below and justified the same.*

83. We see no reasons to take and other view of the matter than the view so taken by the coordinate benches. As for the decision of the Hon'ble Madras High Court in the case of Beardsell Limited (supra) = ***(2003-TIOL-370-HC-MAD-IT),*** *the same has been duly considered, and distinguished, by the coordinate bench in the case of J.G. Vaccum Flasks P. Ltd. (supra). As held by the coordinate benches, provisions for bad debts so made by the assessee is not for meeting any liability but in effect to provide for diminution in the cost of the assets. We are in considered agreement with the conclusions arrived at by the coordinate bench. In any event, there is no contrary decision so far as this aspect of the matter is concerned."*

40.1 Thus, impliedly the decision of Spl. Bench in the case of Clogue Engineering has not been approved by the Spl. Bench in the case of Sumitomo Mitsui Banking Corporation (supra). The, Spl. Bench in Sumitomo Mitsui Banking Corporation has not considered this issue as is evident from the following two grounds which were answered by Special Bench:

"1. Whether or not on the facts and in the circumstances of the case, the CIT(A) was justified in holding that interest payable by the Indian

PE of the foreign bank to its HO and other Overseas Branches, is not deductible in computing its total income;

2. Whether or not, on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in holding that interest income payable by the Indian PE of a foreign bank to its HO and branch offices abroad cannot be taken into account for the purpose of computing the income of HO liable to be taxed in India."

41. A distinction has to be kept in mind between banking and financial institutions and non-banking and financial institutions. If entity is not in the business of giving commercial loans, no notional interest charged is allowed as a deduction to the intra entity borrowing. If the entity is a bank or other financial institution and, therefore, in the business of giving commercial loans, the current interest rate applicable to the funds lend to the PE is deductible to the borrower (PE). However, as far as assessability in the hands of lender (HO) is concerned the same has to be excluded on the ground of mutuality as held by Special Bench in the case of Sumitomo Corporation (supra).

42. As far as the detailed submissions advanced by ld. CIT(DR) with reference to separate computations under DTA and domestic law are concerned, we find that Spl. Bench in the case of Sumitomo Mitsui Banking Corporation, while referring to the decision in Dresdner Bank's case, has itself observed that the same also is one point of view but has observed that since a judicial precedent laid down by Spl. Bench is available, therefore, the same view has to be taken by a Division Bench. We, therefore, respectfully

following the decision of Spl. Bench allow ground nos. 2 &3 raised by the assessee.

42.1 As far as the additional ground raised by the ld. CIT(DR) regarding the disallowance u/s 14A is concerned, we find considerable force in the same in view of the detailed observations reproduced earlier in the case of Oman International Bank (supra). Therefore, for computation of disallowance u/s 14A the matter is restored back to the file of AO.

43. In the result, the additional ground raised by ld. CIT(DR) is allowed for statistical purposes.

44. Now we will take up Ground no. 4 in regard to interest received by PE from HO on deposits kept by PE with HO. Ld. Counsel has relied on the decision of Special Bench in the case of Sumitomo Corp. (supra). However, we find that in the case of Sumitomo Mitsui Banking Corporation also one of the argument advanced by ld. CIT(DR) Shri Girish Dave, as noted by Tribunal in para 13 of Sumitomo Mitsui Banking Corporation, was as under:

> *13. "Shri Girish Dave submitted that the assessee is adopting split approach by claiming deduction for interest under treaty and by claiming exemption for the same interest in the hands of recipients under local law. He submitted that articles 7(2) and 7(3) of the treaty under which the assessee is claiming deduction for such interest recognize PE and head office as two distinct entities especially in respect of interest in so far as banking entity is concerned. He*

contended that full effect has to be given to such treatment for considering the deductibility as well as taxability of interest. He invited our attention to page no. 133 of his paper book to show the new convention agreed by both the Governments in exercise of the powers conferred by sec. 90 of the I.T. Act and submitted that as a result of such agreement, the said convention has become a part of local law. He also invited our attention to article 23 of the said convention at page no.143 of his paper book which provides that the laws in force in either of the contracting states shall continue to govern the taxation of income in the contracting state except where express provisions to the contrary are made in the convention. He contended that this issue, therefore, has to be decided as per the relevant provisions made in the said convention governing the issue and not as per the provisions of local law."

45. The contention of ld. CIT(DR) was primarily based on the decision of Hon'ble Supreme Court in the case of SAL Narayan Rao and Another vs. Eshwar Lal Bhagwan Das & Another, 57 ITR page 149, wherein the Hon'ble Supreme Court referring to the decision in the case of M.K. Venkata Challan vs. Bombay Dying and Manufacturing Company Limited referred to the observations relied in that case of Lord Asquith of Bishoptone in East End Dwellings Company Limited vs. Finsbury Borough Council, "if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and

incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

45.1 Thus, primarily the contention of ld. CIT(DR) is that when as per Article 7(2) the PE is taken as a distinct and separate enterprise engaged in the same or similar activities then in view of the decision of Hon'ble Supreme Court in the case of Eshwar Lal Bhagwan Das (supra) the consequences flowing from considering the PE as separate entity as real state must inevitably follow and, therefore, the income accruing to the non-resident bank in consequences to the payment made by PE has to be taken into consideration for determining the income attributable to PE branch in India.

46. It is interesting to note that in the case of ACIT vs. M/s Credit Agricole Indosuez ITA No. 6615/Mum./2003. Ld. Counsel for the assessee himself had submitted that the amount paid by PE to its HO/branches should not be allowed as deduction so as to bring symmetry between interest income and interest accrued from or to HO. The next limb of submission of ld. CIT(DR) which can be culled out from his submissions on this aspect is that specific deeming provision u/s 9(1)(v) will override the concept of mutuality. In our opinion this argument advanced by ld. CIT(DR) deserves to be accepted because concept of mutuality cannot override specific provision of law. Once the interest received by PE is deemed to be income of PE and there is no bar in the treaty on its taxability then it cannot be excluded from

computation of income earned by PE. In view of above discussion ground no. 4 is rejected.

