

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ, मुंबई।

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

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं /I.TA Nos.4926 to 4928/Mum/2009

(निर्धारण वर्ष / Assessment Years: 2004-05 to 2006-07

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| Abu Dhabi Commercial Bank Ltd., 75B Rehmat Manzil, Veer Nariman Road, Mumbai-400 020 | बनाम/ Vs. | The DCIT (International Taxation)-1(1), Scindia House, Narottam Morarjee Marg, Ballard Estate Mumbai-400 038 |
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आयकर अपील सं /I.TA No. 3760/Mum/2012

(निर्धारण वर्ष / Assessment Year: 2006-07

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| The DCIT (International Taxation)-1(1), Scindia House, Narottam Morarjee Marg, Ballard Estate Mumbai-400 038 | बनाम/ Vs. | Abu Dhabi Commercial Bank Ltd., 75B Rehmat Manzil, Veer Nariman Road, Mumbai-400 020 |
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C.O. No. 121/Mum/2013

(Arising out of I.TA No. 3760/Mum/2012

(निर्धारण वर्ष / Assessment Year: 2006-07

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| Abu Dhabi Commercial Bank Ltd., 75B Rehmat Manzil, Veer Nariman Road, Mumbai-400 020 | बनाम/ Vs. | The DCIT (International Taxation)-1(1), Scindia House, Narottam Morarjee Marg, Ballard Estate Mumbai-400 038 |
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACA 4216B

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| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| अपीलार्थी ओर से/ Assessee by: | | Shri Dhanesh Bafna |
| प्रत्यर्थी की ओर से/Revenue by: | | Ms. Chandni Shah |

सुनवाई की तारीख / **Date of Hearing** :13.04.2016
घोषणा की तारीख / **Date of Pronouncement** :29.04.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

ITA Nos. 4926 to 4928/M/09 are filed by the assessee against the order of the Ld. CIT(A)-XXXI, Mumbai dated 15.06.2009 pertaining to assessment years 2004-05 to 2006-07. ITA No. 3760/M/12 is filed by the Revenue and the cross objection is filed by the assessee against the order of the Ld. CIT(A)-10, Mumbai for assessment year 2006-07. All the appeals by the assessee & Revenue & cross objection by the assessee were heard together and disposed of by this common order for the sake of convenience and brevity.

ITA No. 4926/M/2009-A.Y. 2004-05

2. The first ground raised by the assessee is in respect of Transfer Pricing (i) in restriction the deduction for head office expenses by applying the provisions of Sec. 44C of the Act as against the assessee's claim that the entire expenses allocated to the Indian branches should be allowed as deduction as per the provision of Article 7(3) of the convention between the Government of U.A.E. and the Government of India and (2) Upholding the Assessing Officer's action of not allowing the claim of the assessee that the tax rate applicable to its business income is 35% and not 40% being the rate applicable to foreign companies for the year under appeal.

3. At the very outset, the Ld. Counsel for the assessee submits that this issue is decided in favour of the assessee in assessee's own case for assessment years 1995-96 to 2004-05. The Ld. Counsel submits that the decision of the Tribunal for assessment years 1995-96 to 2000-01 is reported in (150 TTJ 85) and for the assessment years 2001-02 & 2002-03 is reported in (60 SOT 71) and for the assessment years 2003-04 and 2004-05 he submits that the Co-ordinate Bench decided this issue in ITA Nos. 6530 of 2006 and 3463/M/2010 dated 3.8.2012. Copies of the decisions are placed on record.

4. The Ld. Departmental Representative vehemently supports the orders of the lower authorities. In the alternative, the Ld. DR submits that the provisions of Sec. 41(1) will apply as these expenses are only payable and they are not rooted through balance-sheet. In reply, the Ld. Counsel for the assessee submits that the expenses were paid by head office and they are exempt as per treaty, therefore provisions of Sec. 41(1) are not applicable.

5. Heard both sides and perused the orders of the lower authorities. On going through the orders of the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Yrs 1995-96 to 2000-01, we find that the issue is decided in favour of the assessee holding that income of the PE of the assessee should be computed as business income after allowing all the expenses attributable to its business in India including the head office expenses. This decision is reported in Abu-Dhabi Commercial Bank Ltd. Vs ADIT (International Taxation) (138 ITD 83). Respectfully following the said decision, we allow the

ground raised by the assessee. We do not find much substance in the alternative contention raised by the Revenue in so far as the applicability of provisions of Sec. 41(1) of the Act. Thus, we dismiss the alternative contention of the Revenue.

6. So far as ground No. 2 i.e. in respect of upholding the Assessing Officer's action of not allowing the claim of the assessee that the tax rate applicable to its business income is 35% and not 40% is concerned, the Ld. Counsel submits that this ground is decided against the assessee in assessee's own case for assessment years 2001-02 and 2004-05 reported in (60 SOT 71). Copies of orders are placed on record. Respectfully following the said orders, we dismiss this ground of appeal.

7. The next issue in the appeal of the assessee is that the Ld. CIT(A) erred in holding that the provisions of Sec. 14A r.w. Rule 8D are applicable in computing the amount of expenditure alleged to have been incurred in relation to exempt income thereby disallowing interest and expenses amounting to Rs. 2,28,01,012/- and Rs. 14,98,250/- respectively.

7.1. The Ld. Counsel for the assessee submits that the Assessing Officer disallowed interest at Rs. 2,28,01,012/-. In other words, the Assessing Officer out of gross exempt income of Rs. 3,01,12,220 deducted expenditure of Rs. 2,71,08,030/- and arrived at exempt income at Rs. 30,04,990/-. The Ld. Counsel submits that the Ld. CIT(A) however applied Rule 8D and determined the expenditure attributable for earning exempt income at Rs. 2,42,99,262/-. He

further submits that for the assessment year 2004-05, the provisions of Rule 8D have no application in view of the decision of the Jurisdictional High Court in the case of Godrej & Boyce Co. Ltd., Vs CIT (328 ITR 81). The Ld. Counsel further submits that there is no nexus between the borrowed funds and investments and these investments were old and were made during the years 1997 and 2000. The Ld. Counsel further submits that similar issue has been decided in favour of the assessee by the Co-ordinate Bench for the assessment year 2003-04 in ITA No. 581 of 2007 dated 3.8.2012 by deleting the disallowance.

