

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 8480/MUM/2011
(Assessment Year : 2007-08)

Antwerp Diamond Bank NV
(Now merged with KBC Bank NV)
2nd Floor, Engineering Centre,
9 Mthew Road, Opera House,
Mumbai 400 004
PAN: AAADCA 2713J

... Appellant

Vs.

The Dy. Director of Income Tax
(International Taxation)- 1(1),
Scindia House, Ballard Pier,
Mumbai 400 038

.... Respondent

Appellant by : S/Shri K.K.Ved & N.A.Patade
Respondent by : Ms. Vandana Sagar

Date of hearing : 19/08/2015
Date of pronouncement : 30/10/2015

ORDER

PER G.S. PANNU,AM:

The captioned appeal is preferred by the assessee and is directed against the impugned order dated 11/10/2011 passed by DDIT (International Taxation)-1, Mumbai pertaining to the assessment

year 2007-08 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961(in short “the Act”).

2. The appellant before us is a foreign banking company incorporated in Belgium and is tax resident of Belgium. It is carrying on banking business in India on the strength of licence granted by the Reserve Bank of India. For the year under consideration, it filed a return of income on 14/11/2007 disclosing a total income of Rs.41,78,76,187/-, which was subject to scrutiny assessment, wherein the total income has been assessed at Rs.42,40,38,700/-. The assessment under section 143(3) r.w. 144C(13) of the Act dated 11/10/2011 was finalized by the Assessing Officer in terms of the directions issued by DRP-1, Mumbai under section 144C(5) of the Act dated 23/9/2011. The appellant had approached the DRP against the variation to the returned income proposed by the Assessing Officer in his draft assessment order passed under section 144C(1) of the Act dated 23/12/2010. In this background, we may now take up the four issues raised by the assessee in seriatim.

3. The first issue is with regard to a disallowance of Rs.34,64,227/- , which represented Data ‘Processing Costs’ paid to the Head Office. In this context, the brief facts are that assessee claimed that it has paid Rs.34,64,227/- to the Head Office as reimbursement for data processing cost on the basis of debit note issued by the Head Office to the India branch towards allocation of the said expenditure. The Head Office has acquired its main banking software and when the assessee branch was set up in India in Mumbai the software licence was amended to allow the branch also to use the same software making it

accessible through the servers located at Belgium. Since the branch in India is using the IT resources situated at Belgium and paid by the Head Office, the branch reimbursed to the Head Office pro-rata cost for the use of the said resources. The aforesaid expenditure was not allowed by the Assessing Officer, as according to him, the said expenditure was in the nature of royalty and, therefore, tax was liable to be deducted at source, which the assessee had not deducted. Therefore, as per the Assessing Officer such expenditure was hit by the provisions of section 40(a)(i) of the Act. The aforesaid stand of the Assessing Officer was in line with his stand for the earlier Assessment Years 2004-05 to 2006-07.

3.1 In this background, it was a common point between the parties that in Assessment Year 2004-05 vide order dated 14/03/2014 the Tribunal has decided the said issue in favour of the assessee. It was also a common point between the parties that in Assessment Year 2006-07, the Tribunal vide ITA No.5857/Mum/2010 dated 10/4/2015 followed the earlier decision of the Tribunal for A.Y 2004-05 dated 14/03/2014 and held that the data processing cost paid by the assessee does not amount to royalty and, therefore, there was no requirement of deduction of tax at source so as to warrant the application of section 40(a)(i) of the Act. Following the aforesaid precedents, which continue to hold the field, we allow the plea of the assessee. Accordingly, on this aspect the Assessing Officer is directed to delete the addition of Rs. 34,64,227/- made out of the data processing costs. Thus, on this aspect the assessee succeeds.