47. Brief facts apropos ground no. 5 with reference to applicability of the provisions of section 115JB to assessee are that the assessee had attached a note with the return of income that the provisions of section 115JB were not applicable to it. It was claimed that assessee was subject to tax in India on the income earned by its PE in India and that, such profits earned by the PE in India were included and incorporated in global accounts prepared by the head office in Japan. It was submitted that, neither the bank was an Indian company nor it was declaring and distributing dividend out of its income in India. The assessee also relied on the legislative intent behind the introduction of section 115JB. The assessee also submitted that the profits of the PE of the assessee i.e. Indian Branches had to be computed under Article 7 of the treaty and computation of book profits u/s 115JB of the Act had no application at all. The assessee also relied on various case laws holding that the treaty overrides the provision of the Income Tax Act. The AO did not accept the assessee's contention for the following reasons:

a) Once the assessee was having PE in India then it would be assessed for determining the profit as per the Income Tax Act and the expenses were to be allowed as per Income Tax Act;
b) If the assesse's argument that the provisions of the Income Tax Act relating to determination of the profit were applicable and rests provisions were not applicable, then it will lead to an anomalous

situation and even the loss incurred in earlier year will not be allowed to be carried forward and set off u/s 80 of the I.T. Act;

c) The AO referred to section 115JB(i) and pointed out that the said section is applicable in case of companies and the definition of company u/s 217 includes any body corporate, incorporated by or under the laws of a company outside India. Therefore, company, as used in section 115JB, includes foreign companies.

d) There is no indication in the memorandum explaining the introduction of the said section that the said section shall not apply to foreign companies. In this regard the AO pointed out that section 115JB starts with the phrase "notwithstanding anything".

e) The AO relied on the decision of Authority of Advance Ruling. The AO also referred to the decision of Authority for Advance Ruling in the case of NLKORESSOURCES Ltd. vs. CIT; 234 ITR 828, where the assessee sought the benefit of section 42, which allows special deduction for those engaged in the business of prospecting for mineral oil. The Authority for Advance Ruling (AAR) held that for the purposes of section 115JA, the question of any allowance u/s 42 would have no relevance AAR also rejected the argument of assessee that section 293A enables the Central Government to grant exemption for such undertakings.

f) The AO referred to the findings of ld. CIT(A) in the case of assessee for A.Y. 2003-04 and 2004-05, wherein it was held that the provisions of section 115JB are applicable.

48. Ld. DRP upheld the AO's action.

49. Ld. Counsel for the assessee submitted that the provisions of section 115JB were not applicable for the following three reasons:

1. The accounts had been prepared in accordance with Banking Regulation Act;
2. Section 115JB applies to domestic companies only;
3. the profits had been determined by PE as per the provisions contained in double taxation avoidance agreement and not as per the provisions of Income Tax Act.

50. Ld. Sr. Counsel referred to page 342 of paper book, wherein notes to accounts are contained and pointed out that note 12 reads as under:

12. *"Applicability of the provisions of section 115JB of the Act*

The assessee is a company incorporated in Japan and is a resident of Japan under the DTAA. It carries on business in India through branches.

In their report on the Balance Sheet as at 31st March, 2007, and the Profit & Loss Account of the Indian branches for the year ended 31st March, 2007 (Annexed with the Return), the auditors have stated that in accordance with the provisions of section 29 of the Banking Regulations Act, 1949, read with the provisions of sub-sections (1),(2) and (5) of section 211 and sub-section (5) of sec. 227 of the Companies Act, 1956, the Balance Sheet and the Profit & Loss Account, are not required to be, and are not drawn up in accordance with Schedule VI to the Companies Act, 1956. The accounts are therefore, drawn up in conformity with Forms 'A' and 'B' of the third Schedule to the Banking Regulations Act, 1949.

For the purpose of computing the book profits u/s 115JB of the Act, it is required that the assessee prepares its Profit & Loss Account in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. The assessee is neither required to draw up its accounts in Indian in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 nor it is

required to place the accounts before the AGM as per sec. 210 of the Companies Act. It does not declare or distribute any dividends in India with reference to any such accounts. Therefore, provisions of section 115JB are not applicable in the case of the assessee.

The assessee places reliance on the following decisions:

- *Maharashtra State Electricity Board vs. Joint CIT 77 TTJ 33 (Bom.);*
- *Process Pumps (P) Ltd. vs. DCIT 94 TTJ 190 (Bang.)*

However, without prejudice to the assessee's claim that provisions of sec. 115JB are not applicable to its case, computation of book profits u/s 115JB of the Act are annexed herewith alongwith certificate in Form No. 29B."

50.1 Ld. Sr. Counsel filed copy of Annual Report for 2007, wherein the auditors have pointed out that the financial statements of Bank of Tokyo – Mitsubishi UFJ, Ltd. Indian Branches were prepared u/s 29 of the Banking Regulation Act, 1949 and these accounts were not as per part II & III of Schedule VI to Companies Act.

50.2 Ld. Sr. Counsel relied on the following decisions : (a) ITAT 'G' Bench, Mumbai in the case of Krunk Thai Bank PLL vs. JCIT, vide ITA No. 3390/Mum/2009; b) Kerala State Electricity Board vs. DCIT, vide ITA Nos. 1703, 1710 & 1716 of 2009 & 127 of 2010; c) M/s Reliance Energy Ltd. vs. ACIT, vide ITA No. 218/Mum./2005.

50.3 Ld. Sr. Counsel further submitted that Explanation 3 inserted below sub-section (2) by the Finance Act, 2012 w.e.f. 01/04/2013 reads as under:

"Explanation 3. – For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, has, for an assessment year commencing on or before the 1st day of April, 2012, an option to prepare its profit and loss account for the relevant previous year either in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act, 1956 or in accordance with the provisions of the Act governing such company."

50.4 This has been held to be prospective in following cases:

M/s State Bank of Hyderabad vs. DCIT, vide ITA No. 578/Hyd./2010 & 779/Hyd./2010;

ICICI Lombart General Insurance Co. Ltd. 27 Taxmann 326 (Mum.)

50.5 He further submitted that a foreign company does not hold AGM under Companies Act and its accounts are never laid before Annual General Meeting. He further referred to Explanation 1 clause (d), (e) and (vii) to submit that these clauses are indicative of fact that sec. 115JB is applicable only to domestic companies. He pointed out that adjustments contemplated u/s 115JB have no applicability in case of foreign company.

50.6 Ld. Sr. Counsel referred to the Hon'ble Finance Minister's speech while introducing Finance Bill, 1996 – 1997 and pointed out that it was observed in clause 90 as under:

90. "Corporate tax rates have been reduced and simplified over the past few years and the results have been very encouraging with a significant increase in corporate taxes as a percentage of GDP. However,

there are two issues which need to be addressed. The first is the promise made in the past that the corporate surcharge will be temporary. The other is the phenomenon of zero tax companies which, according to many observers, reflects an excessive degree of laxity in the tax regime. I propose to respond to the two issues as follows:

(i) I am reducing the rate of surcharge on corporation tax from15% to 7.5% and hope to take a similar step in my next budget. The reduced tax burden will benefit all companies big and small.

(ii) I propose to introduce a "Minimum Alternate Tax" (MAT) on companies. In a case where the total income of the company, as computed under the I.T. Act after availing of all eligible deductions, is less than 30% of the book profit, the total income of such a company shall be deemed to be 30% of the book profit and shall be charged to tax accordingly. The effective rate works out to 12% of book profit calculated under the Companies Act. Companies engaged in the power and infrastructure sectors will, however, be exempted from the levy of MAT."

50.7 He further referred to the Finance Minister's speech while introducing Finance Bill, 2000 which reads as under:

156. "The various exemptions currently available while calculating Minimum Alternate Tax (MAT) and the credit system has undermined the efficacy of the existing provision and has also led to legal complications. To address these issues, I propose that the Minimum

Alternate Tax be now levied at the revised rate of 7.5% of the "book profits" ***as determined under the Companies Act*** *instead of the existing effective rate of 10.5%. However, this will now be uniformly applied – barring one exception that I will mention later. There will also be no credit for Minimum Alternate Tax paid. This should bring all zero tax companies within the tax-net, which is also the basic purpose of this tax. The new system has the virtue of a lowered rate of tax, a simple method of computation, and an equitable spread."*

50.8 He further referred to notes on clauses appended to Finance Bill, 2002 and pointed out that clause 49, reads as under:

"Clause 49 seeks to amend section 115JB of the Income-tax Act relating to special provision for payment of tax by certain companies.

The existing provisions of the said section provide for levy of a minimum tax on domestic companies of an amount equal to seven and one-half per cent of the book profit, if the tax payable on the total income chargeable to tax as per the provisions of the Income Tax Act, 1961, is less than seven and one-half per cent of the book profit.

Sub-clause (a) seeks to provide that where the tax payable on the total income chargeable to tax is less than seven and one-half per cent of book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent.

This amendment will take effect retrospectively from 1st April, 2001 and will, accordingly, apply in relation to the assessment years 2001-02 and subsequent years."

50.9 With reference to above speeches of Hon'ble Finance Minister, ld. Sr. Counsel submitted that it is evident that the MAT provisions were meant only for domestic companies and not foreign companies. Ld. Sr. Counsel further submitted that under treaty all expenses are to be allowed but that is no so for computing total income as per MAT provisions.

60. Ld. Counsel further pointed out that in the return itself assessee had computed the total income as per MAT provisions with a rider that the provisions of section 115JB are not applicable.

61. Ld. CIT(DR) submitted that even if treaty is applicable 115JB provisions will apply. There cannot be any discrimination between Indian Company and foreign companies on this count. As regards the 1st contention of assessee regarding accounts being prepared under Banking Regulation Act, ld. CIT(DR) submitted that section 115JB starts with a non-obstante clause. He submitted that section 115JB(2) gives only mode of preparation of profit and loss account. It only requires that the accounts are to be prepared as per Schedule VI. Ld. CIT(DR) submitted that language of section is not 'as prepared' but 'as per Schedule VI' only. Only this compliance is mandatory. He submitted that Income Tax Act is not subordinate to Companies Act. He further submitted that section 211 of

Companies Act only provides mode of preparation of Balance Sheet and profit and loss account. The manner of preparation is to be followed. In this regard he referred to the decision in the case of 257 ITR 51 (Rajasthan) Chhogmal Chiranji Lal vs Commissioner of Income-Tax. He submitted that Companies Act does not prescribe form of profit and loss account. He referred to page 103, wherein the particulars in regard to profit and loss account as per Banking Regulation Act are required to be given and pointed out with reference to Schedule VI to Companies Act contained at pages 85 to 98 of Paper Book that profit and loss account is not very special under Companies Act. He further referred to section 29(3) of Banking Regulation Act contained at page 102 of paper book to submit that Companies Act requirements have been made applicable to the extent not inconsistent with Banking Regulation Act. He submitted that even Banking Companies are required to prepare Accounts under Companies Act as any other company.

61.1 Ld. CIT(DR) referred to page 333 of paper book, wherein the computation of Taxable income under normal provisions of Income Tax Act is contained and also to page 336 wherein computation of taxable income u/s 115JB(MAT) is contained. He, therefore, submitted that assessee itself computed u/s 115JB. He referred to pages 307 and 308 of paper book and pointed out that assessee filed the Return of Income accordingly. He referred to page 317 of paper book and pointed out that deemed total income u/s 115JB was returned. Further, he referred to page 327 and

pointed out that assessee itself stated in Return in MAT schedule that profit and loss account was prepared as per Schedule VI. This clearly demonstrates the conduct and understanding of provisions by assessee. Ld. CIT(DR) referred to the submissions of assessee that explanation 3 inserted to section 115JB(2)(b) is prospective and, therefore, by implication the provisions of section 115JB(2) are not applicable. In this regard ld. CIT(DR) submitted that purpose of amendment was as under:

(a) only for aligning the provisions;

(b) to avoid hardship of preparing accounts as per Schedule VI;

(c) explanation 3 is for removal of doubts and, therefore, relevant for cases prior to 2012.

61.2 He, thus, submitted that amendment is only clarificatory in nature. He submitted that assessee exercised option of preparing accounts as per Schedule VI.

61.3 As regards the submission of ld. Sr. Counsel regarding non-applicability of section 115JB to foreign companies, ld. CIT(DR) submitted that section 2(17)(ii) includes in the definition of company a foreign company also. He further pointed out that section 2(23A) defines 'foreign company' as a company which is not domestic company. He pointed out that section 2(22A) defines a domestic company. He submitted that section 115JB does not make any distinction and refers only to company. He further submitted that whenever so required, legislature has made specific provisions applicable to only foreign companies like sub-section 44BB, 115A, 44DA,

80HHBA. He pointed out that since the law is unambiguous, therefore, Hon'ble Finance Minister's speech and memorandum explaining introduction of clause are not relevant.

61.4 As regards assessee's contention regarding non-applicability of provisions of section 115JB to Treaty, ld. CIT(DR) submitted that:

(i) Assessee opted to be taxed under domestic law;

(ii) Assessee computed income u/s 115JB;

(iii) Return filed and tax paid as per domestic law.

Treaty in above steps does not come into picture.

61.5 Further, Article 7(3) under Treaty talks of only book profits.

If foreign company paying tax below book profit then it will have to determine income as per section 115JB. He submitted that since 115JB has overriding effect, therefore, it will override section 90 also.

62. Ld. DR referred to AAR's ruling contained at page 47 of the Department's case law paper book in the case of Suhas Chandra Sen & Mohini Bhussry JJ. [1998] 234 ITR 0335, wherein it has been held that section 115JA is applicable to foreign companies. He pointed out that at internal page 7 AAR observed that there is no difficulty in computing profit/loss of Indian business. He pointed out that Authority relied on IRC vs.Ross Minister (1979) 52 TC 160 (HL). Ld. DR further referred to page 57, wherein the decision in the case of Nice Resources Ltd. vs. CIT, 234 ITR

828 before Authority for Advance Ruling is contained, wherein authority for AAR has given its opinion on following questions:

> *"1. Whether the applicant is entitled to special benefits allowed under specific section 42 of the Income-tax Act, 1961 (regarding the special provisions for deduction in case of business of prospecting, etc., of mineral oil), before calculating the book profit as per section 115JA?"*

62.1 In this case the assessee's contention was that since the activities of assessee come within the scope of section 42 of Income Tax Act (Special Provision relating to companies engaged in oil exploration), therefore, section 115JA cannot be made applicable. The contention was that section 115JA cannot override special provision. This argument was rejected by authority for advance ruling.

62.2 He pointed out that authority after considering the provisions of section 42, 115JA and section 293A opined as under:

> *"Section 293A has nothing to do with computation of total income. It lays down that the Central Government may by notification grant exemption or reduction in rate of tax or other modifications in respect of income-tax in favour of certain classes of assesses. We were referred to two notifications issued u/s 293A dt. March 31, 1983 and July 6, 1987. Both the notifications pertain to rates of tax payable by foreign companies under certain circumstances. We fail to see the relevance of these two notifications for the purpose of the present case. Neither section 293A nor the two notifications issued there under*

can cut down the scope or effect of sec. 115JA which stands on a different footing altogether. It does not contain a machinery for computation of business income or total income of an assessee. It provides a rough and ready formula. A minimum amount of tax will have to be paid by an assessee on the basis of its book profits if its total income is less than thirty per cent of its book profit. This is a legal fiction. It will come into play only when the total income as computed under this Act is less than thirty per cent of the book profit of an assessee. Total income has to be computed in the manner laid down in the Act. If an assessee has business income, it will have tobe computed in the manner laid down in sections 30 to 43D. All the deductions and allowances permissible under any other provision will also have to be given to the assessee for the purpose of computation of his total income in regular course of assessment of income. If the total income, thus calculated, falls short of thirty per cent of book profit,the special provisions of sec. 115JA come into operation. There is no scope for any deduction or allowance under any other provision of the Act at this stage. The section is to apply "notwithstanding anything contained in any other provisions of this Act". Book profit has been defined and explained in section 115JA. This provisionbecame necessary because a large number of companies were not paying any tax in spite of making huge profits by taking advantage of the various provisions for deduction and allowances contained in the Act. The total income thus computed was way below the

taxable limit. To circumvent this, section 115JA was introduced in the statute. Thirty per cent of the book profit of a company will have to be treated as its total income in a case where the total income as computed in with the other provisions of the Act was found to be less than thirty per cent of the book profit of the company. What is book profit has been defined and explained in that section. Section 115JA is a self contained code and will apply notwithstanding any other provisions of the Act. There is no scope for any allowances or deduction under any other section from what is deemed to be total income of an assessee.

The questions raised by the applicant which we have set out earlier are not happily framed. We answer all the questions by saying that the applicant cannot claim any special benefit u/s 42 in the calculation of its book profit by resorting to section 115JA. Deduction of expenditure u/s 42 is allowable only when business icnome is computed under Chapter IVD of the Income-tax Act. Section 42 of the Income-tax Act cannot override the provisions of section 115JA. The provisions of section 115JA will clearly apply in the case of the applicant company."

62.3 Thus, in the case of foreign company the provisions of section 115JA were applicable.

63. Ld. DR further referred to page 75 of the paper book in the case of Timken Company in reference, 326 ITR 193 before AAR and pointed out that the following questions were raised before the AAR:

"On the above facts stated by the applicant. the following Wing questions are formulated by the applicant I seeking advance ruling

(i) Whether the provisions of section 115JB of the Act relating to payment of minimum alternative (MAT) are applicable only to domestic Indian companies?

(ii) If the answer to question No 1 IS negative, whether the provisions of section 115JB of the Act relating to payment of MAT are applicable to only such foreign companies that have a physical business presence In India?

(iii) Based on the answer to question (II) since the applicant IS a foreign company who does not have a, physical presence In India In the form of an office or branch and also In the light of the declaration provided by the applicant that It does not have a permanent establishment In India In terms of article 5 the India-USA Double Taxation Avoidance Agreement (attachment VIII), whether the provisions of section115JB of the Act are applicable on the sale of shares of a listed company, VIZ , Timken India Limited, t the applicant, which has suffered securities transaction tax and, accordingly, tax exempt under section 10(38) of the Act?

(iv) If the provisions of section 115JB of the Act are applicable to the applicant. whether the payment made to the applicant on sale of the shares would suffer any withholding tax under section 195 of the Act and If yes whether tax at 15 per cent of the net capital gains would be required to be withheld?"

63.1 Ld. DR pointed out that AAR answered the question no. 3 only in negative but not dissented from earlier decisions. He submitted that since the applicant had no physical presence in India therefore, it was held that the provisions of section 115JB were not applicable. Ld. DR further referred to

the decision of AAR in the case of Castleton Investment Ltd. 2012-TII-36-ARA-INTL, wherein, inter-alia, it was held that 115JB is not applicable only to domestic company but also to foreign companies. Ld. DR submitted that this decision has been followed in RST R BatliBoi & Co.

> *25. "Question no. 2 is whether the applicant would be liable to be taxed u/s 115JB of the Act in the absence of a Permanent Establishment in India or in the absence of a business connection in India. The applicant argues that section 115JB would apply only to domestic companies and not foreign companies. The relevant notes on clauses to Finance Bill, 2000 is relied on in support. Earlier Rulings of this Authority in that behalf are also relied on. The Revenue has not joined issue on this, merely stating that the question has to be decided on merits.*
>
> *26. On a reading of sec. 115JB coupled with the definition of company in the Act, it may not be difficult to say that sec. 115JB will be applicable to a company incorporated outside India. Sub-section (2) also may not stand in the way since it seeks preparation of accounts in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act "for the purpose of this section". It may not depend on an obligation otherwise to prepare such an account.*
>
> *27. But, we are not pursuing this aspect further since the aspect was not perused and the parties proceeded as if the provision may have no application. Hence, accepting the plea of the applicant, we rule that section 115JB has no application in this case."*

64. Ld. CIT(DR) submitted that all these decisions of Authority for Advance Ruling have persuasive force though not binding.