8. The Ld. Departmental Representative placed reliance on the decision of the lower authorities.

9. Heard both sides and perused the orders of the lower authorities. In view of the decision of the Hon'ble Jurisdictional High Court in the case of Godrej & Boyce Co. Ltd., (supra) Rule 8D has no application for the assessment year 2004-05. However, reasonable disallowance should be made towards expenditure attributable for earning exempt income. It is the submission of the Ld. Counsel that in the case of DDIT Vs Development Bank of Singapore (33 Taxman.com 300), 2% of dividend income is held to be reasonable for earning exempt income. Respectfully following the above decision, we hold that 2% of dividend income will be reasonable expenditure for earning exempt income. This ground of the assessee is partly allowed.

10. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 4927/M/2009- A.Y. 2005-06

11. The first ground relates to the deduction for head office expenses by applying the provisions of Sec. 44C of the Act as against the assessee's claim that the entire expenses allocated to the Indian branches should be allowed as deduction as per the provision of Article 7(3) of the convention between the Government of U.A.E. and the Government of India

12. This issue is identical with the issue in ground No. 1 in ITA No. 4926/M/09 for assessment year 2004-05, though quantum may differ. Therefore, on similar lines and for similar reasons, the ground raised by the assessee in ITA No. 4927/M/09 for assessment year 2005-2006 is dismissed.

13. The next issue in the appeal of the assessee is the Ld. CIT(A) erred in holding that the provisions of Sec. 14A r.w. Rule 8D are applicable in computing the amount of expenditure alleged to have been incurred in relation to exempt income thereby disallowing interest and expenses amounting to Rs. 1,17,68,939/- and Rs. 8,33,625/- respectively.

14. This issue is identical with the issue in ground No. 3 of ITA No. 4926/M/09 for assessment year 2004-05. In that year we have estimated the expenditure attributable for earning exempt income at 2% of the said income. Therefore, on similar lines and for similar reasons, the ground raised by the assessee in ITA No. 4927/M/09 for assessment year 2005-2006 is partly allowed.

15. Ground No. 3 & 4 is that the Ld. CIT(A) erred in upholding the action of the Assessing Officer in applying provisions of Sec. 40(a)(i) to interest paid by the assessee to its Head Office/overseas branch.

16. The Ld. Counsel for the assessee submits that the issue is covered in favour of the assessee by the Special Bench decision in the case of Sumitomo Mitsui Banking Corporation Vs DDIT (136 ITD 66). On the other hand, the Ld. Departmental Representative placed his reliance on the decision of Co-ordinate Bench in the case of Oman International Bank SAOG reported in 35 CCH 207 (Mum). The Ld. Counsel for the assessee submits that Oman International Bank is in the contest of the provisions of Sec. 14A and not u/s. 40(a)(i) of the Act and therefore the decision is factually distinguishable. On a reading of the order of the Special Bench, we find that the Special Bench decided the issue in favour of the assessee holding that interest paid by the Indian Branch of the assessee bank to its head office and other branches outside India is not chargeable to tax in India, therefore provisions of Sec. 195 could not be attracted and there being no failure to deduce tax at source from payment of interest made by PE. It was held that the question of disallowance of the said interest by invoking provisions of Sec. 40(a)(i) does not arise. While holding so, the Special Bench of the Tribunal held as under:

“63. We have carefully gone through the above provisions of the treaty along with other provisions which are relevant in this context as well as commentaries available on this point which are found to be helpful in interpreting the relevant provisions of the treaty. As per article 11(1), if the interest is

arising in a contracting State and paid to a resident of other contracting State, then it is taxable in that other contracting State. The said interest income, however, may also be taxed in the contracting State in which it arises as per article 11 (2) according to the Laws of that contracting State provided that if the recipient of such interest is the beneficial owner of the interest, the tax so charged shall not exceed 10% of the gross amount of interest. In the present case, there is no dispute that the head office of the assessee bank in Japan is the beneficial owner of the interest and that is how the said interest has been taxed by the AO in the hands of the assessee at a fixed tax rate of 10%. It is, however, to be noted that such interest can be taxed in India in the hands of GE at a maximum rate of 10% as per article 11(2) according to the Laws of India. As already held by us, interest payable by the PE in India to the GE of which it is a part is a payment to self and the same, therefore, does not give rise to income in India that is taxable as per the domestic law.

64. As stated in the preliminary remarks on OECD commentary on article 11 concerning the taxation of interest, the formula reserving the exclusive taxation of interest to one State, whether the State of the beneficiary's residence or the State of source, could not be sure of receiving general approval. It is stated that a compromise solution, therefore, has been adopted by providing that interest may be taxed in the State of a residence, but leaves to 'the State of source the right to impose a tax if its laws so provide, it being an implicit in this right that the State of source is free to give up all taxation on interest paid to non resident. The State of source thus has to exercise its right to bring to tax interest income arising in that State to the non resident or to the resident of the other State by making specific provision to that effect in the domestic law. In the present context, there is no such provision made in the Indian Income-tax Act, 1961 to bring to tax in India interest payable by the Indian PE to the foreign GE of which it is a part, which otherwise is not taxable being payment to self.

65. Shri Girish Dave has contended before us that the deeming fiction created in article 7(2) of the treaty treating the PE in India as separate and independent entity should be extended to article 11 to the treaty. According to him, if the PE in India and the head office abroad are treated as two separate entities, there

will be no difficulty in bringing to tax interest paid by Indian PE as income of the GE in India as per article 11(2). Before we deal with this argument relating to the extension of deeming fiction created in article 7(2) and application thereof to article 11 also as sought by Shri Girish Dave, we consider it proper to first deal with article 11 (6) of the Indo-Japanese treaty which has been referred to by both the sides in different context and in different manner seeking interpretation thereof in support of their respective case. The said article 11(6) reads as under:

“The provisions of paragraphs 1,2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein or performs in that other contracting state independent personal services from a fixed base situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply”.