4. The second issue in dispute relates to interest paid to Head Office of Rs.23,49,91,691/- on subordinated debts and Term borrowings. The assessee had claimed the deduction of interest while computing taxable income of the India Branch, which is the assessee before us. The assessee branch also deducted tax on interest @10% in accordance with the CBDT Circular No.740 dated 17/04/1996 read with Article-11 of the Tax Treaty between India and Belgium. Simultaneously, such interest income was also offered to tax @ 10% in the hands of the Head Office in the return of income.

4.1 The Assessing Officer did not accept the plea of the assessee and disallowed the claim of deduction on account of interest paid to Head Office by following his stand in the assessment for earlier Assessment Years 2004-05 to 2006-07.

4.2 Before us, it was a common point between the parties that in the earlier Assessment Years of 2004-05 to 2006-07 vide ITA Nos. 7224/Mum/2007, A.Y.2004-05 dated 28/2/2013, ITA No. 1798/Mum/2009, A.Y. 2005-06 dated 04/09/2013 and ITA No. 5857/Mum/2010, A.Y. 2006-07 dated 10/4/2015, the issue has been decided in favour of the assessee.

4.3 Before us, it has also been canvassed that the Assessing Officer erred in not considering the decision of Hon'ble Calcutta High Court in the case of ABN Amro Bank.N.V. vs. CIT, 198 Taxman 376(Cal). It has also been pointed out that in the immediately preceding assessment year of 2006-07 the amount of Rs.43,68,985/-, was disallowed also on the ground that the requisite tax was not deducted at source and,

therefore, the provisions of section 40(a)(i) of the Act were applied. As the relevant tax has been deducted and paid in the course of the impugned assessment year, it is contended that the same be allowed as a deduction in the current assessment year also. We deem it fit and proper to direct the Assessing Officer to apply the precedents in assessee's own case in the past years and rework the income on this aspect accordingly and also by taking into account assessee's plea for a further deduction of Rs.43,68,985/- purported to have been disallowed in the earlier Assessment Years on account of provisions of section 40(a)(i) of the Act. Thus, on this aspect assessee succeeds for statistical purposes.

5. The third issue on this appeal is with regard to taxability of interest of Rs.23,49,91,691/- on subordinated debts and Term borrowings by the Head Office from the India Branch. On this aspect, it was pointed out that having regard to the decision of Hon'ble Calcutta High Court in the case of ABN Amro Bank.N.V. (supra), the same is not taxable in the hands of the Head Office. We find that in A.Y 2004-05 vide order in ITA No.7224/M/2007 dated 28/2/2013 the Tribunal has considered an identical controversy. As per the Tribunal, since the assessee was eligible to the benefits of tax treaty between India and Belgium, interest could not be taxed in the hands of the assessee being a foreign enterprise being payment to self, but the same is deductible while determining the profits attributable to its Permanent Establishment, which is taxable in India as per the tax treaty. Following the aforesaid precedent, we direct the Assessing Officer to re-

work the tax liability accordingly. Thus, on this aspect also assessee succeeds.

6. The last issue in this appeal is with regard to deduction of interest paid on income tax of Rs.1,95,510/- while computing the income of the assessee. The Assessing Officer noticed that while computing total income assessee had claimed deduction of Rs.1,97,510/- being interest payable under sections 234B & 234C of the Act. The Assessing Officer disallowed the claim on the ground that even interest paid under sections 234B and 234C of the Act is in the nature of payment of income tax.

7. On this aspect the Ld. Representative for the assessee has contended that there is a difference in the nature of payment of income tax vis-à-vis payment of interest under sections 234B & 234C of the Act. In this context, the Ld. Representative for the assessee referred to the judgment of the Hon'ble Bombay High Court in the case of Arthur Anderson & Company vs. Asstt.CIT,324 ITR 240(Bom) and pointed out that the expression 'tax' defined under section 2(43) of the Act does not include penalty or interest and, therefore, the prohibition contained under section 40(a)(ii) of the Act covers only income tax paid or payable, and not the interest paid on income-tax.

8. On the other hand, Ld. Departmental Representative appearing for the Revenue has contested the stand of the assessee by relying on the following decisions:-

(1) Shah Construction Co.Ltd. v ITO, (1986) 26 TTJ 0378(Mum)

(2) DCIT vs. Sandvik Asia Ltd., (2011) 15 taxmann.com 381(Pune)(TM)

9. Having considered the rival submissions, in our considered opinion, there can be no two opinions that in the light of the judgment of the Hon'ble Supreme Court in the case Bharat Commerce & Industries Ltd. vs. CIT , 230 ITR 733 (SC), interest payable for defaults committed by the assessee in discharging statutory obligation of payment of advance tax is not a permissible deduction. As per the Hon'ble Supreme Court payment of such interest is inextricably connected with assessee's tax liability and, therefore, the same has also to be considered as falling within the purview of section 40(a)(ii) of the Act. In fact, even the Hon'ble Bombay High Court in the case of CIT vs. Ghatkopar Estate & Finance Corporation (P) Ltd., 172 ITR 222 (Bom) has held that interest paid by the assessee on delayed payment of income tax cannot be allowed as deduction under the provisions of the Act. Hon'ble Gauhati High Court in the case of Assam Forest Products (P) Ltd. vs. CIT, 180 ITR 478 (Gau) has also held that interest is to be understood as part and parcel of the liability to pay tax and is not deductible in terms of section 40(a)(ii) of the Act. The Hon'ble Delhi High Court in the case of Raj Narain Agarwal vs. CIT, 259 ITR 720, following the decision of the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) held that interest payable to the income tax department under sections 217 and 220 (2) of the Act is not to be allowed as a business expenditure. The Third Member decision in the case of Sandvik Asia Ltd. (supra) relied upon by Ld. Departmental Representative also supports the action of the Assessing

Officer denying the deduction for payment of interest under sections 234B and 234C of the Act in view of section 40(a)(ii) of the Act.

10. Before us, Ld. Representative for the assessee has relied upon the judgment of the Hon'ble Bombay High Court in the case of Arthur Anderson & Company(supra) for the proposition that interest paid under sections 234B & 234C of the Act do not fall within the mischief of section 40(a)(ii) of the Act as the same do not constitute tax paid or payable. In this context, we have perused the judgment of the Hon'ble Bombay High Court in the case of Arthur Anderson & Company(supra) and find that the primary issue therein related to the challenge to the reopening of assessment by invoking the provisions of section 147/148 of the Act. The relevant facts were that assessee had disclosed certain interest income in the return of income which represented interest received from the income tax department under section 244A of the Act net of the amount of interest paid to the income tax department under section 220(2) of the Act. The assessment was originally completed under section 143(3) of the Act accepting the said position as such. Thereafter, the assessment was sought to be reopened by issuing notice under section 148 on the ground that instead of net interest, the entire interest received under section 244A of the Act was required to be offered for taxation, since under section 40(a)(ii) of the Act income tax paid or payable does not constitute deductible expenditure. In this background, assessee therein preferred a Writ Petition before the Hon'ble High Court contending that the reopening of assessment was bad in law because assessee had disclosed fully and truly all material facts pertaining to assessment. The aforesaid

controversy has been addressed by the Hon'ble High Court and the stand of the assessee was upheld, as according to the Hon'ble High Court the invoking of section 147/148 of the Act was invalid having regard to the facts and circumstances of the case. In our considered opinion, the controversy before us has been directly answered by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd.(supra) and that the judgment of the Hon'ble Bombay High Court sought to be relied upon by the assessee in the case of Arthur Anderson & Company(supra) is not in the context of the issue relating to deductibility of payment of interest for default in payment of advance tax. Therefore, the decision of the Hon'ble Bombay High Court does not help the plea of the assessee and on this ground the assessee fail.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 30/10/2015.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER
Mumbai, Dated 30/10/2015

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Vm, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai