IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBERAND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.3747/Mum./2018
(Assessment Year : 2012–13)

ITA no.363/Mum./2019
(Assessment Year : 2011–2012)

JP Morgan Chase Bank N.A.
JP Morgan Tower, Off CST Road
Kalina, Santacruz (East) ……. Appellant
Mumbai 400 098
PAN – AAACT5545N

v/s

Dy. Commissioner of Income Tax
International Taxation ……. Respondent
Circle–3(1)(1), Mumbai

Assessee by : Shri Madhur Agarwal
Revenue by : Shri Samuel Darse

Date of Hearing – 03.10.2019	Date of Order – 30.12.2019

O R D E R

PER SAKTIJIT DEY. J.M.

The captioned appeals filed by the same assessee arise out of two separate orders dated 29th March 2018, and 13th November 2018, passed under section 263 of the Income Tax Act, 1961 (for short *"the Act"*) by the learned Commissioner of Income Tax (International Taxation)–3, for the assessment years 2011–12 and 2012–13.

2. Brief facts are, the assessee is the Indian branch of a non–resident banking company viz. J P Morgan Chase Bank N.A. incorporated in USA. The assessee carries on its banking activities in India through its branch located in Mumbai. For the assessment years under consideration, the assessee filed its return of income in the regular course. Since, the assessee is a foreign company, the Assessing Officer framed draft assessment orders under section 144C(1) of the Act for both the assessment years under dispute proposing certain variations in the income offered in the return of income. As observed by the Assessing Officer, since the assessee did not file any objections before the Dispute Resolution Panel (DRP) against the draft assessment orders within the prescribed time limit, the Assessing Officer passed final assessment orders under section 144C(3) of the Act on 22nd May 2015, and 29th April 2016, for the assessment years 2011–12 and 2012–13 respectively. Subsequent to completion of assessment as aforesaid, learned CIT, in exercise of power conferred under section 263 of the Act, called for the assessment records for the years under dispute and after examining them found that in the relevant assessment years, the assessee has paid interest to its Head Office and overseas branches. Being of the view that the interest paid to Head Office and overseas branches are taxable in India as per the provisions of India–USA Double Taxation Avoidance Agreement (DTAA) as business profits through its

Permanent Establishment (PE) i.e., the Indian branch. Since, the Assessing Officer had not brought to tax the interest income at the hands of the Head Office/overseas branches, the learned CIT was of the view that the assessment orders are erroneous and prejudicial to the interests of Revenue. Accordingly, he issued show cause notices to the assessee to explain as to why the assessment orders should not be revised. In response to the show cause notice issued by the learned CIT, the assessee furnished its detailed reply objecting to the initiation of proceedings under section 263 of the Act. However, the submissions made by the assessee did not find favour with learned CIT. He observed, as per the existing provision of India–USA Tax Treaty, interest income is taxable in the source country. He observed, since the assessee has a PE in India through its Branch Office, the interest income is taxable in India. He observed, the Branch Office in India and the Head Office are two separate entities. He observed, once the assessee opts to be governed under the beneficial provisions of the Tax Treaty and it is accepted that it has PE in India, the single entity approach under the Act gives way to the distinct and independent entity or separate entity approach under the DTAA. Further, he observed, even as per Explanation (a) to section 9(1)(v)(c) of the Act introduced to the statute by Finance Act, 2015, w.e.f. 1st April 2016, interest paid by Indian Branch of a non–resident bank is taxable in India. He observed, though the aforesaid amendment was made

effective from 1st April 2016, however, since such amendment is clarificatory in nature, it will apply retrospectively. Further, referring to the CBDT Circular no.740, dated 17th April 1996, learned CIT observed, the Branch of a foreign company in India is a separate entity for the purpose of taxation under the Act. As regards the Special Bench decision of the Tribunal, in Sumitomo Mitsui Banking Corporation v/s DDIT, [2012] 19 taxmann.com 364 (Mum.), the learned CIT observed, in the said decision the Bench had no occasion to consider various reasoning provided by him in the context of treaty provisions. Thus, he ultimately concluded that the interest income earned by the Head Office / overseas Branches from the Indian Branch amounting to Rs.58,56,350/– and Rs.1,20,21761/– in Assessment Years 2011-12 and 2012-13 respectively, is taxable in India. Accordingly, holding the assessment orders passed for the impugned assessment years to be erroneous and prejudicial to the interests of Revenue, he cancelled them with a direction to the Assessing Officer to make fresh assessment keeping in view the observations made by him.

3. Shri Madhur Agarwal, learned Counsel for the assessee submitted, the exercise of power under section 263 of the Act is wholly without jurisdiction as the assessment orders passed by the Assessing Officer are neither erroneous nor prejudicial to the interests of

Revenue. He submitted, in the returns of income filed for the relevant assessment years, the assessee has appended a note explaining in detail the reasoning for not offering the interest income received from the Indian Branch to tax. He submitted, in the course of assessment proceedings, the Assessing Officer has made specific enquiry with regard to the interest income earned and after considering the submissions of the assessee and all the relevant facts has accepted assessee's claim while completing the assessment. He submitted, as per the ratio laid down in the judicial precedents cited before the Assessing Officer, interest paid by the Indian Branch to Head Office/overseas branches is not taxable as it is considered to be a payment made to self, hence, governed under the principle of mutuality. He submitted, since the Assessing Officer was bound by the ratio laid down in the judicial precedents, he has acted in a judicious manner while accepting assessee's claim. Therefore, the assessment orders cannot be treated as erroneous. Further, he submitted, the issue is otherwise squarely covered in favour of the assessee by the Special Bench decision of the Tribunal, in Sumitomo Mitsui Banking Corporation (supra) wherein it has been held that interest paid by the Indian Branch to the Head Office/overseas branches is covered under the principle of mutuality as it is a payment made to self. Therefore, under the provisions of the Act, it is not taxable. He submitted, the Bench has also held that since the provisions of the Act is more

beneficial, it will prevail over the provisions of the Tax Treaty. Thus, he submitted, keeping in view the decision of the Special Bench in Sumitomo Mitsui Banking Corporation (supra), the interest income is not taxable at the hands of the assessee. Further, he submitted, reference to the CBDT Circular no.740, dated 17th April 1996, is also misplaced as in case of Sumitomo Mitsui Banking Corporation (supra), the Bench has held that the aforesaid circular cannot override the statutory provisions. The learned Counsel for the assessee submitted, Explanation (a) to section 9(1)(v)(c) of the Act cannot come to the rescue of the Department as the said provision would apply prospectively from 1st April 2016. Without prejudice, he submitted, even assuming that the aforesaid provision will have retrospective effect still the assessment orders cannot be considered to be erroneous and prejudicial to the interests of Revenue as section 263 of the Act cannot be invoked to give effect to a retrospective amendment. Thus, he submitted, the orders passed under section 263 of the Act being contrary to the Special Bench decision of the Tribunal in Sumitomo Mitsui Banking Corporation (supra) has to be quashed. In support of such contention, the learned Counsel for the assessee relied upon the following decisions:–

i) Sumitomo Mitsui Banking Corporation v/s DDIT, [2012] 19 taxmann.com 364 (Mum.); and

ii) DCIT v/s BNP Paribas S.A., ITA no.1689/Mum./2018 &Ors., dated 17.07.2019.

4. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Undisputedly, learned CIT has exercised his power of revision conferred under section 263 of the Act on the issue of taxability of interest paid by the Indian Branch to the Head Office and other overseas branches. As could be seen from the facts on record, in the returns of income filed for the respective assessment years, the assessee had appended notes stating in detail the reasons for which the interest paid to the Head Office/overseas branches are not taxable at the hands of the assessee in India. On a perusal of the said note, it appears that during the relevant assessment years, Indian branch had received interest from Head Office/overseas branches and had also paid interest to them. In the course of assessment proceedings, the Assessing Officer has issued notice under section 142(1) of the Act raising specific query regarding the interest received from the Indian Branches. In response to the query raised by the Assessing Officer, the assessee has also furnished detailed reply stating the reasons why the interest received from Indian Branches is not taxable. In support of its claim, the assessee has relied upon certain judicial precedents. The Assessing Officer after considering the submissions of the assessee has ultimately concluded the assessments excluding from taxation the

interest income received from Indian Branch. As could be seen from the impugned orders of learned CIT, the primary reason on which he considers the assessment orders to be erroneous and prejudicial to the interest of Revenue is, interest received from the Indian Branch is taxable in India as per Article 14(6) of the India–USA Tax Treaty. According to learned CIT, the provisions of Tax Treaty will prevail over the provisions of the Act. Of course, learned CIT by referring to the Explanation (a) to section 9(1)(v)(c) of the Act, has also held that the interest income is taxable even under the provisions of the Act. The issue relating to the taxability of the interest paid by Indian Branch to the Head Office/other overseas branches of non-resident Banking Company came up for consideration before the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). The Special Bench after considering all the aspects of the issue, including the interplay between the provisions of the Act and the Tax Treaty, held that since the interest paid by Indian Branch to foreign Head Office/overseas branches is in the nature of payment made to self, it will be governed by the principle of mutuality, hence, would not be taxable under the provisions of the Act. The Special Bench observed, that since the provisions of the Act are more beneficial to the assessee qua the interest income, it will prevail over the provisions of the Tax Treaty. In this context, the Special Bench decision also referred to the CBDT Circular no.740, dated 17th April 1996, and held that if the

interest income is not chargeable to tax under the provisions of domestic law, it cannot be brought to tax by way of a Board Circular. The ratio laid down by the Special Bench in the decision referred to above, squarely applies to the facts of the present case. Inasmuch as, the issue of taxability of interest received by a foreign bank from its Indian branch, in our considered opinion, is squarely covered by the aforesaid decision of the Special Bench and we are bound by such decision. Therefore, according to us, the interest received from the Indian Branch being a payment received from self is governed by the principle of mutuality, hence, not taxable under the provisions of the Act. Further, since the provisions of the Act are more beneficial to the assessee, it will prevail over the provisions of the Tax Treaty as per section 90(2) of the Act, as held by the special Bench. After the decision of the special Bench in Sumitomo Mitsui Banking Corporation (supra), the legislature, though, had thought it prudent to make amendment to the provisions of section 9(1)(v)(c) of the Act to nullify the effect of the Special Bench decision. Accordingly, amendment was made to the aforesaid provision by introducing Explanation (a) and (b) by Finance Act, 2015, w.e.f. 1st April 2016. As per Explanation (a) to section 9(1)(v)(c) of the Act, it was clarified that the interest paid by an Indian Branch of a non–resident banking company shall be deemed to be accruing or arising in India and shall be chargeable to tax in addition to any income attributable to the PE in India. It further says

that the PE in India shall be deemed to be a person separate and independent of the non–resident person. In our view, the aforesaid provision would apply prospectively from 1st April 2016 and not prior to that. The aforesaid view has been expressed by the Co–ordinate Bench in DCIT v/s BNP Paribas S.A. (supra). Therefore, Explanation (a) to section 9(1)(v)(c) of the Act cannot be pressed into action for bringing to tax the interest income in the impugned assessment years. In any case of the matter, the issue, whether or not interest received by the Head Office/overseas Branches from the Indian Branch is taxable in India is a highly debatable issue and the position of law prevailing at the time of completion of assessments as per the available judicial precedents on the issue, clearly held that the interest income was not taxable as it is governed by the principle of mutuality. Therefore, it cannot be said that it is not a possible view. Rather, the assessment orders would have been erroneous had the Assessing Officer taxed the interest income received from the Indian Branch overlooking the decision of the Special Bench in case of Sumitomo Mitsui Banking Corporation, which was available at the time of completion of assessments. Even, assuming for the sake of argument that Explanation (a) to section 9(1)(v)(c) of the Act will apply retrospectively, however, proceedings under section 263 of the Act cannot be initiated on the basis of such retrospective amendment as the Assessing Officer has to proceed on the basis of law prevailing as

on the date of assessments. Thus, looked at from any angle, the assessment orders cannot be considered to be erroneous and prejudicial to the interests of Revenue for not bringing to tax the interest received from the Indian Branch. Accordingly, we hold that the impugned orders of learned CIT passed under section 263 of the Act are unsustainable in law, hence, have to be quashed. Accordingly, we quash the orders passed under section 263 of the Act and restore the assessment orders passed by the Assessing Officer for the impugned assessment years. Grounds are allowed.

5. In the result, appeals are allowed.

Order pronounced in the open Court on 30.12.2019

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 30.12.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai