

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI 'B' BENCH, MUMBAI**

[Coram: Pramod Kumar AM and Pawan Singh JM]

ITA No.3541/Mum/2014
Assessment Year: 2009-10

BNP Paribas SA**Appellant**
1, North Avenue, Maker Maxity,
Bandra Kurla Complex,
Bandra (East)
Mumbai. [PAN: AAACB 4868 Q]

Vs.

Additional Director of Income Tax**Respondent**
(International Taxation) – Range – 3,
Mumbai.

Appearances by:

A.V. Sonde, for the appellant
Jasbir Chouhan, for the respondent

Date of concluding the hearing: January 05, 2016
Date of pronouncing the order: March 31st, 2016

O R D E R

Per Pramod Kumar AM:

1. By way of this appeal, the assessee appellant has called into question correctness of the order dated 5th February, 2014, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961 (the Actq hereinafter) for the Assessment Year 2009-10. Grievances raised by the appellant are as follows:-

“Aggrieved by the order passed by the Commissioner of Income-tax (Appeals)–10, Mumbai, under section 250 of the Income-tax Act, 1961 and based on the facts and circumstances of the case, BNP Paribas SA respectfully submits that the learned CIT(A) erred in upholding the order of the Additional Director of Income-tax (International Taxation) – Range 3, Mumbai and in disposing the appeal of the Appellant on the following grounds, which are without prejudice to each other :

1. *In not accepting the claim that the rate of tax applicable to domestic companies and/or co-operative banks for Assessment Year 2008-09 is also applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India-France tax treaty.*
2. *In subjecting to tax, the data processing fees paid by Indian branch offices of the appellant to its Singapore branch, as income of the appellant to the tune of Rs.18,53,83,446/- under Article 13 (Royalties and fees for technical services and payments for the use of equipment) of the India-France tax treaty.”*

2. Learned Representatives fairly agree that whatever we decide in ITA No.3540/Mum/2014 for the assessment year 2008-09, which we have heard along with this appeal, will apply, *mutatis mutandis*, to this assessment year as well, as the grievances raised by the assessee in this assessment year are identical. It is an agreed position that all the relevant material facts are the same in this assessment year as well.

3. As far as the first ground of appeal is concerned, vide our order of even date, and in assessee's own case for the assessment year 2008-09, we have observed as follows:-

*“3. Learned counsel fairly accepts that the issue is covered, against the assessee, by a series of orders passed by the various co-ordinate benches in assessee's own case as also in the cases of **Chohung Bank vs. DDIT [(2006) 6 SOT 144 (Mum)]** and **JCIT vs. Sakura Bank Limited [(2006) 100 ITD 215 (Mum)]**. In this view of this undisputed position and the conclusions arrived at by the learned CIT(A) being in harmony with the views of the co-ordinate benches, we reject the grievance of the assessee. No interference is thus called for.*

4. *Ground no.1 is thus dismissed.”*

4. We see no reasons to take any other view of the matter than the view so taken in assessee's own case in assessment year 2008-09. Respectfully following the same, we dismiss the grievance raised by the assessee in ground no.1.

5. In respect of second ground of appeal, vide our order of even date, and in assessee's own case for the assessment year 2008-09, we have observed as follows:-

7. *We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*

8. *We find that while the CBDT circular No. 740, relied upon by the authorities below, does indeed state that "the branch of a foreign company/concern in India is a separate entity for the purpose of taxation" but this view has not really found favour with the judicial forums. Rejecting this approach after an elaborate analysis of the scheme of the Income Tax Act, Hon'ble Supreme Court has, in the case of CIT Vs Hyundai Heavy Industries Co Ltd [(2007) 291 ITR 482 (SC)], has held that "a taxable unit is a foreign company and not its branch or PE in India." The very foundation of dual taxable entity is thus laid to rest. There is only one taxable unit and that is the GE, though it is taxable in respect of the profits attributable to the PE, and there is thus no question of taxability by the GE in respect of a payment received from the PE. It is, therefore, devoid of legally sustainable basis to proceed on the basis that an internal charge by the Indian PE will result in a corresponding income in the hands of the French GE. We have also noted that, in the light of the undisputed facts set out in the statement of facts before the CIT(A), the services were rendered by the BNP Singapore on a cost plus 5% mark up basis, and that BNP India has claimed deduction in respect of actual costs and not the mark up. The mark up of 5% has already been offered as a suo motu disallowance in the computation of taxable income. Effectively thus, what has been added as income by the Assessing Officer is only the actual expense incurred for rendition of these services to the BNP India.*

9. *The fundamental question, however, is whether an internal charge on the PE can result in income in the hands of the GE or an intra GE unit.*

10. *In our considered view, a deduction, in respect of an internal charge, as is the inherent nature of an intra GE payment for data processing services, being allowed in the computation of income attributable to the permanent establishment in the hands does not result in an income arising in the hands of the GE. It is a notional adjustment which is allowed in the computation of profit attributable to the permanent establishment. Explaining this hypothesis, Prof. Kees Van Raad, a well known international tax academician, in his preface to "The Attribution of Profits to Permanent Establishments – The taxation of intra-company dealings [ISBN 90-76078-84-X; published by IBFD, Amsterdam]", has stated that "Since my early days of teaching international tax law I have tried to explain to students the relationship between a PE and the general enterprise of which the PE is a part, as that of an egg and the yolk it contains. I have further explained that, with regard to income attribution to PEs, the OECD Model does not require that a general enterprise is divided into two separate parts – a head office and a PE – and that, therefore, an*

internal charge borne by a PE will not yield income for anyone, but only produces a smaller amount of PE income to be taxed by the PE state and, correspondingly, a smaller amount of foreign income in respect of which the residence state needs to provide relief. I must admit that my attempts to get these views across have met with varying levels of success.” In a way, Dr Kees van Raad’s frustrations in being able to hammer this fundamental international tax principle does show how widespread this erroneous misconception is.

11. *In any case, there is no dispute that the assessee is carrying on business in India through a permanent establishment and that, in terms of article 13(5) of the Indo French DTAA, the charging provisions of 13(1) read with 13(2) will not apply not apply in such a situation as long as “the royalties, fees for technical services or the payments for the use of equipment are effectively connected with such permanent establishment”. As article 13(5) states it in unambiguous terms, “in such case the provisions of Article 7.....shall apply”. Under article 7, as is elementary, only such profits can be brought to tax as business profits as are attributable to the permanent establishment, and that has already been done. There is no dispute about this position. In this view of the matter also, there is no scope of further addition being made in respect of an intra GE charge for the services rendered another PE within the GE.*

12. *As regards the DRP’s directions for the assessment year 2006-07, which have been relied upon by the authorities below, we find that these directions have since been disapproved by a coordinate bench, vide order dated 21st November 2014. This order, in turn, refers to the order dated 16th July 2014 for the same assessee. The relevant observations in the said order are as follows:*

5. *Ground No.3 pertains to subjecting the data processing charges paid to the Singapore branch of the assessee amounting to Rs.132,335,594/- applying the provisions of Article 13(Royalties, fees for technical services and payments for use of equipment) of the India-France Tax Treaty. This issue is also covered by the order of the Tribunal in assessee’s own case for AY 2001-02 to 2003-04 wherein interest paid by assessee to Head Office/overseas branches was held to be not liable to tax, following was the precise observation of the Tribunal in its order dated 20-6-2012 for AY 2002-03:-*

3. The solitary issue involved in the appeal of the assessee for, the A.Y. 2002-03 relates to the addition of Rs.1,48,30,613/- made by the A.O. and confirmed by the Ld. CIT (A) on account of "interest" paid by the Indian Branches of the assessee bank to its head office and other overseas branches.

4. The assessee, in the present case is a commercial bank having its Head Office in France. It carries on the normal banking activities including financing of foreign trade and foreign exchange transactions in India through its eight branches situated at Mumbai, New Delhi, Kolkata, Bangalore, Pune,

Ahmedabad, Chennai and Hyderabad. During the previous year relevant to A.Y. 2002-03, the Indian Branches of the assessee bank have paid total interest of Rs.1,48,30,613/- to its Head office and overseas branches and the same was claimed as a deduction while determining the profits attributable to Indian Branches, which was chargeable to tax in India. The said interest was treated by the A.O. as income of the assessee's Head office/overseas branches chargeable to tax in India. This decision of the A.O. was challenged by the assessee in the appeal filed before the Ld. CIT(A) and the contention raised before the Ld. CIT (A) in this regard was that the Head office of the assessee bank as well as all its branches being the same person and one taxable entity as per the Indian Income-tax Act, interest paid by Indian Branches to head office and other overseas Branches was payment to self, which did not give rise to any income as per the Income-tax Act. In support of this contention, reliance was placed on behalf of the assessee on the decision of Hon'ble Supreme Court in the case of Sir Kikabhai Premchand vs. CT (Central) 24 ITR 506 as well as the decision of Kolkata Special Bench of the ITAT in the case of ABN Amro Bank NV vs. Asst. Director of Income-tax 98 TTJ 295. The contention of the assessee, however, was not accepted by the Ld. CIT (A) and relying on the decision of Mumbai Bench of the ITAT in the case of Dresdner Bank AG vs. Add1. CIT 108 ITD 375, he held that the interest paid by the Indian branches of the assessee bank to its head office and overseas branches was chargeable to tax in India. Accordingly, the addition made by the A.O. on this issue was confirmed by the Ld. CIT(A).

5. We have heard the arguments of both the sides and perused the relevant material on record. As agreed by the Ld. Representatives of both the sides, the issue involved in this appeal of the assessee now stands squarely covered by the decision of Special Bench of the ITAT in the case of Sumitomo Banking Corp. Mumbai wherein it was held, after elaborately discussing the legal position emanating from the interpretation of relevant provisions of Indian Income-tax Act as well as treaty, that interest paid to the head office of the assessee bank as well as its overseas branches by the Indian branch cannot be taxed in India being payment to self which does not give rise to income that is taxable in India as per the domestic law or even as per the relevant 'tax treaty'. Respectfully following the said decision of Special Bench of the ITAT I which is directly applicable in the present case, we delete the addition of Rs.1,48,30,613/- made by the A.O. and confirmed by the Ld. CIT (A) on this issue and allow the appeal of the assessee.

5.1 The issue has also been dealt by the Special Bench of the Tribunal in the case of Sumitomo Mitsui Banking Corporation (supra), wherein the observation of the Bench at para 88 is as under :-

“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 art. 7(2) and 7(3) of the Indo-Japanese Treaty read with, para 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 s. 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 s. 40 (a)(i) does not arise, Accordingly we answer question No. 1 referred to this Special Bench in the negative i.e. in favour of the assessee and question No. 2 in affirmative i.e. again in favour .of the assessee.”

As the facts and circumstances of the case during the year under consideration are *peri materia*, where payment made by assessee to Singapore Branch for data processing, was brought to tax. Respectfully following the order of the Tribunal in assessee's own case as well as the order of the Special Bench of the Tribunal in the case of Sumitomo Mitsui Banking Corporation (*supra*), we hold that the department was not justified in taxing the data processing charges to the Singapore Branch of the assessee by applying the provisions of Article 13 of the India-France Tax Treaty”

13. In effect thus, reversing the stand of the DRP, the coordinate bench has come to the conclusion that the payment on account of data processing charges paid to BNP Singapore cannot be taxed in the hands of the assessee. The conclusion arrived at by the coordinate bench, whatever may

have been the path traversed by the coordinate bench to reach this point, are the same as arrived at by us. Of course, our reasons are different, as set out earlier in this order, but that does not really matter as on now. We fully agree with the conclusions arrived at by the coordinate bench. We, therefore, direct the Assessing Officer to delete the impugned disallowance of Rs 13,10,97,790. The assessee gets the relief accordingly.

14. *Ground no. 2 is thus allowed.*

6. We see no reasons to take any other view of the matter than the view so taken in assessee's own case in assessment year 2008-09. Respectfully following the same, we direct the Assessing Officer to delete the impugned disallowance of Rs.18,53,83,446/-. The assessee gets the relief accordingly.

7. Ground no.2 is thus allowed.

8. In the result, the appeal is partly allowed in the terms indicated above.
Pronounced in the open court today on the 31st day of March, 2016.

Sd/-
Pawan Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Dated: the 31st day of March, 2016.

Copies to: (1) *The appellant* (2) *The respondent*
(3) *CIT* (4) *CIT(A)*
(5) *DR* (6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai Benches, Mumbai