

**आयकर अपीलीय अधिकरण, 'एल' खंडपीठ मुंबई**  
**INCOME TAX APPELLATE TRIBUNAL, MUMBAI "L" BENCH**

**सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य**

Before S/Sh. Rajendra, Accountant Member & Ram Lal Negi, Judicial Member  
**आयकर अपील सं./ITA No.3688/Mum/09, निर्धारण वर्ष/Assessment Year-2000-01**  
**आयकर अपील सं./ITA No.3689/Mum/09, निर्धारण वर्ष/Assessment Year-2001-02 and**  
**आयकर अपील सं./ITA No.2358/Mum/14, निर्धारण वर्ष/Assessment Year-2003-04**

ADIT(IT)-3(1) Scindia House, Room No.132, 1 <sup>st</sup> Floor, N.M. Road Mumbai-400 038.	Vs.	The Hong Kong and Shanghai Banking Corporation Ltd. 52/60, Mahatma Gandhi Road, Fort, Mumbai-400 001. PAN:AAACT 2786 P
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

प्रत्याक्षेप सं/C.O.No.244/Mum/2009 Arising out of ITA No.3688/Mum/09(2000-01)  
प्रत्याक्षेप सं /C.O.No.245/Mum/2009 Arising out of ITA No.3689/Mum/09(2001-02) and  
प्रत्याक्षेप सं /C.O.No.129/Mum/2015 Arising out of ITA No.2358/Mum/09(2003-04)

The Hong Kong and Shanghai Banking Corporation Ltd. Mumbai-400 001.	Vs.	ADIT(IT)-3(1) Mumbai-400038.
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(प्रत्याक्षेपक /Cross Objector)

(प्रत्यर्थी / Respondent)

**निर्धारिती ओर से/Assessee by: Shri Arvind Sonde**

**राजस्व की ओर से/ Revenue by : Shri Jasbir Chauhan**

**सुनवाई की तारीख/ Date of Hearing : 09.02.2016**

**घोषणा की तारीख / Date of Pronouncement : 12.02.2016**

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

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

**खंडपीठ के अनुसार PER BENCH-**

Challenging the orders dated 26.3.2009, 31.3.2009 and 22.10.2013 for the assessment years 2000-01, 2001-02 and 2003-04 respectively of the CIT(A), the Assessing Officers (AO.s) have filed the present appeals. The assessee has filed Cross-Objections (CO.s) for the above mentioned Assessment Years (AY.s). As the issues involved in the appeals and the CO.s are common, so, we are adjudicating them by a single common order.

**ITA/3688/Mum/2009 & CO 244/Mum/2009, AY.2000-01 :**

Assessee, a non-resident company, is engaged in the business of banking. It filed its return of income on 29.11.2000, declaring income of Rs.2,91,30,08,800 /-. The AO completed the assessment, u/s.143(3) of the Act, on 21.03.2003. A notice u/s.148 of the Act was issued for re-opening the assessment. The assessee objected the re-opening. The AO finalised the assessment on 31.12.2007, u/s.147 r.w.s.143(3) of the Act, determining the income of the assessee at Rs.2,78,27,09,380 /-.

2. Effective Ground of appeal, filed by the AO, is about interchange income (fees) received by the Head Office (HO)/foreign branches of the assessee. During the re-assessment proceedings, the AO observed that the assessee had paid an amount of Rs.3.16 Crores to Visa Card and Rs.4.75 Crores to Master Card, that there were two types of transactions with regard to the credit cards, that foreign banks would earn substantial amount of discount/commission/inter change merchant establishment discount (ICMED), that the assessee had not offered the said discount

in the return of income filed for the year under consideration, that the ICMED towards the use of credit cards had deemed to accrue or arise in India as per the provisions of the Act, that there was no tax treaty with Hongkong, that provisions of section 5 and 9 of the Act were applicable, that the assessee had not provided the details of interchange received by it. The AO estimated the total interchange fees received by the non India branches/HO of the assessee on account of use of cards in India @1% of the interchange received. The AO made an addition of Rs.50,75,990/- to the total income of the assessee.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him it was argued that re-opening of the assessment was bad in law, that there was no failure on part of the assessee to disclose material facts, that the ICMED was not taxable in India. After considering the submissions of the assessee and the assessment order, the FAA held that action taken by the AO u/s.147 of the Act was justified, that his predecessor had, while deciding the appeals for the AY.s.2000-01 and 2001-02, decided the identical issue against the assessee. 'Following the rule of consistency', he upheld the re-opening. On merits, he held that in the earlier AY.s. his predecessor had adjudicated the issue of ICMED in favour of the assessee, that there was no change in the facts of the case. Finally, he deleted the addition made by the AO.

4. Before us, the Departmental Representative (DR) supported the order of the FAA with regard to the issue of reassessment and relied upon the order of the AO for taxability of ICMED. The Authorised Representative (AR) stated that the issue is covered in favour of the assessee by the decision of the Tribunal delivered in the case of Standard Chartered Grindlays Bank Ltd. (127TTJ319). With regard to the CO, the AR contended that the notice u/s.148 of the Act was issued without the prior approval of the CIT, that the assessee had disclosed all the material facts at the time of filing of original return, that the sanctioning authority had not applied his mind while approving the proposal of re-opening submitted by the AO, that sanction itself was bad in law. He relied upon the cases of Desai Brothers (272ITR335), Maharashtra Sugar Mills Ltd. (263ITR180), Kelvintaor India Ltd. (320ITR561), Govind Chaudhary & Sons (109ITR370).

5. We have heard the rival submissions and perused the material before us. We find that in the matter of Standard Chartered Grindlays Bank Ltd. (supra), the issue of taxability of commission with regard to Credit Cards was deliberated upon and decided by the Tribunal. We would like to re-produce the relevant portion of the order that deals with the facts as well as the reasoning, given by the FAA and the Tribunal, for deciding the issue against the AO. It reads as under:

*"43. Next ground of appeal is against deletion of addition of Rs. 10 crores being made on alleged commission earned by foreign branches of ANZ Grindlays Bank on their credit card business overseas where transactions have taken place in India.*

*44. During the course of assessment the AO required the assessee to give details of total commission received by the foreign branches of the assessee bank on international credit cards issued by them where the transactions were completed in India by the card holders and the cards were honoured by the branches of the assessee bank or branches of any other bank in India. The AO was of the view that whatever income arose in or from India to any foreign branch of the assessee is also taxable in India. The assessee could not furnish any details; at the same time it did not deny that no income arose from the transaction in India on credit cards issued by its foreign branches. The AO, therefore, estimated the income. The AO stated that commission income from cards issued by Indian branches was Rs. 9.90 crores. It would be reasonable to estimate income of Rs. 10 crores earned by foreign branches from transactions entered into India.*

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*The learned CIT(A) held that the income earned either by way of issuing bank of credit card or acquiring bank of credit card, transaction is accounted for. He also held that under s. 9 of the IT Act all incomes accruing or arising directly or indirectly through or from any business connection in India or through or from any source of income in India can be taxed. As per s. 9(1)(v)(c), income can be deemed to have accrued in India only if payment is made for the debt that has been incurred in India by a non-resident which will not be the case here since the issuing bank which provides debt is outside India being a foreign branch. As per art. 7 of Indo-UK DTAA, income that can be brought to tax in India must be directly or indirectly attributable to the PE in India. Since the transactions were with appellant's foreign branches where the issuing bank and the acquiring bank in India was some bank other than the Indian branch of the assessee, it cannot be said that Indian branch was in any way connected with the transaction or that income earned could in any way be said to have been directly or indirectly through PE in India. He accordingly held that the income arising in India from transaction in India by using credit cards of foreign branches should be taxed in India. This income can only be the income received by the Indian branch and such commission income being already included as an acquiring bank. The income to the foreign branch from the credit given to its card holders outside India cannot be taxed in the hands of the Indian branch since it is not arising in India and also it cannot be attributed to the assets and activities of the Indian branch as is required under art. 7 of DTAA. Therefore, there is no need to further estimate any income. He accordingly deleted the addition.*

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*48. We have considered the rival submissions. We are in agreement with the finding of the learned CIT(A). Where the foreign branch has issued credit card and even if the transaction takes place in India, the credit is given to the customer outside India and the debt has also arisen outside India. The merchant shipments in India may receive the payment but the merchant shipments do not incur any debt. They merely receive charges for the goods sold or services rendered. However, the charges are received by the foreign branch for providing credit to their card holders outside India. The amount payable by the card holders who have acquired the credit card from branches outside India incurs the debt outside India. Therefore, the fees in respect of such transaction are not taxable in India. We, therefore, uphold the deletion of addition of Rs. 10 crores." ."*

As the issue is squarely covered by the decision of the above referred order of the Tribunal, so, we hold that the order of the FAA does not suffer from any legal or factual infirmity as far as issue of taxability of ICMED is considered. Confirming his order, we decide the effective ground of appeal against the AO.

6. Though, we have dismissed the appeal filed by the AO, yet, we would like to decide the jurisdictional issue, raised by the assessee in its CO, i.e. re-opening of the assessment u/s. 147 of the Act. We find that in the case under consideration the notice for re-opening was issued without the approval of the competent Authority. Therefore, we hold that the assessment order passed by the AO was invalid. CO filed by the assessee is allowed.

**ITA/3689/Mum/09-AY.2001-02, ITA/2358/Mum/14AY.2003-04 & CO./245/Mum/2009, AY.2001-02, CO./129/Mum/2015 AY.2003-04:**

7. Grounds of appeal filed by the AO, s. and grounds of CO filed by the assessee for the above mentioned two AY, s. are identical to the grounds of AY.2000-01- the only difference is the amount involved. For the AY, s. 2001-02 and 2003-04, the AO had disallowed Rs. 33,66,213/- and Rs. 50,75,990/- respectively under the head ICMED. The assessee challenged the addition as well as re-opening of the assessment for both the years before the FAA. Following the orders of the earlier years, he decided the issue of re-opening assessments against the assessee. However, the issue of taxability of ICMED was decided in favour of the assessee.

**7.1**As the facts and circumstances of the both the AY.s. are identical to the facts of AY.2000-01, so following the order for that year, we decide the effective ground (deletion of addition on account of ICMED) against the AO.

**8.**As far as CO.s filed by the assessee are concerned, we would like to mention that during the original assessment proceedings the AO had called for the details of ICMED and the assessee had filed detailed reply in this regard (pg-166-185 of the paper book). Though the AO had mentioned that the assessee had failed to disclose the material facts, yet he had not explained as to which information was not filed. We further find that while approving the re-opening proposal the CIT had mentioned that he was satisfied. The reasons for his satisfaction are not available on record. In our opinion, mere mentioning that sanctioning authority was satisfied is not sufficient to initiate re-assessment proceedings, where during the original assessment proceedings AO takes a particular view after considering the submission of the assessee. It is not the case where assessee had not filed details required by the AO. If the AO decided not to call for particular information the assessee cannot be held responsible for that omission/commission. Therefore, we hold that there was no failure on part of the assessee to disclose material facts truly and fully. Considering all the facts cumulatively, we are of the opinion, that the order passed by the AO for both the AY.s were invalid. C.O.s filed by the assessee are decided in its favour.

As a result, appeals filed by the AO for the AY.s 2000-01, 2001-02 and 2003-04 stand dismissed. The Cross Objections filed by the assessee are allowed.

फलतः निर्धारित अधिकारियों द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं और निर्धारित के प्रत्याक्षेप मंजूर किए जाते हैं।

Order pronounced in the open court on 12<sup>th</sup> February, 2016.  
आदेश की घोषणा खुले न्यायालय में दिनांक 12 फरवरी, 2016 को की गई।

**Sd/-**

(राम लाल नेगी / Ram Lal Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Date: 12.02. 2016

व.नि.स./Jv.Sr.PS..

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, L खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.