64.1 Ld. CIT(DR) referred to various decisions relied upon by ld. Counsel for the assessee and submitted as under:

1. As regards Kerala State Electricity Board, ld. DR pointed out that the same is based on peculiar set of facts. He referred to para 46.6 and pointed out that the Hon'ble High Court observed as under:

> "46.6 Companies engaged in the business of generation and distribution of power and those enterprises engaged in developing, maintaining and operating infrastructure facilities under sub-section (4A) of section 80-IA are exempted from the levy of MAT, so that the incentive given to infrastructure development is not affected".

65. As regards the reliance placed on the decision of State Bank of Hyderabad, ld. CIT(DR) pointed out that in para 13 Tribunal has observed that the amendment is prospective in nature. Explanation 3 has not been considered in this decision and Tribunal followed the decision in the case of Maharashtra State Electricity Board vs. JCIT, 82 ITD 422.

66. Ld. CIT(DR) submitted that in our case assessee has prepared accounts in accordance with part II of Schedule VI of Companies Act. He submitted that facts and context has to be seen because slightest difference in facts will change the entire complexion. He submitted that assessee's case comes within the ambit of Companies Act and not any special Act. In this regard ld. DR referred to page 37 of paper book, wherein the decision of

Tribunal in the case of Maharashtra State Electricity Board is contained and pointed out that in para 15 Tribunal has, inter-alia, noted that as per section 115JA(2) company is required to prepare its profit and loss account in accordance with the provisions of part II & III of schedule VI to the Companies Act. However, MSEB was required to prepare its accounts in conformity with the provisions of section 69 of the Electricity Supply Act. Ld. CIT(DR) pointed out that in our case assessee has prepared accounts in accordance with part II of schedule VI to Companies Act and, therefore, this decision is not applicable. Ld. CIT(DR) referred to the decision of ITAT Mumbai Benches in the case of Krung Thai Bank PCL and pointed out that in this case requirements of Banking Regulation Act were not considered.

67. Ld. CIT(DR) further referred to the decision of ITAT, Mumbai Benches in the case of M/s Reliance Energy Ltd. vs. ACIT, vide ITA No. 218/Mum./2005 and pointed out that accounts prepared as per Electricity Act are materially different but in the present case the accounts prepared by assessee are not materially different from the requirements of schedule VI. He further pointed out that here is not a case of impossibilities since assessee itself prepared the accounts in accordance with schedule VI. As regards the reliance on the decision in the case of ICICI Lombard General Insurance Co. Ltd. vs. CIT, 54 SOT 538 ld. CIT(DR) pointed out that in this case Insurance Act was considered and it was held that prior to 01/04/2003 provisions of section 115JB were not applicable in case of Insurance

Company as they were not required to prepare accounts as per part II & III of schedule VI of Companies Act, wherein Tribunal held that there was impossibility of preparation of accounts as per Schedule VI part II & III. In this regard Tribunal relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Official Liquidator Pillai Central Bank Ltd.,150 ITR 539 and also on the decision of Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Setty, 128 ITR 294. Tribunal also referred to the decision in the case of Quality Biscuits Ltd. 284 ITR 434, wherein it has been held that provisions of section 234B and 234C are not applicable in respect of computation of deduction u/s 115J because the computation of profit u/s 115J has to be made on the basis of book profit and since entire exercise of computing the income u/s 115J can only be done at the end of the financial year, and the provisions of section 207, 208, 209 and 210 cannot be made applicable until and unless the accounts are audited and the balance sheet prepared.

68. Ld. Counsel in the rejoinder referred to the decision in the case of Krung Thai Bank PCL and pointed out that in this case the issue before the Tribunal was whether the reopening of the assessment in assessee's case on the ground of applicability of MAT provisions u/s 115JB was in accordance with law or not. Tribunal in para 7 held as under:

> *"7. The plea of the assessee is indeed well taken, and it meets our approval. The provisions of Section 115 JB can only come into play when the assessee is required to prepare its profit and loss account*

in accordance with the provisions of Part II and III of Schedule VI to the Companies Act. The starting point of computation of minimum alternate tax under section 115 JB is the result shown by such a profit and loss account. In the case of banking companies, however, the provisions of Schedule VI are not applicable in view of exemption set out under proviso to sectlon 211 (2) of the Companies Act. The final accounts of the banking companies are required to be prepared in accordance with the provisions of the Banking Regulation Act. The provisions of Section 115 JB cannot thus be applied to the case of a banking company."

69. Ld. Counsel referred to page 327 and pointed out that in the Return of Income there is typographical error as regards the preparation of profit and loss account as per Schedule VI to which ld. CIT(DR) vehemently opposed at this stage. Ld. Counsel referred to page 336, wherein computation of Taxable Income u/s 115JB(MAT) of the Act is contained and pointed out that was with reference to Note 12 and 13 given in the Notes to computation of Income in Annexure V. He submitted that assessee had pointed out that without prejudice to its claim regarding applicability of provisions of section 115JB, the computation was filed by assessee ld.Counsel referred to the Returns of Income for A.Ys. 2006-07, 2008-09 and 2009-10 and pointed out that assessee had specifically written '2' (No.) in regard to preparation of profit and loss account as per parts II and III of Schedule VI. He further referred to page 127 wherein the objections filed before DRP are contained and pointed out that assessee stated as under:

"It was submitted to the AO that the assessee carries on banking business through its branches and prepares its Profit and Loss Account for Indian operations in accordance with the section 29 of the Banking Regulation Act, 1949 and not as per Parts II and III of Schedule VI to the Companies Act, 1956."

69.1 He further referred to page 282 and 283to point out that this fact was brought to the notice of AO also. Ld. Counsel further referred to para 9 of AO's order and pointed out that AO has noted that assessee had disputed the applicability of MAT provisions. He, therefore, submitted that it is wrong to submit that merely on account of computation being made u/s 115JB, the said provisions were applicable to assessee.

70. Ld. Counsel further submitted that 'company' u/s 115JB contextually refers only to domestic company. It cannot include foreign company. Ld. Counsel relied on 341 ITR 1 (131) Vodafone International Holdings B.V. Vs. Union of India and pointed out that it has been held that word 'presence' to be construed u/s 195 in the context of the transaction and not in a manner that brings a non-resident assessee under jurisdiction of Income Tax Authorities.

71. Ld. Counsel relied on the detailed submissions contained at page 130 onwards.

71.1 We have considered the rival submissions and have perused the record of the case. The facts are not disputed.

72. Admittedly the assessee had prepared its accounts as per the requirements of Banking Regulation Act and while filing the return of income, though it had computed the book profits as per the provisions of section 115JB also, but had given a note that the provisions of section 115JB were not applicable. It is also not disputed that profit and loss account of assessee had not been prepared as per part II & III of schedule VI to the Companies Act.

73. Ld. Counsel has relied on the decision in the case of Maharashtra State Electricity Board (supra), M/s Reliance Energy Limited (supra), Kerala State Electricity Board (supra), which have been rendered with reference to Electricity (Supply) Act, 1948. The decision in the case of ICICI Lombard General Insurance Company Ltd. has been rendered with reference to accounts prepared as per the Insurance Regulatory and Development Authority (preparation of financial statements on auditor's report of Insurance Company) Regulation, 2002. In all these decisions it has been held that since the accounts were not prepared as per the provisions of part II of schedule VI of Companies Act and the accounts were not laid before the Annual General Meeting in accordance with the provisions of section 210 of the Companies Act as per the requirements of sub-section (2) of section 115JB, therefore, the provisions of section 115JB were not applicable. Explanation 3 has been inserted by the Finance Act, 2012 w.e.f. 01/04/2013

as per which now the book profits can be computed on the basis of accounts prepared under the governing Act to such company.

73.1 Ld. Counsel pointed out that in the case of State Bank of Hyderabad (supra) it has been held that this amendment is prospective and, therefore, it is not applicable for the present assessment year.

74. Ld. CIT(DR) however, pointed out that Tribunal has not considered in detail the import of this amendment and has simply on the basis of date of insertion has observed that it is prospective. He has pointed out that in the case of State Bank of Hyderabad primarily the decision in the case of Maharashtra State Electricity Board has been followed and Explanation 3 has not been considered. In our opinion this explanation cannot be held to be retrospective in operation because it has brought in a substantial change in the computation provision. Till the insertion of this amendment, various decisions clearly held that in case of Banking Companies, Electricity Companies and Insurance Companies, since they were governed by Special Acts and the profit and loss account was not prepared as per part II of schedule VI to the Companies Act, therefore, the computation provisions failed. Accordingly, in view of the decision of Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra), 128 ITR 294, the law till the insertion of

this explanation was that the provisions of section 115JB were not applicable on account of impossibility of computation as the accounts were not prepared in accordance with part II, schedule VI to the Companies Act. Now by incorporating Explanation 3, the Companies governed by Special Acts which come within the ambit of company u/s 2(17) are covered by the provisions of section 115JB. Therefore, this amendment brings substantial change in the taxability of companies governed by the special acts and, therefore, cannot be held to be retrospective. In this regard we also find strength from the ratio laid down by the Hon'ble Supreme Court in its decision dated 16.9.2014 in the case of CIT vs. Vatika Township Pvt. Ltd. In Civil Appeals arising out of SLP(C) No. 1362 of 2009 and others. The five judges Bench of the Hon'ble Supreme Court strikes down division Bench ruling on retrospective applicability of proviso to section 113 of the Income Tax Act holding the proviso to operate prospectively. Laying down perusal principles governing retrospectivity, the Hon'ble Supreme Court has been pleased to rule that unless contrary intention appears, a legislation is presumed not to be intended to have retrospective operation, current law ought to govern current activities, law passed today cannot apply to past events.

75. Ld. Counsel has also relied on the decision in the case of Krung Thai Bank PCL in which it has been held that since in the case of banking

companies schedule VI is not applicable, therefore, section 115JB cannot be applied.

76. The MAT provisions were brought in statute by the Income Tax Act by Finance Bill, 1996 and the Hon'ble Finance Minister while introducing this provision, inter-alia, observed that company engaged in the power and infrastructure sector will remain exempt from the levy of MAT. This provision was brought in to bring within the tax net the zero tax companies. In Finance Bill, 2000, the Hon'ble Finance Minister, inter-alia, proposed that the MAT be levied at the revised rate of 7.5% of book profits as determined under the Companies Act instead of the existing effective rate of 10.5%. The Finance Bill, 2002 vide clause (49) amended section 115JB observing as under:

> *"Clause 49 seeks to amend section .115JB of the. Income-tax Act relating to special provision for payment of tax by certain companies. .*
>
> *The existing provisions of the said section provide for levy of a minimum, tax on domestic companies of an amount equal to seven and one-half per cent., of the book profit, if the tax payable on the .total income chargeable to tax as per the provisions of the Income-tax Act, 1961, is less than seven and one-half per cent of the book profit.. .*
>
> *Sub-clause (a) seeks to provide that where the tax payable on the total income chargeable to tax is less than seven and one-half per cent. of book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assesset: on such total .income shall be the. amount of income-tax at the rate of seven and one-half per cent."*
>
> *This amendment will take effect .retrospectively from 1st AprlL 2001, and*
>
> *will, accordingly, apply in relation to the assessment years 2001-2002 and subsequent years.*

76.1 This makes the intention of legislature very clear that the MAT provisions are applicable only to domestic companies and not to the foreign companies.

77. Ld. DR has relied on various decisions of Authority for Advance Ruling which have elaborately been considered in the arguments advanced by him. These decisions have only persuasive value and are not binding on us. We find that consistent view of various coordinate benches is that section 115JB is not applicable in case of banking companies.

78. Even if for sake of argument ld. CIT(DR)'s contention is accepted still in view of the provisions of section 90(2), the assessee's claim for lower impost of tax will have to be accepted because the provisions of section 115JB are subordinate to section 90(2) and have no overriding effect on the said section.

78.1 In view of the above discussion, this ground is allowed because it has been clarified by ld. Counsel that the taxable income had been computed as per the provisions of article 7(3) of the DTAA.

79. Ground no. 6 is in regard to addition on account of interest received on external commercial borrowings given to Indian borrowers. The AO required the assessee to furnish the details of interest earned from the ECB (External Commercial Borrowings) as per section 9(1)(v) of the Act. The AO observed that after repeated opportunities, the assessee provided a list totaling interest of Rs. 1159672669/- and also stated that "interest received by the head office/overseas branches from majority of the Indian borrowers are enclosed as Annexure 1. It is submitted that the bank is in process of collating information with respect to other borrowers, which shall be

furnished with your office shortly". As the information was not forthcoming, the AO required the assessee to file copies of loan agreements along with pending details. Since assessee failed to provide the complete details, the AO computed the interest of this account at Rs. 1391607202/- being 20% higher than the figure submitted by the assessee. He pointed out that this interest income accrues to the assessee from India and is arising from India and is taxable in India also as per section 9(1)(v) of the Act and as per article 11 of the DTAA. The assessee pointed out that the fee offered to tax as the 'syndication fee' is the income attributable to the PE and the same has been offered to tax in India. The AO did not accept the assessee's submission and pointed out that the compensation given to the PE for services rendered by it to an associate enterprise has to be at arm's length price. He pointed out that the syndication fee was the remuneration to the branch in India and no way the interest. The interest is received by the head office and the foreign branches which has not been offered to tax. The AO taxed the entire interest income on gross basis @ 10% observing as under:

> *"As discussed above the debt claim should form part of lhe balance sheet of the PE; however even otherwise. even as per the arguments of the assessee at the maximum only a part of the debt claim of the assessee can be considered to be effectively connected with the PE i.e. the part income as is directly or indirectly attributable to that permanent establishment. Rest of the amount of Interest amount will still be taxable as per Article 11 of the DTAA as the loan forms part of the balance sheet of the branches abroad and the money which Is the core of the transaction come from branches abroad and the risks etc. are borne by them.*
> *The income chargeable to tax as per Article 7 of the DT AA will be taxed as per the rates applicable to net income as per the Income-*

Tax Act 1961. the deduction of specific expenses can be allowed and the head office expenses u/s 44C of the Act, if any. It is stated by the assessee that it has not deducted the TDS as per Income-Tax Act 1961 on payment of interest (if any) for accepting deposits taking loans for giving ECBs to parties in India. The concessional rate of tax is provided under Article 11 of the DTAA of 10% of the gross. It is estimated that the tax payable on the (net income after allowing eligible deductions) interest attributable to the PE in India will equal to 10% of the gross amount.
Accordingly, the entire interest income is taxed hereby at the rate of 10% of gross basis."

80. Ld. DRP confirmed the AO's action, inter-alia, observing that syndication fees received by assessee was for processing the documents only related to ECB's to Indian borrowers. However, interest on these ECB's had not been offered for taxation.

81. At the outset ld. Counsel for the assessee requested for admission of additional evidence under rule 29 of the Income Tax Appellate Tribunal Rules which is in the form of agreement with Suzuki Power Train India Limited and with Maruti Suzuki Automobile India Limited with the assessee to demonstrate that interest on external commercial borrowing is net of tax and, therefore, the same could not be taxed on gross basis. In A.Y. 2008-09, the assessee has also filed the loan agreement with Indian overseas bank Singapore, the assessee has filed affidavit in support of these applications. Ld. CIT(DR) submitted that firstly admissibility of additional ground has to be decided. He submitted that the additional ground has been raised in November, 2012 though appeal was filed on 30/11/2010 i.e. after two years. He submitted that this ground was neither raised before AO nor

DRP. He referred to page 23 of assessment order to demonstrate that even remotely this issue was not before AO and same was the position before ld. DRP. Ld. CIT(DR) submitted that assessee has to give reasons why this ground was not taken earlier. He submitted that fresh investigation of facts is required to find out as to how the loan was utilized outside India. Ld. DR relied on the decision in the case of Dr. Chandravati, 301 ITR 172; (ii) Brook Bond India vs. CIT, 100 CTR 284(Cal.), wherein it has been held that where fresh examination of facts is required then no additional ground can be raised. He also referred to the following decisions:

- 116 ITR 778, CIT vs. Gangappa Cables Ltd.
- 204 ITR 166 (AT), CIT vs. Lt. Begum Noor Banu Alladin.
- 299 ITR 400 (Ker.), P.R. Narahari Rao vs. CIT.
- 266 ITR 409 (Ker.), Ooppootil Kurien & Co. (P) Ltd. vs. CIT.

81.1 He submitted that if objection on a particular point has not been raised before the First Appellate Authority then the same cannot be raised for the first time before the Tribunal. He submitted that it has to be examined whether the loans given by the head office or foreign branch offices to Indian borrowers were utilized for the purposes of business conducted by borrower (resident outside India).

82. Ld. Sr. Counsel submitted that though additional ground has been raised by the assessee but it is only with respect to what income is chargeable under the Act. Ld. Counsel submitted that interest earned from

ECB is not chargeable to tax. However, assessee has only taken a ground to support its main ground. Ld. Counsel also referred to various decisions relied upon by ld. DR and pointed out that since AO has taxed the amount on gross basis which should have been on net basis, therefore, these loan agreements have to be considered.

82.1 We have considered the rival submissions and have perused the record of the case. The Indian branch of assessee was performing the following services with respect to ECB loan:

i) marketing/sales promotion;

ii) passing on the lead to the overseas branches;

iii) Indian branches did the credit evaluation of the Indian customers and used to send an evaluation report to the head office/overseas branches;

iv) Review of terms and conditions of the approval;

82.2 The syndication fee was received by Indian Branch for the aforementioned services. But that part of interest earned by head office/foreign branches which was attributable to the PE in India was not returned by assessee. At page 203 of the paper book, the assessee has admitted that the Indian branches of the bank play an active role in the disbursement of ECB loan and also regularly monitor the same. Therefore, the ECB loans disbursed by the Head office/foreign branches were effectively connected with the Indian branches. Therefore, interest income

had to be appropriated to the PE in India as it had accrued and arisen in India. Now the question would be as to how much interest is allocable to the PE in India. The AO has taxed 10% of the gross interest. The assessee's contention is that the interest paid to head office/foreign branches are net of tax for which the loan agreements have to be examined which has been filed by way of additional evidence. We agree with ld. Sr. Counsel that these agreements, though filed as additional evidence, are necessarily to be taken into consideration for arriving at the correct taxability of interest. We, therefore, admit these agreements and restore the matter to the file of AO for denovo consideration.

83. In the result, this ground is allowed for statistical purposes.

84. Ground no. 7 is with regard to deduction u/s 44C of the Act which deduction has not been allowed by AO while computing interest income from "ECB's. As we have restored the ground no. 6 for determining the interest income on ECB's relating to PE in India, therefore, this ground necessarily has to be restored to the file of AO.

85. In the result, this ground is allowed for statistical purposes.

86. Ground no. 8 is regarding treatment in respect of deferred bank guarantee commission. The AO noted that the commission received on guarantees in respect of the period which had not expired was not offered as income accrued for the year but had been treated as an advance in line with the accounting policy followed by the bank. He observed that amount of

commission received is an income which accrues at the time the bank issues the guarantee. The period of guarantee has nothing to do with the assessee's right to receive having arisen. He pointed out that the commission received was like a fee for issuing the guarantee and was not a contingent receipt or advance and it was also not returnable at the end of the guarantee period. Thus, the amount of commission received was income, which accrued at the time the bank issued the guarantee. Ld. DRP confirmed the AO's action, inter-alia, observing that the decision of Hon'ble Kolkata High Court in assessee's own case was not accepted by the Department and SLP had been filed before the Hon'ble Supreme Court.

86.1 Having heard both the parties, we find that this issue is squarely covered by the decision of Hon'ble Kolkata High Court in the case of CIT vs. Bank of Tokyo Ltd., 71 Taxman 55, wherein under similar circumstances, it has been held that full commission though payable at the outset did not crystallize into perfect right to receive so far as un-expired period was concerned because the payability or receivability from the view of the assessee bank was counter balanced by the refundability diluting the right to receive into a contingent right as regards un-expired period of the guarantee. The assessee clarified that FEDAI Guidelines places an obligation on the

assessee to refund the proportionate commission for the un-expired period. Therefore, respectfully following the decision of Hon'ble Kolkata High Court in assessee's own case, this ground is allowed.

87. Ground No. 9 is regarding applicability of rate of tax. The assessee's grievance is that ld. DRP and AO did not adjudicate this under the provisions of Article 24 of the DTAA. The contention is that the applicable rate of tax on the income of the assessee attributable to its PE in India cannot exceed the applicable rate of tax (as per the Finance Act for the assessment year) in the case of domestic companies.

87.1 Having heard both the parties, we find that this issue is covered against the assessee by Explanation 1 to section 90(2), which reads as under:

> *"Explanation 1.-For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company."*

88. In view of above explanation this ground is rejected.

89. Ground no. 10 is relating to initiation of penalty u/s 271(1)(c), the same being premature, is dismissed.

90. In the result, the assessee's appeal is partly allowed for statistical purposes.

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91. Ground no. 1 is regarding disallowance of salary paid overseas to expatriates of the appellant working in India by the Head Office and the

Indian taxes paid thereon by the Head Office Rs. 110,832,464/-. This issues has been decided by us in A.Y. 2007-08 for the reasons stated in para 5 to 12 of the said order this ground is allowed.

92. Ground no. 2 & 3 are regarding addition on account of interest paid to Head Office and other overseas branches of the Bank amounting to Rs. 238,222,371/- and relating to addition on account of income of the appellant pertaining to receipt of interest from Indian branches amounting to Rs. 238,222,371/-. These two grounds have been decided in A.Y. 2007-08 vide para nos. 16 to 42. These grounds are allowed for the reasons stated therein.

92.1 Ld. CIT(DR) has raised an additional ground in course of argument that if interest received by HO from branch is not considered as income then expenditure claimed by assessee in earning that interest is to be disallowed under section 14A. Additional ground has been considered in para no. 31 onwards and in para 42.1 it has been held that the matter is to be restored back to the file of AO for computation and disallowance u/s 14A. Therefore, the additional ground raised by the ld. CIT(DR) is allowed for statistical purposes.

93. Ground no. 4 is regarding interest amounting to Rs. 30,975,098/- accrued/received by the Indian PE from its HO/overseas branches. This ground has been considered by the Tribunal in A.Y. 2007-08 in para 44 to 46. For the reasons stated therein para nos. 44 to 46 this ground is rejected.

94. Ground no. 5 is regarding non-applicability of the provisions of sec. 115JB of the Act relating to Minimum Alternate Tax ('MAT'). This ground has been considered by the Tribunal in A.Y. 2007-08 from para 47 to 78.1 and for the reasons stated therein this ground is allowed.

95. Ground no. 6 is regarding addition on account of interest received on External Commercial Borrowings ('ECBs') given to Indian Borrowers. This ground has been considered by the Tribunal in A.Y. 2007-08 from paras 79 to 83 and for the reasons stated therein this ground is allowed for statistical purposes.

96. Ground no. 7 is regarding deduction u/s 44C of the Act. This ground has been considered by the Tribunal in A.Y. 2007-08 from pars 84 to 85 and for the reasons stated therein this ground is allowed for statistical purposes.

97. Ground no. 8 is regarding treatment in respect of Deferred Bank Guarantee Commission. This ground has been considered by the Tribunal in A.Y. 2007-08 from paras 86 to 86.1 and for the reasons stated therein this ground is allowed.

98. Ground no. 9 is regarding applicable rate of tax. This ground has been considered by the Tribunal in A.Y. 2007-08 from paras 87 to 87.1 and for the reasons stated therein this ground is rejected.

99. Ground no. 10 is regarding computation of interest u/s 234B of the Act. This ground reads as under:

a) Without prejudice to the grounds 1 to 9 above, on the facts and circumstances of the case and in law, the AO has erred in not determining the correct amount of interest u/s 234B of the Act by ignoring the credit of MAT for the purpose of computation of interest u/s 234B of the Act.

99.1 In the case of CIT vs. Tulsyan Nee Ltd., 2010-(SC2)-GJX-0969-SC, the issue was whether MAT credit admissible in terms of sec. 115JAA has to

be set off against the tax payable (assessed tax) before calculating interest u/s 234A, 234B & 234C of the Income Tax Act, 1961. The Hon'ble Supreme Court held as under:

> *"From the above, it is evident that any tax paid in advance/pre-assessed tax paid can be taken into account in computing the tax payable subject to one caveat, viz., that where the assessee on the basis of self computation unilaterally claims set off or MAT credit, the assessee does so at its risk as in case it is ultimately found that the amount of tax credit availed was not lawfully available, the assessee would be exposed to levy of interest u/s 234B on the shortfall in the payment of advance tax. We reiterate that we cannot accept the case of the Department because it would mean that even if the assessee does not have to pay advance tax in the current year, because it would mean that even if the assessee does not have to pay advance tax in the current year, because of his brought forward MAT credit balance, he would nevertheless be required to pay advance tax, and if he fails, interest u/s 234B would be chargeable. The consequence of adopting the case of the Department would mean that MAT credit would lapse after five succeeding assessment years u/s 115JAA(3); that no interest would be payable on such credit by the Government under the proviso to section 115JAA(2) and that the assessee would be liable to pay interest under sections 234B and C on the shortfall in the*

payment of advance tax despite existence of MAT credit standing to the account of the assessee. Thus, despite MAT credit standing to the account of the assessee, the liability of the assessee gets increased instead of it getting reduced."

99.2 Further as per clause (v) to Explanation 1 to section 234B(1), for computing assessed tax any tax credit allowed to be set off in accordance with the provisions of section 115JAA has to be reduced. The AO is directed to determine the interest payable u/s 234B keeping in view the aforementioned position of law.

100. In the result, this ground is allowed for statistical purposes.

101. Ground no. 11 is relating to initiation of penalty u/s 271(1)(c), the same being pre-mature is dismissed.

102. In the result, the assessee's appeal is partly allowed for statistical purposes.

103. In the result, both the appeals are partly allowed for statistical purposes.

Order pronounced in the open court on 19/09/2014

Sd/-	Sd/-
(I.C. SUDHIR)	**(S.V. MEHROTRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 19/09/2014
*Kavita

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

TRUE COPY

By Order

ASSISTANT REGISTRAR