66. It is to be noted that the provisions of article 11(6) of the Indo-Japanese convention are pari-materia to that of article 11(4) of the OECD model convention. The purpose and scope of article 11 (4) of the OECD model convention has been explained in para 24 and 25.1 of the OECD commentary on Model Tax Convention on Income and on Capital (condensed version) issued in July 2010 as under:

"24. Certain States consider that dividends, interest and royalties arising from sources in their territory and payable to individuals or legal persons who are residents of other States fall outside the scope of the arrangement made to prevent them from being taxed both in the State of source and in the State of the beneficiary's residence when the beneficiary has a permanent establishment in the former State. Paragraph 4 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". It does not

stipulate that interest arising to a resident of a Contracting State from a source situated in the other State must, by a kind of legal presumption, or fiction even, be related to a permanent establishment which that resident may have in the latter State, so that the said State would not be obliged to limit its taxation in such a case. The paragraph merely provides that in the State of source the interest is taxable as part of the profits of the permanent establishment there owned by the beneficiary which is a resident in the other State, if it is paid in respect debt-claims forming part of the assets of the permanent establishment or otherwise effectively connected with that establishment. In that case, paragraph 4 relieves the State of source of the interest from any limitation under the Article. The foregoing explanations accord with those in the Commentary on Article 7.

25.1 A debt-claim in respect of which interest is paid will be effectively connected with a permanent establishment, and will therefore form part of its business assets, if the "economic" ownership of the debt-claim is allocated to that permanent establishment under the principles developed in the Committee's report entitled Attribution of Profits to Permanent Establishments (see in particular paragraphs 72-92 of Part I of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic" ownership of a debt-claim means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (e.g. the right to the interest attributable to the ownership of the debt-claim and the potential exposure to gains or losses from the appreciation or depreciation of the debt-claim).

67. Keeping in view the purpose and scope of article 11(4) of the OECD Model Convention, the provisions of which are pari materia to the provisions of article 11(6) of the Indo- Japanese treaty, we are of the view that the same is not applicable to the facts of the present case inasmuch as the situation as contemplated to make it applicable does not exist in the present case. In the present case, the amount is advanced by the head office of the assessee bank to its PE in India and the same represents liability of the PE in India as reflected in the balance

sheet of that PE. Interest paid by the PE on such liability, therefore, cannot be regarded as interest paid in respect of debt claims forming part of the assets of the Permanent Establishment. It also cannot be said that the economic ownership of the debt claim is allocated to that Permanent Establishment so as to say that it is effectively connected with the Permanent Establishment. It is no doubt true that article 7 makes inroads in article 11 as a result of the provisions contained in article 11 (6) as contended by Shri Girish Dave. However, the situation contemplated in article 11 (6) should be found to be in existence in a case to bring the interest to article 7 in order to treat the said income 5 business profit attributable to the PE indirectly by force of attraction. In the present case, such situation does not exist and article 11(6), therefore, in our opinion, has no application.

68. *Now we shall deal with the contention of Shri Girish Dave seeking extension of the deeming fiction created in article 7(2) to treat the Permanent Establishment in India of the assessee bank as a separate and independent entity for the purpose of application of article 11 especially paragraph 2 thereof. It is relevant here to refer to the provision of article 7(2) which is reproduced hereunder:*

"Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected 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. "

69. *The provisions of article 7(2) are subject to the provisions of article 7(3) and if the same are read together in harmonious manner, we are of the view that it becomes clear that the profits attributed to the PE are the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or*

similar condition and dealing wholly independently with the enterprise of which its PE. The said fiction, in our opinion, therefore, is applicable only for the purpose of determining the profits attributable to the PE and this limited application contemplated in the treaty cannot be extended and applied to compute the income of the GE. It is no doubt true that if the accounts of two entities are prepared symmetrically and the methods of attributing profits or expenses applied are the same, such accounts are more acceptable to the tax authorities having jurisdiction over both these entities because the same will result in the deduction allowed in the hands of one entity as income in the hands of other entity. The relationship between a PE and the GE of which the said PE is part, however, is entirely different and the effects of article 7 should be considered keeping in view this peculiar relationship between the PE and GE.

70. The purpose and function of article 7 is to determine whether the source State may tax the profit of an enterprise carried on by a resident of other contracting State through a PE in the source State and if so, how much of the profits the source State may tax. The resident State has to determine the profits attributable to the PE considering it as a separate entity mainly for the purpose of granting double taxation relief according to the relevant treaty and not for the purpose of determining the total taxable income of the enterprise carried on by such resident. Article 7 provides for taxation of the profits attributable to the PE in the PE State which is source State and for determining such profits attributable to the PE, it is treated as independent entity. There is thus a departure from preparation of the accounts of PE and GE symmetrically to the extent that independent fiction is applied only to the PE treating the PE and the enterprise of which it is a part as two separate entities only for the purpose of determining the profits attributable to the PE and not for the purpose of determining the total profits of the enterprise as a whole.

71. While explaining the peculiar relationship between a PE and the enterprise of which it is a part, a comparison is often made to a Yolk and its egg. The PE is considered as yolk and the enterprise as a whole is considered as the egg. This comparison is made to show that whatever is in the yolk is necessarily in the egg itself and there is no need to account for the egg separately.

On the other hand, not everything that is in the egg is part of the yolk and it is, therefore, not necessary to account for the yolk separately in cases where the resident State avoid total taxation using the credit method or the tax exemption method. This position can further be explained by giving an example as follows:

“Suppose there is a PE in one State which is a part of a GE having HO in another State. During the relevant year, loan has been advanced by HO to PE on which interest of Rs.3 crores has been provided by the PE. The total profit of the HO excluding the said interest say is Rs.95 crores. The profits attributable to the PE without taking into consideration the said interest is Rs.5 crores. In such a case, the total profit of the GE representing consolidated figures of HO and PE will be Rs.100 crores as the interest payable by PE and receivable by HO will get squared of. In so far as taxation is concerned, the profit attributable to PE will be RS.2 crores on which the PE State will impose tax as business profit. The remaining amount of RS.98 crores will be taxed in the hands of GE State i.e. resident State. Suppose we take another situation where the only difference is that HO has advanced the sum to a third party in the other State i.e. PE State on which it has received interest of Rs.3 crores, while the PE has taken a loan from third party on which interest of Rs.3 crores has been paid. In such a case, the profit attributable to the PE will remain the same at Rs.2 crores on which the PE State will impose tax. The profit of GE which represents the consolidated figure of HO and PE will also remain unchanged at Rs.100 crores as the interest received from third party of Rs.3 crores will be credited to the consolidated profit & loss account and the interest paid by PE to third party amounting to Rs.3 crores will be debited in the consolidated profit & loss account. The total profit of the GE thus will remain the same even in this situation at 100 crores out of which Rs. 2 crore will be taxed in PE State being profit attributable to PE and the balance amount of Rs.98 crore will be taxed in GE State i.e. resident State. However, it will have to pay in addition to the tax payable on the profit attributable to the PE of Rs.2 crores, tax on interest of Rs.3 crores received from third party of the

other State in that State i.e. PE State as per article 11 (2) of the treaty. The GE, however, will be able to claim credit for such tax paid in its country as per article 23B of the relevant treaty. The GE thus at enterprise level will neither gain nor lose anything as far as its tax liability is concerned. The PE State, however, will lose in the first situation tax on interest payable by the PE to the head office because the same being payment to self is not taxable under the domestic law”.

