IN THE INCOME TAX APPELLATE TRIBUNAL 'L' BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./ I.T.A. No. 4542 & 1671/Mum/2015
(**निर्धारण वर्ष /** Assessment Year: 2009-10 & 2010-11)

Dy. CIT(IT)-4(2)(2), 1st Floor, R. No. 120, Scindia House, Ballard Estate N.M. Road, Mumbai-400 038	**बनाम/ Vs.**	M/s. Societe Generale 19th Floor, Tower 'A' Peninsula Business Park, Ganpatrao Kadam Marg Lower Parel, Mumbai 400013
स्थायीलेखासं./जीआइआरसं./ **PAN/GIR No.** AABCS7484C		
(अपीलार्थी**/Revenue)**	**:**	**(**प्रत्यर्थी /**Assessee)**

अपीलार्थी की ओर से/**Revenue by**	**:**	Shri M.V. Rajguru, Sr. D.R.
प्रत्यर्थी की ओर से**/ Assessee by**	**:**	Shri Brijmohan P. Agarwal, A.R.

सुनवाई की तारीख**/ Date of Hearing**	**:**	15/06/2017
घोषणा की तारीख **/ Date of Pronouncement**	**:**	11/09/2017

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER

The present appeals filed by the revenue for A.Ys 2009-10 and 2010-11 are directed against the respective orders/directions passed by the CIT(A)-56, Mumbai, and the Dispute Resolution Panel-IV, Mumbai (for short 'DRP-IV'), dated 07.05.2015 and 28.11.2014,

respectively, which in itself arises from the assessment orders passed by the A.O u/s. 143 r.w.s 144C(3) and u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), respectively. That as certain common issues are involved in the present appeals of the revenue, therefore, the same are being taken up and disposed of together by way of the present consolidate order. We shall first take up the appeal of the revenue for AY: 2009-10, wherein the revenue assailing the order of the CIT(A) had raised the following grounds of appeal:-

"1. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that payments made by the assessee for purchase of a copyrighted article being software product, cannot be treated as royalty in view of explanation-4 of section 9(1) of the Act and therefore disallowable u/s. 40(a)(i) of the Act as no tax was deducted there from?

2. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the entire guarantee commission is not taxable in the year in which guarantee is given though assessee has spread over the income by treating it as advance guarantee commission received?

3. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the payments made by assessee to its HO in Singapore towards data communication charges and annual Microsoft billing and tru up charges were not in nature of Royalty/FTS but merely in nature of reimbursement. The Ld. CIT(A) after having admitted in para 13 of its order that the payment was for right to use of software failed to appreciate that the same could not be in nature of reimbursement, even of there was no markup as held in case of Centrica India Offshore (P) Ltd. 364 ITR 336 (Del)?

4. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that Reimbursement/ Royalty payments made by the assessee, to its HO is not taxable in the hands of assessee, being PE of the Head Office in view of new explanation below sub clause (c) of Clause (v) of section 9(1) introduced by Finance Act 2015?

5. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the interest payable by the Indian Branch/ Permanent Establishment of the foreign bank to its HO and other overseas Branches is not taxable as it does not give rise to any income although as per the deeming provisions of Article 7 read with Article 12 of the concerned DTAA interest income of HO is taxable in the hands of assessee being PE of HO and further the PE has to be treated

as separate and distinct entity under the Act also, in view of explanation below sub clause (c) of clause (v) of section 9(1) introduced by Finance Act, 2015?

6. *The Appellant prays that the order of the CIT(A) be set aside on the above grounds and the draft order of the Assessing Officer be restored.*

7. *The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

2. Briefly stated, the facts of the case are that the assessee is a banking company incorporated in France and during the year under consideration operated in India through its branches located in Mumbai, New Delhi, Banglore and Pune. The assessee had filed its return of income for A.Y. 2009-10 on 29.09.2009, declaring a total income of Rs. 72,30,93,695/- of the Permanent Establishment (for short 'P.E.') of the assessee company constituted by its branches in India. The case of the assessee was selected for scrutiny and assessment order dated 23.05.2013 was passed assessing the total income of the P.E at Rs. 75,00,30,276/-, and that of the Head office of the assessee chargeable to tax in India at Rs.1,80,63,878/-.

3. The assessee being aggrieved with the modifications made to its returned income, therein carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the various contentions raised by the assessee before him, allowed the appeal.

4. The revenue being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The revenue by way of ground of appeal no.1 had assailed the order of the CIT(A) holding that as the payments made by the assessee for purchase of a copyrighted article being software product, cannot be treated as royalty in view of *Explanation 4* of Section 9(1) of the 'Act', therefore, no disallowance

u/s 40(a)(i) was called for in the hands of the assessee. The facts pertaining to the issue under consideration are that the assessee had purchased AML license software for a consideration of Rs.16,83,036/- from IMTF, Switzerland. The assessee on being called upon by the A.O to explain as to why no tax was deducted at source while making the payment to IMTF, Switzerland, submitted that as the remittance was made on account of license software sold by the company and was not in the nature of payment for royalty or fees for technical services, therefore, no tax was deductible at source under the said head. The A.O however did not find favour with the aforesaid contention of the assessee and being of the view that the consideration paid by the assessee was for use or right to use of computer software, therefore, the same was in the nature of payment for royalty. The A.O thus on the basis of his aforesaid conviction concluded that as the assessee had failed to deduct tax at source on the royalty paid to the company, therefore, disallowed the aforesaid expenditure of Rs. 16,83,036/- under Sec. 40(a)(i) of the 'Act'.

5. The assessee being aggrieved with the aforesaid order of the A.O carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the issue under consideration found favour with the contentions of the assessee and deleted the disallowance made by the A.O, by observing as under:-

> *2. The first ground of appeal filed by the assessee is against the disallowance by the A.O of the payment made by the assessee towards purchase of software amounting to Rs.16,83,036/- in terms of the provisions of section 40(a)(i) of the Act. The concerned software was for the purpose of identification, monitoring and reporting of anti money laundering transactions. The assessee had treated the concerned transaction as a payment for the purposes of purchase of a copyrighted software product. However, the A.O was of the view that such payments made by the assessee would fall in the category of payment of royalty and TDS was deductible on the payment*

made to the supplier. As no such TDS had been deducted, the concerned expense was disallowed as a deduction by the A.O in the assessment order.

3. In coming to the conclusion that the payment for acquisition of software was in the nature of payment of royalty, the A.O relied on the amendment made in the provisions of section 9(1)(vi) of the Act by insertion of Explantion-4 thereto by the Finance Act, 2012 with retrospective effect from 01.06.1976. The said Explanation-4 stipulates that –

> *"for the removal of doubts, it is clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software(including granting of a licence) irrespective of the medium through which such right is transferred."*

4. It is true that this explanation inserted in the Income-tax Act through the aforesaid amendment would clearly make the purchase of software as coming within the definition of royalty for the period presently under consideration. However, as per the provisions of section 90(2), the assessee being the Permanent Establishment of a non resident based in France, it would be entitled to claim the benefits available to it under the relevant DTAA. Article 13(3) of the Indo-France tax treaty defines the term royalties as payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary artistic or scientific work. Software would fall in the category of a literary work. The A.O in the assessment order passed has at length discussed various decisions holding that payment made for the purchases of software would be in the nature of royalty such as the Karnataka High Court decision in the case of CIT Vs. Samsung Electronics Company Limited (320 ITR 209), the Delhi Tribunal decision in the case of Gracemac Vs. ADIT [8 ITR (Tribunal) 522] and the AAR decision in the case of Citrix Systems Asia Pacific Private Limited (343 ITR 1). The assessee on the other hand, in the course of the present appellate proceedings has brought to the attention of the undersigned an equally long list of decisions in favour of its stand that payment for purchase of software would not be in the nature of a payment of royalty. The issue remains unresolved with no unanimity in the decisions rendered by the Tribunals and the Courts. However, the jurisdictional Mumbai Tribunal, after considering the various decisions on this issue, has been inclined to accept the view that the payment for the purchase of computer software would not fall in the category of royalty.

5. The Apex Court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh (271 ITR 401) in a decision pronounced in the context of sales tax assessment has held that a transfer of a software package would be in the nature of a sale of goods and would be liable to sales tax. Royalty on the other hand is in the nature of a rent paid for the use of a copyrighted asset. Accordingly, if transfer of a right to use software is taken as completed on the grant of the requisite licence amounting to a sale of a product, then the

payment could not be treated as akin to a rent paid for its use as in the case of payment of royalty.

6. The Delhi High Court in its recent decision in the case of DIT Vs. Infrasoft Ltd. (39 taxmann.com 88) has held that the amount received by the assessee under the licence agreement for allowing the use of software would not be royalty under the DTAA. It has elaborated further in this decision that the right that was transferred was not a right to use the copyright but was only limited to the right to use the copyrighted material and the same would not give rise to any royalty income and would be business income. In this decision, the Delhi High Court has also expressed its disagreement with the decision of the Karnataka High Court in the Samsung Electronics case that was retied upon by the A.O in the assessment order.

7. The Delhi High Court itself in its earlier decision in the case of DIT Vs Nokia Networks (25 taxmann.com 225) had pointed out that a distinction has to be made between a "copyright" and a "copyrighted article". The definition of royalty in Article 13(3) of the DTAA was found by the Court to be narrower than the one provided in the Income Tax Act. The DTAA refers to payments for use or right to use a copyright of a literary work whereas in a transaction of sale of software the subject matter of transfer is not the copyright itself but that of a copyrighted article. The definition of royalty in the DTAA does not cover such a transaction. The Hon'ble Delhi High Court in this decision has also noted that the amendment made to the definition of royalty u/s. 9(1)(vi) of the Act by Finance Act, 2012 could not be read into the provisions of the DTAA and concluded that the payments made were for the supply of goods and were not in the nature of royalty as far as the provisions of the DTAA were concerned.

8. The jurisdictional Mumbai Tribunal in the cases of DDIT Vs. Solidworks Corporation (51 SOT 34) and ACIT Vs. Sonata Information Technology Ltd. (55 SOT 455) after considering both the decisions of the Delhi High Court in the Nokia Networks case (supra) and the Karnataka High Court decision in the Samsung Electronics case (supra) preferred to follow the Delhi High Court decision in the Nokia Networks case to hold that the consideration paid for the use of software would not be in the nature of a payment of royalty.

9. In view of the aforementioned decisions, supported by the conclusions reached by the jurisdictional Mumbai Bench of the Tribunal, it is hereby held that the payments for purchase of software licences by the assessee was not in the nature of royalty and accordingly the assessee was not required to deduct the tax at source while making such payment. The transaction being in the nature of a sale of goods by a Non Resident from overseas and the concerned Non Resident seller not having a PE in India, its receipts would not be chargeable to tax in India. Accordingly, the assessee was not required to deduct the tax at source and the concerned payment could not have been disallowed by the A.O under the provisions of section 40(a)(i) of the Act. The A.O is hereby directed to

delete such disallowance made and the appeal filed on this ground may be treated as allowed.

6. The revenue being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorised representative (for short 'A.R') for the assessee relied on the order of the CIT(A). Per contra, the ld. Departmental representative (for short 'D.R') relied on the order of the A.O and submitted that as the remittance made by the assessee to IMTF, Switzerland was in the nature of payment for royalty, therefore, on the failure of the assessee to deduct tax at source on the said amount, the A.O had rightly disallowed the said expenditure under Sec. 40(a)(i).

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have given a thoughtful consideration to the issue before us and find that the CIT(A) relying on the judgment of the **Hon'ble High Court of Delhi** in the case of **DIT Vs. Infrasoft Ltd. (2014) 220 Taxman 273 (Delhi)** held a conviction that the payment made by the assessee to the company for allowing the use of software could not be characterized as royalty. We are of the considered view that the CIT(A) while arriving at the aforesaid conclusion had gone by the observations of the Hon'ble High Court in the case of Infrasoft Ltd. (supra) that as the right that was transferred to the assessee was not a right to use the copyright, but was only limited to the right to use the copyrighted material, therefore, the same cannot be held as payment of royalty by the assessee. We have given a thoughtful consideration to the issue before us and find that the coordinate bench of the ITAT, Mumbai in the case of **DDIT Vs. Solidworks Corporation (2013) 152 TTJ 0570 (Mum)**

concurred with the view arrived at by the **High Court of Delhi** in the case of **Director of Income Tax Vs. Ericsson A.B., New Delhi ITA No.504/2007 dated 23.12.2007**,wherein it was held that when software is incorporated in a CD it becomes a tangible property and the payment made for acquiring the same is not a payment by way of royalty. We further find that a similar view had also been arrived at by the coordinate bench of the ITAT, Mumbai in the case of **ACIT Vs. Sonata Information Technology Ltd. (2013) 152 TTJ 590 (Mum).** We thus being of the considered view that no infirmity does emerges from the order passed by the CIT(A) on the issue under consideration by relying on the aforesaid judgment of the High Court of Delhi in the case of *Infrasoft ltd. (supra)*, and finding ourselves to be in agreement with the view taken by the coordinate benches of the Tribunal in the aforementioned cases, therefore, uphold his order. The **Ground of appeal No. 1** is dismissed.

8. The issue raised in ground of appeal no. 2 relates to the addition of Rs.2,60,72,707/- made by the A.O in respect of guarantee commission in the hands of the assessee. That during the year under consideration the assessee bank which is following mercantile system of accountancy had recognised guarantee commission in its books of accounts, as income over the period of the guarantee. However, the A.O being of the view that as the entire guarantee commission was received by the assessee at the time of furnishing the guarantee, therefore, the income of the assessee accrued or arose the moment the guarantee commission was received and no part of the guarantee commission received could be deferred for the purpose of taxation to any subsequent period. The A.O on the basis of his aforesaid conviction thus made an addition of Rs.2,60,72,707/- to the returned income of the assessee. That on appeal the CIT(A) after duly

appreciating that the issue under consideration had earlier came up before the Tribunal in the assesses own case for AY's 2002-03, 2005-06 and 2008-09, wherein the appeal of the assessee was allowed, thus, being of the considered view that the issue was covered in favour of the assessee by the order of the Tribunal in the preceding years, therefore, deleted the aforesaid addition made by the A.O.

9. That during the course of the hearing of the appeal it was submitted by the ld. Authorized Representative (for short A.R) that the issue was covered by the order of the Tribunal in the assessee's own case for AY's: 2002-03, 2005-06 and 2008-09. The ld. Departmental Representative (for short D.R) could not controvert the said factual position.

10. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We are of the considered view that as the issue pertaining to the taxability of guarantee commission is covered in favour of the assessee by the earlier orders of the coordinate benches of the Tribunal in the assesses own case for AY's 2002-03, 2005-06 and 2008-09, therefore, having no reason to take a different view, we respectfully follow the same. The **Ground of appeal no. 2** raised by the revenue before us dismissed.

11. The issue raised in grounds of appeal no. 3 and 4 relates to the expenses to the tune of Rs. 42,54,528/- allocated by the Head Office (H.O) and other Branches of the assessee to its Indian Branch. The assessee during the course of the assessment proceedings submitted that the expenses were allocated by the H.O and Singapore Branches of the assessee to its Indian Branch were pure reimbursements for

services, viz. data communication charges, Annual Miscrosoft Enterprise Software product billing and true up charges incurred etc., rendered for its Indian branch and did not contain any mark-up. The A.O however did not find favour with the contentions of the assessee and concluded that the services rendered by the H.O of the assessee bank to the Indian branch were squarely covered by the definition of royalty/fees for technical services. The A.O in the backdrop of his aforesaid observations concluded that as the royalty was deemed to accrue and arise in India u/s 9(1)(vi)(c) and s. 9(1)(vii)(c), since the services/facilities had been utilized by the Indian branch for the purpose of the business in India and also for the purposes of making or earning income in India, thereafter, they were deemed to accrue or arise in India. The A.O thus on the basis of his aforesaid conviction computed the tax liability on the payment of Rs. 42,54,428/- @10% as per Article 13 of the India-France Tax Treaty.

12. That on appeal the CIT(A) after deliberating on the issue under consideration held that the addition made by the A.O in the hands of the Head office of the assessee with reference to the reimbursement of expenses made by the P.E. of the assessee was found to be not justified and thus deleted the same.

13. That during the course of hearing of the appeal it was submitted by the ld. A.R. that the aforesaid issue was squarely covered by the order passed by the Tribunal in the case of the assessee for assessment year 2010-11, viz. M/s Societe Generale Vs. DCIT (IT), Mumbai) (ITA No. 1854/Mum/2015); dated 19.04.2017. The aforesaid contention of the ld. A.R was not rebutted by the ld. D.R.

14. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the aforesaid issue is squarely covered by the order passed by the coordinate bench of the Tribunal in the assessee's own case for A.Y. 2010-11, viz. M/s Societe Generale Vs. DCIT (IT), Mumbai (ITA No. 1854/Mum/2015), dated 19.04.2017, wherein the Tribunal deliberating on the issue under consideration, had held as under:-

> *2.3. We heard the rival submissions and perused the matter before us. We find that the assessee had made payment its sister concern located in Singapore for the services rendered by that entity, that it had claimed the payments were reimbursements only without any mark up, that the AO and the Panel rejected claim made by the assessee, that both the authorities held that the payment made by it were Royalty/FFTS. We find that the assessee had produced the debit note raised by the foreign entity. The invoices issued by the SGS talk about reimbursement, software maintenance charges, data communication charges, EDP consumables and others. If the DRP had some doubt about maintenance of software, it should have called for explanation from the assessee. But, doubt cannot take place of evidence to confirm any addition. Page 24 of the paper book contains detail of various charges paid by the assessee to the foreign entity. The Panel has not brought anything on record to controvert the entries appearing in it. Besides, Protocol 7 to the DTAA also supports the stand taken by the assessee. We would like to reproduce the relevant portion of the judgment of Steria (supra) and same is as under:*
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> > *The Protocol to the Double Taxation Avoidance Agreement between India and France (see [1994] 209 ITR (St.) 130, 157) provides that if under any Convention, Agreement or Protocol signed after September 1, 1989, between India and a third State which is a member of the OECD, India limits its taxation at source, inter alia, on fees for technical services to a rate lower or a scope more restricted than the rate of scope provided for in this Convention, the same rate or scope as provided for in that Convention Agreement or Protocol shall also apply under this Convention. There is no warrant for the restrictive interpretation placed oil 7 of the Protocol to the Double Taxation Avoidance Agreement between India and France in such a manner that that if a reference is made to one Convention signed after September 1, 1989 between India and another OECD member State for the purposes of ascertaining if it had a more restrictive scope or a lower rate of tax, then that Convention alone has to be referred to for both purposes or that it is not permissible for the assessee, in terms of clause 7 of the Protocol, to rely upon one*

Convention between India and an OECD member State for the purposes of taking advantage of a lower rate of tax and then refer to another Convention between India and another OECD member State to take advantage of a more restricted scope. The words "a rate lower or a scope more restricted" occurring therein envisage that there could he a benefit on either score, i.e., a lower rate or a more restricted scope. One did not exclude the other. The purpose of clause 7 of the Protocol is to afford to a party to the India-France Convention the most beneficial of the provisions that may be available in another Convention between India and another OECD country.

The wording of clause 7 of the Protocol makes it self-operational. Once the Double Taxation Avoidance Agreement has itself been notified, and contains the Protocol including clause 7 thereof; there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other Convention between India and another OECD country to be separately notified to form part of the Indo-France Double Taxation Avoidance Agreement. Clause 7 of the Protocol, which forms part of the Double Taxation Avoidance Agreement between India and France, automatically becomes applicable. .... that the definition of "fee for technical services" occurring in article 13(4) of the Double Taxation Avoidance Agreement between India and the United Kingdom clearly excludes managerial services. What was being provided by SF to the assessee in terms of the management services agreement were managerial services, it was plain that once the expression "managerial services" was outside the ambit of "fee for technical services", the question of the assessee having to deduct tax at source from payments for the managerial services, would not arise. The payment made by the assessee to SF for the Managerial services provided by the latter could not be taxed as fees for technical services and the payment were not liable to withholding of tax under section 195 of the Act.

The Hon'ble Bombay High Court in the case of WNS Global Services has also dealt with the e of International Telecom Operators lease Lines. considering the above, we are of the opinion payment made by the assessee was neither royalty nor FFTS. It was case of pure and simple reimbursement. Secondly, the assessee had not made any payment to Singapore Telecommunication. Therefore, following judgment of Steria (supra) we decide Ground no. 1 in favour of the assessee".

We have deliberated on the issue under consideration and find that the Tribunal in its aforesaid order had held that the payments made by the assessee to its H.O, viz. Societe Generale, Singapore were neither Royalty or Fees for technical services, but were pure reimbursements for services, viz. data communication charges, Annual Miscrosoft Enterprise Software product billing and true up

charges incurred etc., rendered for its Indian branch. We being of the considered view that the issue involved in the present appeal before us is squarely covered by the aforesaid order of the Tribunal, therefore, respectfully follow the same. The **Ground of appeal no. 3 and 4** raised by the revenue before us are dismissed.

15. The ground of appeal no. 5 relates to the taxability of the interest of Rs. 1,38,09,350/- paid by the assessee to its H.O and other overseas branches on borrowings. The facts pertaining to the issue under consideration are that the A.O during the course of the assessment proceedings, being of the view that the P.E in India and the Head office and other branches were separate entities for the purpose of computation of income and the determination of the taxable profits, therefore, concluded that the payment of interest of Rs.1,38,09,350/- by the assessee P.E. were part of the interest income of the recipient head office and the overseas branches and hence chargeable to tax in India in the hands of the assessee. That on appeal the CIT(A) observed that the Tribunal in the assessee's own case for A.Y's 2005-06 and 2006-07 had accepted the assessee's contention that interest payment by the P.E in India to the Head office or other overseas branches of the assessee was not chargeable to tax in their hands in India. The CIT(A) thus being of the view that as the aforesaid issue was squarely covered by the order of the Tribunal in the assessee's own case, therefore, deleted the addition of the interest income in the hands of the assessee.

16. The ld. A.R of the assessee relied on the order of the CIT(A) and submitted that the issue was squarely covered by the order passed by the Tribunal in the assessee's own case for A.Y's 2005-06 and 2006-07. The ld. D.R could not controvert the aforesaid contention of the assessee.

17. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have deliberated on the issue under consideration and are persuaded to be in agreement with the ld. A.R that the same is squarely covered by the order passed by the Tribunal in the assessee's own case for AYs: 2005-06 and 2006-07. We find that the Tribunal while disposing of the appeal of the assessee for A.Y. 2005-06, had observed as under:-

> *"4. We have heard the ld. A.R of the assessee as well as the ld. D.R and considered the relevant material on record. At the outset, we note that this issue is now covered by the decision of the Special Bench of this Tribunal in the case of Sumitomo Mitsui Banking Corporation Vs. Dy Director of Income Tax reported in 16 ITR (Tub) 11 6(Mumbai)(SB) wherein the Special Bench of the Tribunal has held as under:*
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> > *'Keeping in view all the facts of the case and the legal position emanating from the interpretation of the relevant provisions of the 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 permanent establishment in India is not deductible an expenditure under the domestic low being payment to self, the same is deductible while determining the profit attributable to the permanent establishment which is taxable in India as per the provisions of article 7(2) and (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 the 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 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 1rsaid payment of interest made by the permanent establishment the question of disallowance of the said interest by*

> *invoking the provisions of section 14(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 2 in affirmative. i.e, again in favour of the assessee.*
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> *4.1 Since the benefit of DTAA is available to the assessee; therefore, though the interest cannot be taxed in India in the hands of the assessee being a foreign enterprise, being payment to self, the same is deductible while determining the profits attributable to PE which is taxable in India as per Article 7(2)(3) of DTAA. Accordingly, following the decision of the Special Bench of this Tribunal (supra). We decide this issue in favour of the assessee and against the revenue. The disallowance made u/s. 40(a)(ia) is accordingly deleted.*

We find that as the issue involved is squarely covered by the aforesaid order of the Tribunal, therefore, finding no reason to take a different view thus uphold the order of the CIT(A) who by following the orders of the Tribunal in the assessee's own case for the preceding years had held that the interest paid by the Indian branch/Permanent establishment of the foreign bank to its H.O and other overseas branches is not chargeable to tax. The **Ground of appeal no. 5** is dismissed.

18. The **Grounds of appeal no. 6 and 7** are general in nature and nothing have been averred by the ld. D.R in respect of the same, therefore, the same are dismissed as not pressed.

19. The appeal of the revenue is dismissed.

ITA No. 1671/Mum/2015
AY: 2010-11

20. We now take up the appeal of the revenue for AY: 2010-11. The revenue assailing the order/directions of the Dispute Resolution Panel-IV, Mumbai (for short 'DRP') had carried the matter in appeal before us, therein raising the following grounds of appeal:-

"1. Whether on the facts and in the circumstances of the case and in law the DRP was justified in holding that since the assessee was consistently following offering of guarantee commission by spreading it over the period of guarantee given and ultimately there is no revenue impact without appreciating the fact that on each assessment year the assessee is supposed to offer all the income that has accrued to the assessee and by not offering all the guarantee commission income received/ accrued during the year the assessee has postponed its tax liability?

2. Whether on the facts and in the circumstances of the case, the DRP was justified in holding that interest payable by the Indian Permanent Establishment of the foreign bank to its H.O. and other overseas branches, is deductible in computing the total income?

3. Whether on the facts and in the circumstances of the case, the DRP was justified in holding that interest income payable by the India Permanent Establishment of a foreign bank to its H.O. and branch offices abroad cannot be taken into account for the purpose of computing the income of H.O. liable to be taxed in India without appreciating that in view of decision in case of ABN Amro Bank 343 ITR 81 (Cal) later affirmed by Hon'ble Supreme Court also, for all purposes P.E. & G.E. are to be treated as separate entities?

4. Without prejudice to ground No. 2 & 3 above, whether on the facts and in the circumstance of the case, the DRP was justified in not directing the A.O. to make disallowance u/s. 14-A following the decision of ITAT, Mumbai in assessee's own case for A.Y. 2001-02 in ITA No. 954/Mum/2005 and decision of ITAT, Mumbai in the case of Oman International Bank SAOG 35 CCH 207 (Mumbai Trib.) once the DRP had held that interest payable by PE to its H.O and branch offices was not taxable in India?

5. The appellant prays that the order of the DRP be set aside on the above grounds and the draft order of the Assessing Officer be restored.

6. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

21. Briefly stated, the facts of the case are that the assessee had filed its return of income on 13.09.2010, declaring an income of Rs.10,72,60,881/-. That a draft order u/s 143(3) r.w.s 144C(1) of the 'Act' was passed by the A.O on 28.02.2014, proposing to assess the income of the assessee at Rs.11,97,23,831/-. The assessee objecting to the various modifications proposed by the A.O in the 'draft order',

thus filed objections before the DRP. The DRP vide its order dated 28.11.2014 issued directions and the A.O was called upon to give effect to the same as per the provisions of Section 144C(13) of the Act. The revenue being aggrieved with the order passed by the DRP u/s 143(3) r.w.s 144C(13), had carried the matter in appeal before us.

22. The issue raised in ground of appeal no. 1 relates to the addition of Rs. 48,34,301/- in respect of guarantee commission, which though was proposed by the A.O vide his draft order dated. 28.02.2014, but was deleted pursuant to the directions of the DRP. We find that the facts and issue involved in the ground of appeal no. 1 is identical to the facts and the issue involved in the Ground of appeal no. 2 raised by the revenue in its appeal for A.Y. 2009-10, viz. ACIT (International Taxation)-4(2)(2), Mumbai Vs. M/s. Societe Generale, Mumbai (ITA No. 4542/Mum/2015), therefore our decision on the said issue in the aforesaid appeal shall apply *mutatis mutandis* for adjudicating the Ground of appeal no. 1 raised by the revenue in its present appeal before us. The **Ground of Appeal No. 1** raised by the revenue is thus dismissed in terms of our aforesaid observations.

23. The grounds of appeal no.2 and 3 relates to the taxability of the interest of Rs. 15,86,609/- paid by the assessee to its H.O and other overseas branches on borrowings. We find that the facts and issue involved in the grounds of appeal no. 2 and 3 are identical to the facts and the issue involved in the Ground of appeal no. 5 raised by the revenue in its appeal for A.Y. 2009-10, viz. ACIT (International Taxation)-4(2)(2), Mumbai Vs. M/s. Societe Generale, Mumbai (ITA No. 4542/Mum/2015), therefore, our decision on the said issue in the aforesaid appeal shall apply *mutatis mutandis* for adjudicating the Grounds of appeal no. 2 and 3 raised by the revenue in its present

appeal before us. The **Grounds of Appeal No. 2 and 3** raised by the revenue are thus dismissed in terms of our aforesaid observations.

24. The ground of appeal no. 4 relates to disallowance under Sec. 14A of the expenses relatable to the interest paid by the assessee P.E to its H.O and Overseas Branches, which was held by the DRP to be not taxable in India. The ld. A.R adverting to the ground of appeal no. 4 raised by the revenue before us, submitted that the same does not emerge from the orders of the lower authorities. Per Contra, the ld. D.R relied on the order passed by this bench of the Tribunal while disposing of the appeal of the revenue for AY: 2001-02. The ld. D.R taking us through the order passed by the Tribunal while disposing of the appeal of the revenue for A.Y. 2001-02, drew our attention to Para 44-45 of the order. It was submitted by the ld. D.R that the Tribunal in its aforesaid order after concluding that the interest income of Rs.3.96 crore received by the assessee on funds placed with Head office/Overseas branches was exempt from tax on the principle of mutuality, had however observed that the interest paid by the assessee on the funds which were placed as deposits with the H.O/Overseas branches would be liable to be disallowed under Sec.14A of the 'Act'. The ld. D.R further to fortify his aforesaid contention also relied on the order passed by a coordinate bench of the Tribunal in the case of **Oman International Bank SAOG Vs. Jt.DIT (International Taxation) (2013) 35 CCH 0207 (Mum).**

25. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We are of the considered view that now when we have concluded that the interest of Rs. 15,86,609/- paid by the assessee to its H.O and other Overseas branches on borrowings is not

liable to be brought to tax, therefore, as a necessary corollary, interest paid in respect of the deposits on which such interest was received would also be liable to be disallowed under Sec. 14A. We are persuaded to be in agreement with the view taken by the coordinate bench of the Tribunal while disposing of the appeal of the revenue in the assesses own case for A.Y.2001-02, viz. Dy. Director of Income-tax Vs. M/s Societe Generale (ITA No. 954/Mum/2005; dated. 09.01.2013, as well as the order passed by the coordinate bench of the Tribunal in the case of the **Oman International Bank SAOG Vs. Jt.DIT (International Taxation) (2013) 35 CCH 0207 (Mum).** We therefore, restore the matter to the file of A.O for adjudicating the issue afresh keeping in view the principle laid down by the coordinate bench of the Tribunal while disposing of the appeal of the revenue in the assesses own case for A.Y.2001-02, viz. **Dy. Director of Income-tax Vs. M/s Societe Generale (ITA No. 954/Mum/2005; dated. 09.01.2013**, as well as the order passed by the Tribunal in the case of **Oman International Bank SAOG Vs. Jt.DIT (International Taxation) (2013) 35 CCH 0207 (Mum).** The A.O shall during the course of the set aside proceedings adjudicate the issue afresh in the backdrop of the facts involved therein, though keeping in view our aforesaid observations. Needless to say, the A.O shall during the 'set aside' proceedings afford an opportunity of being heard to the assessee. The **Ground of appeal no. 4** is allowed for statistical purposes.

26. The **Ground of appeal no. 5 and 6** are general in nature and nothing had been averred by the ld. D.R in respect of the same during the course of the hearing of the appeal, therefore, the same are dismissed as not pressed.

27. The appeal of the revenue is partly allowed.

28. The appeal of the revenue for AY: 2009-10, marked as ITA No. 4542/Mum/2017 is dismissed, while for the appeal of the revenue for AY: 2010-11, marked as ITA No. 1671/Mum/2017 is partly allowed.

Order pronounced in the open court on 11.09. 2017

Sd/-	Sd/-
(SHAMIM YAHYA) ACCOUNTANT MEMBER	(RAVISH SOOD) JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 11.09.2017
Ps. Rohit Kumar

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

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**