72. As already discussed by us with reference to OECD commentary, article 11 (2) gives an option to the source State to tax interest arising in that State to the person resident of another State if he is the beneficial owner of such interest, at the rate not exceeding 10% according to the laws of that State. This option thus has to be exercised by the source State by making suitable provisions in the domestic law providing expressly for taxing the interest payable by PE in that State to the GE in another State. This position has been recognized in the commentary on 'Model Convention on Income and on Capital' (condensed version) published by OECD in July, 2010 in para no. 29 which states that some States consider that the separate and independent enterprise fiction that is mandated by article 7 (2) should not be restricted to the application of article 7, 23A and 23B but should also extend to the interpretation and application of other article of the convention, so as to ensure that permanent establishments are, so far as possible, treated in the same way as subsidiaries. These states also consider that notional charges for dealings which, pursuant to article 7(2), are deducted in computing the profits of the PE should be treated, for the purposes of other article of the convention, in the same way as payments that would be made by subsidiary to its parent company. It is suggested in the commentary that these states may therefore wish to include in their tax treaties provisions according to which charges for internal dealings should be recognized for the purposes of article 11. It is, however, cautioned that the tax will be levied in accordance with such provisions of the treaty only to the extent provided for under domestic law. We have already noted that no such provisions are made either in the Indo-Japanese treaty or even in the domestic law i.e. Income-tax Act, 1961 to expressly provide for taxation of interest payable by the

PE in India to the GE of which it is a part which constitutes a payment to self.

73. The OECD commentary 'Model Tax Convention on income and on capital (condensed version)' released in July, 2010 has also considered in paragraph no. 28 the effect of the separate and independent enterprise fiction that is mandated by article 7(2). It is stated in this context that the said fiction is restricted to the determination of profits that are attributable to a Permanent Establishment and it does not extend to create notional interest income for the enterprise which a contracting State could tax as such under its domestic law by arguing that such income is covered by another article of the convention. It is also clarified that the separate and independent enterprise fiction does not extend to article 11 and for the purpose of that article, one part of an enterprise cannot be considered to have made an interest payment to another part of the same enterprise.

74. In the assessment order, the AO has relied on the provisions of section 9(1)(v)(c) of the Income-tax Act to "hold that interest payable by PE in India being income deemed to accrue or arise in India is chargeable to tax in India. In our opinion, such interest payable by the PE to GE being payment to self does not give rise to any income that is chargeable to tax in India as held, inter alia, by the Hon'ble Supreme Court in the case of Kikabhai Premchand (Sir) (supra) and the question of bringing the said income to tax by relying on the provisions of section 9(1)(v)(c) therefore, does not arise.

75. The AO has also relied on the Board Circular No. 740 issued on 17-04-1996 clarifying that the branch of the foreign company or concern in India is a separate entity for the purpose of taxation and interest paid or payable by such bank abroad will be liable to tax in India and would be governed by the provisions of section 115A. The provisions of section 115A read as under:

"115A(l) Where the total income of-

(a) a non-resident (not being a company) or of a foreign company, includes any income by way of-

(i) dividends (other than dividends referred to in section 115-0; or

(ii) interest received from Government or an Indian concern on monies borrowed or debt incurred by Government or the Indian concern in foreign currency; or

(iii) income received in respect of units, purchased in foreign currency, of a Mutual Fund specified under clause (23D) of section 10 or of the Unit Trust of India,

The income-tax payable shall be aggregate of -

It is clearly manifest from the above provisions that section 115A is applicable inter alia, in respect of income received by a non resident (not being a company) or a foreign company from Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency. The said provision, however, has no application to the facts of the present case. In any case, if the interest income in question is not chargeable to tax under the provisions of the domestic law as already held by us, the same cannot be brought to tax by way of a board circular.

76. As regards the decision of Hon'ble Calcutta High Court in the case of ABN Amro Bank NV (supra) relied upon by the learned representatives of the assessee, Shri Dave and Shri Srivastava have mainly raised two fold contentions. According to them, the said decision being the decision of non jurisdictional High Court, is not binding on this Special Bench. Secondly, they have made an attempt to demonstrate that the said decision is per incuriam keeping in view that many relevant and vital aspects are not considered while holding that interest receivable by a foreign bank from its Indian branch was not taxable in the hands of foreign bank in India. Shri Dave has also made an attempt to invite our attention to the various findings and observations recorded by the Hon'ble Calcutta High Court in its judgment delivered in the case of ABN Amro Bank NV (supra) which according to him, are self contradictory and inconsistent. The learned counsels for the assessee, Shri Pardiwala and Shri Dastur, on the other hand, have contended that the decision of

Hon'ble Calcutta High Court being the only decision of the High Court directly available on the point, should be followed by the Special Bench even though the same is the decision of the non jurisdictional High Court.

Without going into all these arguments raised by the learned representatives of both the sides, we consider it sufficient to observe that the issues raised before us have been considered and decided by us on merits independently after taking into consideration the various submissions made by both the sides and the relevant material placed on record. This issue, therefore, is not being decided by us by simply following the decision of Hon'ble Calcutta High Court in the case of ABN Amro Bank NV (supra). Nevertheless, we can certainly say that the said decision of Hon'ble Calcutta High Court taking a similar view in the matter supports our view.

77. In the case of Hyundai Heavy Industries Co. Ltd. (supra) relied upon by Shri Dave, the Hon'ble supreme Court no doubt has held that the Permanent Establishment of a foreign enterprise in India is a separate profit centre. It also cannot be disputed that the legal jurisdiction and fiscal jurisdiction are two different concepts and when a foreign enterprise carries on business through a Permanent Establishment in India, it brings itself within the fiscal jurisdiction of India to such an extent that India can tax the profits derived by the foreign enterprise from India directly or indirectly through Permanent Establishment. In the present case, we, however, are concerned with the interest payable by the Indian PE to the foreign GE and the basic question is whether such interest payable by the PE to the GE of which it is a part can give rise to any income chargeable to tax in India in the hands of GE. As already held by us, there are no express provisions in the Indo-Japanese tax treaty to bring the said income to tax in India in the hands of GE and in any case, the said interest payable by the PE to the GE of which the PE is a part is a payment to self which cannot give rise to any income chargeable to tax in India as per the domestic law. The decision of Hon'ble Supreme Court in the case of Hyundai Heavy Industries Co. Ltd. (supra), in our opinion, thus is not of any help to the Revenue in the present context and the reliance of Shri Girish Dave thereon is clearly misplaced.

78. *Shri Girish Dave has also submitted that the Indo-Japanese treaty having been entered into by the Government of India in exercise of the powers conferred by section 90 of the Income-tax Act, 1961, the same has become a part of domestic law and as per article 23 of the said treaty, the issue relating to taxability of the Japanese Bank in India has to be decided as per the provisions of the treaty even though the same is contrary to the provisions of the domestic law. We have already discussed and considered the effect of article 23 of the Indo-Japanese treaty. As held by us, the said provision of the treaty cannot be relied upon to bring to tax certain income in the hands of foreign enterprise in India which otherwise is not taxable as per the domestic law. In this regard, we have referred to the provisions of section 90(2) of the Indian Income-tax Act which provide that the provisions of the domestic law override and prevail over the provisions of treaty if the same are beneficial to the assessee. We have also relied on the decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) wherein it was held that treaty cannot impose tax which is otherwise not provided in the domestic law.*

79. *As regards the reference made by Shri Girish Dave to the balance sheet of Indian Branches of the assessee bank wherein capital and loans given by the head office are reflected separately to show that head office is a distinct and separate entity from the Indian Branches, we have already considered and highlighted the peculiar relationship between the head office of the assessee bank being a foreign GE and its Indian Branches being PE in India. We have also highlighted how as a result of this peculiar relationship, there is a departure from symmetric approach generally followed by two entities in preparing their accounts. As a result of this peculiar relationship, the Indian branch of a foreign bank which represents its PE in India, in our opinion, cannot be treated at par with a subsidiary of a foreign company in India and this position has been recognized even by the OECD in its 'Report on the attribution of profits to permanent establishments Parts I (General Considerations), II (Banks) and III (Global Trading) published in December 2006. As mentioned in the said report, there are a number of aspects to the recognition (or not) of dealings between a PE and the rest of the enterprise of which it is a part. One of such aspects is that a PE is not the same*

as a subsidiary and is not in fact legally or economically separate from the rest of the enterprise of which it is a part. In the context of a PE and its head office, as contrasted with a parent company and its subsidiary, it is the enterprise as a whole which legally bears the risk.

80. As regards the decision of Federal Court of Appeal (FCA), Canada in the case of Cudd Pressure (supra) relied upon by Shri Girish Dave, it is observed that the issue involved in the said case was whether a US resident corporation could, in the computation of the profits attributable to its Canadian PE, deduct 'notional rent' charged by it in relation to the Canadian PE's use of specialized equipment in the performance of the lucrative contract in Canada. It was decided by the lower court that the notional rent was not deductible in computing the Canadian PE's taxable business income from Canadian sources on the basis of factual finding that an arm's length separate and distinct entity in the situation of Cudd's Canadian PE would not have rented the specialized equipment, but would have purchased it instead. It was held relying on the relevant provisions of domestic Law that the taxpayer could only have claimed depreciation for the use of the specialized equipment against the income of its Canadian PE. The Federal Court of Appeal did not find any error in the finding of fact recorded by the lower court and keeping in view the said finding, Roberston J.A., who wrote the leading judgement, upheld the decision of the lower court. The other Judge McDonald, J.A. also reached the same conclusion but discussed the issue of deductibility of notional expenses in more details. It was held by him in this context that deduction of notional rent was not allowable as deduction also for the reason that the amount of such notional rent was never included as income in the hands of head office. It was held by him that to allow deduction in this circumstance would mean that the tax was being avoided on rental income both in Canada and in United States. The facts involved in the case of Cudd Pressure (supra) thus were entirely different from the facts of the present case. Moreover, the present case is not a case where there is avoidance of tax by the assessee in both the countries as already discussed and explained by us. The observations and comments made in the minority view and relied upon by Shri Dave in the case of Cudd Pressure (supra), in our

opinion, therefore, cannot render any support to the Revenue's stand on the issue under consideration in the present case.

81. In the case of ABN Amro Bank (supra) decided by Hon'ble Sindh High Court of Pakistan and cited by Shri Girish Dave, the issue involved was whether the Tribunal was correct to confirm the taxation of interest income received by the branch in Pakistan of a foreign bank from its Head Office and branches located outside Pakistan disregarding the principle of mutuality and the same was decided by the Court on the basis of domestic law of Pakistan which contained a specific provision in section 10S(S)(a) as under:

"Taxation of a permanent establishment in Pakistan of a non-resident person. - (1) The following principles shall apply in determining the income of a permanent establishment in Pakistan of a non-resident person chargeable to tax under the head "Income from Business", namely :-

(a) The profit of the permanent establishment shall be computed on the basis that it is a distinct and separate person engaged in the same or similar conditions and dealing wholly independently with the non-resident person of which it is a permanent establishment."

The PE of a non-resident in Pakistan thus is treated as a distinct and separate person under the domestic law by making express provision and keeping in view the said provision made in the domestic law, it was held by the Hon'ble Sindh Court that the doctrine of mutuality does not and cannot apply to a situation to which section 10S(1)(a) applies. As already discussed by us, there is no such provision contained in the Indian Income Tax Act and in the absence thereof, the interest payable by the Indian PE to its foreign GE of which it is a part can not be said to have given rise to income which is chargeable to tax in India as per the domestic law being payment to self as per the principle of mutuality.

82. In the case of Dresdner Bank AG vs. Addl. CIT (supra) cited by Shri Girish Dave, the issue before the Division Bench of

this Tribunal was whether, under the Indian Income-tax Act, 1961, the profits arising out of dealings of the foreign companies Indian Branch office, with its head office and with other foreign branches, is taxable in India or not. In this regard, the doctrine of mutuality was pressed into service on behalf of the assessee in support of its case that such internal dealings between the Indian branch office of a foreign bank and its head office and other foreign branches being the transactions with self, no income could be said to have arisen that is chargeable to tax in India. The same, however, was not accepted by the Division Bench for the reasons elaborately given in its order before finally concluding the issue in paragraph No. 71 of the order as under:

"For all these reasons, we are not persuaded by the learned counsel's arguments that since no one can be expected to make profits out of transactions with himself, intra organization transactions are to be ignored for the purpose of computing profits accruing or arising, to an Indian PE of a foreign company, under section 5(2)(b) of the Act. In our understanding, for the purposes of computing profits of a PE, the intra organization transactions are to be taken into account as long as these transactions are real and bona fide transactions. It is not the assessee's case that the interest income from the head office is without any consideration or without sufficient consideration. In other words, fact of or correctness of interest earnings from head office are not in dispute. Therefore, in our considered view, the interest earnings from the head office are to be taken into account for the purposes of computing profits arising in or accruing in India. We, therefore, reject the contentions of the assessee."

In the case of Dresdner Bank AG (supra), a reference was made to the decision of Calcutta Special Bench of the Tribunal in the case of ABN Amro Bank NV (supra) which was in favour of the assessee and the same was considered by the Division Bench in paragraph No. 72 of its order as under:

"As we part with this issue in appeal before us, we add that we are alive to the fact that our decision hereinabove can possibility result in an incongruity

inasmuch as while a foreign bank operating in India will be taxable in India in respect of the interest it earns from its head office and branches abroad, no deduction will be available, in the light of Special Bench decision in ABN Amro Bank N.V.'s case (supra) to the foreign banks in respect of interest incurred to head office and branches abroad. In fact, it was for this reason that we did seek comments of the parties on as to why this appeal should not be referred to a larger Bench and let the law be settled in a holistic manner by taking into account all aspects of the intra organization dealings, and unfettered by the earlier decisions of this Tribunal. Learned counsel's emphatic opposition to this suggestion was on the ground that the assessee bank has already wound up its operations in India and it does not want to delay finalization of its tax liability as the constitution of larger Bench will result in, that the case before us only deals with an income situation under the Act while ABN Amro Bank N.V.'s case deals with an expense situation under the tax treaty, and, that, the issue decided by the Tribunal in ABN Amro Bank N.V.'s case (supra) does not arise in this appeal at all. Learned Departmental Representative also, equally emphatically, submitted that the issue before us does not need to be referred to a larger Bench. It was also submitted that there have been no judicial precedents, either from Tribunal or even the higher judicial forums, on the scope of 'income accruing or arising in India' under section 5(2)(b) and, therefore, there is no question of any fetters of the earlier decisions. It was in this backdrop that the matter was decided by us on merits. This decision, therefore, should only be treated as an authority for the issue actually decided by us. Subject to these observations and for the reasons set out above, the plea of the assessee is rejected."

83. In the case of American Express Bank Ltd. (supra) cited by Shri Pardiwala, the issue that arose before the Division Bench of this Tribunal was whether the interest received by the assessee from its non resident branches could be taxed in India and on this issue, reliance was placed on behalf of the assessee on the decision of Kolkatta Special Bench of ITAT in the case of ABN Amro Bank NV (supra) while the Revenue relied on the decision of Division Bench in the case of Dredsner Bank Ltd (supra). The

Division Bench in its order passed in the case of American Express Bank Ltd. took note of the ratio laid down by the Special Bench in the case of ABN Amro Bank (supra) as well as by the decision of the coordinate bench in the case of Dredner Bank (supra) and found conflict therein. The Division Bench, therefore, preferred to follow the decision of Special Bench in the case of ABN Amro Bank (supra) for the following reasons given in paragraph No. 35 of its order:

"The comparative study of both the judgments shows that there is conflict between the ratio laid down by the decision of Special Bench in the case of ABN Amro Bank (supra) and the decision of Division Bench in the case of Dredner Bank (supra). It is not in our domain to make any comment on the decision of the Division Bench. However, there is no dispute to the legal position that in the case of conflict between the decisions of Special Bench and Division Bench, it is the decision of Special Bench which would prevail. In the present case, admittedly, there is no treaty between India and USA in the year under consideration. Accordingly, in view of the Special Bench, it is the local law i.e. the provisions of Income Tax Act, 1961 which would be applicable. Therefore, following the decision of Special bench, it is held that income received/receivable by the Indian branch from head office is not chargeable to tax. The order of learned CIT(A) is therefore, upheld on this issue."

While we fully agree and endorse the view taken by the Bench in the case of American Express Bank Ltd. (supra) to the extent that decision of Special Bench would prevail over that of the Division Bench and the Division Bench has to follow the decision of Special Bench as a matter of judicial discipline and propriety, it is to be noted that the Division Bench in the case of Dredner Bank (supra) has taken pains to present the other view on this complex issue and that too in the peculiar circumstances of that case as discussed in paragraph No. 72 of its order which has been reproduced herein above. Nevertheless, we are of the view that the judicial discipline and judicial propriety are of paramount importance and the same cannot be dispensed with while discharging the judicial duty, whatsoever peculiar the circumstances are or howsoever complex the issue is.

84. *Shri Srivastava, Special Counsel for the Revenue, has strongly relied on the provisions of section 4 read with section 5(2) of the Income-tax Act in support of the Revenue's case that the interest payable by PE in India being the income arising in India to the foreign GE which is a non resident is chargeable to tax in India. We have already considered this aspect of the matter. As noted by us, the GE alone is the taxable entity in India and the Indian PE which is a part of that GE is not a separate and distinct taxable entity in India as per the domestic law. The GE and the PE which is a part of that GE thus is one and the same entity for the purpose of taxation in India and as held by the Hon'ble Supreme Court in the case of Kikabhai Premchand (Sir) (supra), the interest payable by PE to GE cannot give rise to any income which is taxable in India since one cannot make profit out of himself. As rightly contended by Shri Dastur, the basic principle which is to be kept in mind in this context is that nobody can make profit from himself and the income accrues or arises only when there is a deal with some third person and not from the deal with himself.*

85. *As regards the arguments raised by Shri Srivastava relying on the provisions of article 11 (2) of the treaty, it is observed that the same is mainly a reiteration of what has been argued by Shri Girish Dave and we have already dealt with the submissions made by Shri Girish Dave elaborately before finally rejecting the same. As regards the contention raised by Shri Srivastava relying, inter alia, on the decision of Hon'ble Supreme Court in the case of Hyundai Heavy Industries Company Ltd. (supra) that the domestic law also recognizes two entity approach in the case of PE, we are of the opinion that the same cannot be disputed. However, this two entity approach is recognized only to the extent of determining the profit attributable to the PE in India and that too mainly relying on the relevant provisions of the treaty. As already held by us, this separate entity approach adopted in the case of PE by way of a deeming fiction is applicable only for the purpose of determining the profit attributable to the PE in India and the same cannot be extended and applied for the purpose of determining income of foreign GE taxable in India. Shri Srivastava has submitted that interest received by the Indian branch from the overseas branch of the same bank is chargeable to tax in India inspite of the fact that the same is also a payment to self. He, however, has not*

thrown any light as to how and on what basis such income is chargeable to tax in India. If at all such income has been offered to tax by the assessee on mistaken basis, it cannot follow that payment made to self does give rise to income which is chargeable to tax unless the issue is examined and decided in the light of relevant provisions of the law and the relevant tax treaty whichever is applicable.

86. According to Shri Srivastava, whenever there is apportionment of income, the concept of separate entities or existence of two entities is very much embedded. We find it difficult to accept this contention of Shri Srivastava. In our opinion, question of apportionment of income does not always arise only in the case of two entities which are separately chargeable to tax. Moreover, the relation between GE and PE, as already discussed by us, is so peculiar that the GE and PE which is a part of that GE are one and the same entity for the purpose of taxation and the PE is treated as separate entity only for the purpose of determining the profit attributable to it in India as per the deeming fiction created in the relevant article of the treaty. As regards the contention raised by Shri Srivastava relying on article 11 (6) of the Indo-Japanese treaty and the principle of force of attraction, we have already discussed this aspect while dealing with the argument of Shri Girish Dave. As held by us, article 11(6) of the Indo-Japanese treaty is not applicable in the present context for the various reasons given by us. Shri Srivastava has also contended that the entire interest income arising in India is taxable in the hands of GE in India irrespective of whether the funds fetching the said interest are advanced by GE in India directly or through Indian PE. In the present case, the funds, however, are not advanced by the GE to a third party and the same having been advanced directly to the PE, it is a transaction between the two parts of the same entity and the interest paid by PE to GE being payment to self, no income can be said to have arisen or accrued which is chargeable to tax 'in India.

87. Shri Srivastava has submitted before us that article 7(2) of the treaty lays down the procedure for apportionment of income between Head Office and Indian Branch. According to him, as per the said scheme of apportionment, what can be allowed as deduction is the actual cost of funds to the Head

Office. He has contended that if there is no such cost incurred at HO level, interest paid by the branch to the HO will be only a notional expenditure which cannot be apportioned as per article 7(2) of the treaty. We are unable to accept this contention of Shri Srivastava keeping in view the specific provisions contained in article 7(2) of the treaty. As per the said provisions, the profits attributable to the Permanent Establishment are the profits which the PE might be expected 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. The profits attributable to the PE thus are required to be determined treating the same as a distinct and separate enterprise which, inter alia, deals wholly independently with the enterprise of which it is a Permanent Establishment. As per this deeming fiction, the profits attributable to the Permanent Establishment thus are required to be determined as if it is dealing wholly independently with the enterprise of which it is a part and what would be allowable as deduction in such case is the cost of funds to the PE borrowed from GE and not the cost of funds to GE which is totally irrelevant.

88. Keeping in view all the facts of the case and the legal position emanating from the interpretation of the relevant provisions of domestic law as well as that of the treaty as discussed above, we are of the view that although interest paid to the head office of the assessee bank by its Indian branch which constitutes its PE in India is not deductible as expenditure under the domestic law being payment to self, the same is deductible while determining the profit attributable to the PE which is taxable in India as per the provisions of article 7(2) & 7(3) of the Indo-Japanese treaty read with paragraph 8 of the protocol which are more beneficial to the assessee. The said interest, however, cannot be taxed in India in the hands of assessee bank, a foreign enterprise being payment to self which cannot give rise to income that is taxable in India as per the domestic law. Even otherwise, there is no express provision contained in the relevant tax treaty which is contrary to the domestic law in India on this issue. This position applicable in the case of interest paid by Indian branch of a foreign bank to its Head Office equally holds good for the payment of interest made by the Indian branch of a foreign bank to its branch offices abroad as the same stands on

the same footing as the payment of interest made to the Head Office. At the time of hearing before us, the learned representatives of both the sides have also not made any separate submissions on this aspect of the matter specifically. Having held that the interest paid by the Indian branch of the assessee Bank to its head office and other branches outside India is not chargeable to tax in India, it follows that the provisions of section 195 would not be attracted and there being no failure to deduct tax at source from the said payment of interest made by the PE, the question of disallowance of the said interest by invoking the provisions of section 40(a)(i) does not arise. Accordingly we answer question No. referred to this Special Bench in the negative i.e. in favour of the assessee and question No.2 in affirmative i.e. again in favour of the assessee”.

Respectfully following the Special Bench decision, we allow ground No. 3 & 4 raised by the assessee.

ITA No. 4928/M/2009 – A.Y. 2006-07

17. The first ground relates to the deduction for head office expenses by applying the provisions of Sec. 44C of the Act as against the assessee's claim that the entire expenses allocated to the Indian branches should be allowed as deduction as per the provision of Article 7(3) of the convention between the Government of U.A.E. and the Government of India.

18. This issue is identical with the issue in ground No. 1 in ITA No. 4926/M/09 for assessment year 2004-05, though quantum may differ. Therefore, on similar lines and for similar reasons, the ground raised by the assessee in ITA No. 4927/M/09 for assessment year 2005-2006 is dismissed.

19. The next issue in the appeal of the assessee is that the Ld. CIT(A) erred in holding the provisions of Sec. 14A r.w. Rule 8D are applicable in computing the amount of expenditure alleged to have been incurred in relation to exempt income thereby disallowing interest and expenses amounting to Rs. 19,75,401/- and Rs. 1,29,000/- respectively.

20. This issue is identical with the issue in ground No. 3 in ITA No. 4926/M/09 for assessment year 2004-05 . In that year we have estimated the expenditure attributable for earning exempt income at 2% of the said income. Therefore, on similar lines, similar reasons, the ground raised by the assessee in ITA No. 4928/M/09 for assessment year 2006-2007 is partly allowed.

21. Ground No. 3 raised by the assessee is that the Ld. CIT(A) erred in upholding the action of the Assessing Officer in applying provisions of Sec. 40(a)(i) to interest paid by the assessee to its Head Office/overseas branch.

22. This issue is identical with the issue in Ground Nos. 3 & 4 in ITA No. 4927/M/09 for assessment year 2005-06. Therefore, on similar lines and for similar reasons, the ground raised by the assessee in ITA No. 4928/M/09 for assessment year 2006-2007 is allowed.

23. Ground No. 4 is in respect of upholding the Assessing Officer's action of not allowing the claim of the assessee that the tax rate applicable to its business income is 35% and not 40%.

24. This issue is identical with the issue in ground No. 2 in ITA No. 4926/M/09 for assessment year 2004-05. Therefore, on similar lines and for similar reasons, the ground raised by the assessee in ITA No. 4928/M/09 for assessment year 2006-2007 is dismissed.

ITA No.3760/M/2012 - A.Y. 2006-07

C.O. No. 121/M/2013

25. This appeal is filed by the Revenue and the cross objection is filed by the assessee . The Revenue in its appeal is challenging the order of the Ld.CIT(A) in deleting the penalty levied u/s. 271(1)(c) of the Act for the Assessment Year 2006-07.

26. The Ld. Departmental Representative submits that the Assessing Officer levied penalty on the disallowance of head office expenses and on the addition made towards interest paid to head office. The Ld. Departmental Representative referring to the penalty order submits that in the return of income, assessee claimed head office expenses disregarding the provisions of Sec. 44C and he states that head office expenses are only to the extent of 5% of the adjusted total income can be claimed. He submits that such expenses were claimed in the earlier years also and the ITAT decided the issue against the assessee and the matter is in appeal before the Hon'ble High Court. It is the contention of the Ld. Departmental Representative that in the computation of income of the branch as per the domestic laws, the interest would have been allowable as deduction from computation of income but the same is not allowable u/s. 40(a)(i) because assessee failed to deduct tax on payment of interest to overseas branch of the head office. The Ld. Departmental

Representative vehemently supporting the order of the Assessing Officer submits that assessee has made wrong claims thereby furnishing inaccurate particulars of income. He further submits that the income from head office has not been reported by the assessee, therefore there is concealment of income. He vehemently supports the order of the Assessing Officer in levying penalty.

27. The Ld. Counsel for the assessee submits that the AO erred in passing the order under section 271(1)(c) in a mechanical manner without referring to the submissions made by the appellants as to why no penalty was leviable on account of facts such as full disclosure made, difference in interpretation, the rulings of the courts relied upon by the assessee in support of their contentions etc. He submitted that there was no concealment of income and furnishing of inaccurate particulars, notwithstanding the fact that there was a disclosure of the same during the course of the assessment / penalty proceedings. He further submitted that assessee had furnished a statement of true income and tax liability in the return of income. The AO ought to have appreciated that in the assessee's case penalty has been levied on disallowances on account of difference in interpretation of various provisions of law and not on account of concealment or furnishing of inaccurate particulars of income. He further submits that the assessee has not made a deliberate attempt to defraud the revenue. He submits that the Assessing Officer in levying penalty, ignored the decision of the Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. wherein it has been held that mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars of income. He further submits that in levying penalty of Rs. 1,75,12,353/- being

the alleged tax sought to be evaded in respect of the Head Office (HO) expenses without appreciating that full disclosure was made giving reasons for claiming the entire expenditure at the time of the assessment proceedings as well as at the time of penalty proceedings. The Ld. Counsel submits that the disallowance has arisen on account of difference in the stand of the department and the assessee and not on account of concealment / furnishing of inaccurate particulars of income.

28. Heard both sides and perused the orders of the lower authorities. The Assessing Officer levied penalty for the reason that the assessee has claimed head office expenses and also the claim made by the assessee that interest paid to head office is not taxable. In any case, it is the contention of the assessee that TDS was made on the interest paid to head office therefore there is no escapement of tax. On reading of the orders of the Assessing Officer as well as the First Appellate Authority, we find that assessee has made claim in the return of income and it is a full disclosure of the assessee in respect of the expenses as well as the claim towards interest paid to head office. We do not see concealment of income or furnishing of inaccurate particulars in respect of these two disallowances/additions made by the Assessing Officer. It is only a difference of opinion as to whether these claims can be allowable or not and the issues are debatable. It is the finding of the Ld. CIT(A) that the assessee has made full disclosure of all the facts regarding claim towards head office expenses. It is also the finding of the Ld. CIT(A) that in the note filed alongwith the computation of income, assessee has referred to the relevant article of the treaty with UAE and the complete details of expenses are given in the annexure. It is

also the finding of the Ld. CIT(A) that the contention of the Assessing Officer that the issue has already been decided by the Tribunal in assessee's own case is on different aspect of Sec. 44C viz., computation of adjusted total income and the Tribunal has not decided the issue whether the claim were head office expenses on account of general administrative expenses is to be allowed without any restriction contained in Sec. 44C of the Act. None of the findings of the Ld. CIT(A) was rebutted by the Revenue. In the circumstances, we are of the considered view that there is neither concealment of income nor furnishing of inaccurate particulars of income by the assessee so as to levy penalty u/s. 271(1)(c) of the Act. Thus, we affirm the order of the Ld. CIT(A) by deleting the penalty. The appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is dismissed as infructuous.

29. In the result, the appeals filed by the assessee in ITA Nos. 4926 to 4928/M/09 are partly allowed and the appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is also dismissed.

Order pronounced in the open court on 29th April, 2016.

Sd/-

Sd/-

(RAJENDRA)

(C.N. PRASAD)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 29th April, 2016

व.नि.स./ Rj , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai