IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT), 'G' BENCH MUMBAI

BEFORE SHRI JUSTICE P P BHATT, PRESIDENT

&

SHRI M. BALAGANESH, AM

ITA No.6273/Mum/2016
(**Assessment Year :1996-97**)

Dy.Commissioner of Income Tax Circle-2(2)(1) Mumbai	Vs.	State Bank of India Financial Reporting & Taxation Department 3rd Floor, Corporate Centre State Bank Bhavan Madam Cama Road Nariman Point Mumbai – 400 021
PAN/GIR No. AAACS8577K		
(**Appellant**)	..	(**Respondent**)

Revenue by	Shri Anand Mohan, CIT DR
Assessee by	Shri C. Naresh, C.A
Date of Hearing	**29/09/2020**
Date of Pronouncement	**21/10/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.6273/Mum/2016 for A.Y.1996-97 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-5, Mumbai in appeal No.IT-133/15-16/83/16-17 in appeal dated 01/07/2016 (ld.

CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 254 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 27/03/2015 by the ld. Asst. Commissioner of Income Tax, Mumbai (hereinafter referred to as ld. AO).

2. We find that this appeal is the second round of appellate proceedings before this Tribunal. The appeal was originally disposed off by this Tribunal in the first round of appellate proceedings which was also subjected to miscellaneous application proceedings in MA No.371/Mum/2013 dated 03/01/2014. In the said MA order, this Tribunal had remitted three matters to the file of the ld. AO for fresh examination on the ground that these issues were raised before this Tribunal for the first time. We find that out of the three matters remitted to the file of the ld. AO, we find that the Department is in appeal only in respect of two issues in respect of which they had raised the following grounds:-

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) right in deleting the addition made by the AO u/s. 41(4) of the I.T. Act, 1961 without appreciating the fact that the recovery of bad debts is out of the provisions claimed by the assessee as a charge to the Profit & Loss Account and hence taxable u/s. 41(4) of the I.T. Act, 1961.*
>
> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that only the income of the foreign branches is to be included in the total income which was taxed in that foreign country without appreciating the fact that the Hon. ITAT in the case of Bank of Baroda in ITA No. 2927/M/2011 dated 25/07/2014 for A.Y. 2005-06 had held that all the income of the foreign branches shall be taxable in India and credit of taxes if any paid by the branches in the foreign country would be allowed?*
>
> *3. On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) erred in directing the AO to include only income which has been taxed in foreign country in violation of Central Government*

> *Notification No. SO/2123(e), dated 28/08/2008 which clearly indicates inclusion while arriving at the total income."*

3. Out of the above, the ground Nos.2&3 raised by the revenue are with regard to taxability of income of foreign branches and ground No.1 is in respect of recovery in respect of bad debts written off.

4. With regard to ground No.1 raised by the revenue in respect of recovery of bad debts written off, we find that during the F.Y.1995-96, relevant to A.Y.1996-97, the assessee bank had recovered bad debts amounting to Rs.42,63,46,635/- in respect of which, no claim of deduction was made u/s.36(1)(vii) in the past. The ld. AO held that assessee claimed deduction of provision for bad and doubtful debts u/s.36(1)(viia) of the Act out of which bad debts written off is set off. Accordingly, he held that when bad debts written off is recovered subsequently, the same partakes the character of deemed income in the year of receipt in terms of Section 41(4) of the Act and therefore, brought to tax the same. The assessee pleaded that the provisions of Section 41(4) are applicable only when the recovery of bad debts are in relation to a debt for which a deduction u/s.36(1)(vii) of the Act is allowed. As the bank in the instant case had not claimed any deduction u/s.36(1)(vii) of the Act in earlier years, the recovery of bad debts cannot be taxed u/s.41(4) of the Act.

4.1. We find that according to the Section 36(1)(viia) of the Act, the banks are allowed deduction in respect of any provision made for bad and doubtful debts of a sum not exceeding 7.5% of total income and the sum not exceeding 10% of aggregate average advances of rural branches. Further, as per proviso to Section 36(1)(vii) of the Act,

the amount of bad debts written off will be allowed as deduction only if it exceeds the credit balance in provision for bad and doubtful debts u/s.36(1)(viia) of the Act. We find that before the ld. CIT(A), the assessee contended that the ld. AO should have followed the Co-ordinate Bench decision of Bangalore Tribunal in the case of State Bank of Mysore reported in 33 SOT 7 wherein it was clearly held that when no deduction in respect of bad debts written off was claimed u/s.36(1)(vii) of the Act, but only adjusted against the deduction allowed u/s.36(1)(viia) of the Act, the provisions of Section 41(4) of the Act cannot be brought into operation for taxing the recovery in respect of bad debts written off. We find that the ld. CIT(A) duly appreciated the contentions of the assessee and granted relief to the assessee.

4.2. We find that in the instant case, the bad debts written off did not exceed the credit balance in provision for bad and doubtful debts and the bad debts written off was not claimed as deduction u/s.36(1)(vii) of the Act in earlier years. This fact was not controverted by the Revenue before us. Accordingly, we hold that the provisions of Section 41(4) of the Act which has been invoked by the ld. AO in the instant case are not applicable at all in the facts of the instant case. We also find that the Bangalore Tribunal in the case of State Bank of Mysore had held that with regard to taxing the recovery on account of deduction being allowed u/s.36(1)(viia) of the Act, the question of invoking Section 41(4) of the Act would not arise, if the bad debts written off is adjusted against the provision allowed u/s.36(1)(viia) and no deduction of bad debts written off is claimed. Reliance in this regard is placed on the Co-ordinate Bench decision of this Tribunal in

assessee's own case in ITA No.3644/Mum/2016 dated 03/02/2020 for A.Y.2008-09.

4.3. We find that the ld. DR had in principle agreed to the fact that the ratio laid down by the Bangalore Tribunal in the case of State Bank of Mysore shall be applicable to the facts of the instant case but he pleaded for remitting back this issue to the file of the ld. AO for verification of figures alone. In this regard, we find that while giving effect to the order of the ld. CIT(A), the ld. AO would obviously allow the claim only after verifying the figures and hence, no purpose would be served by remitting this issue again to the file of the ld. AO for verification of figures. Hence, the argument made by the ld. DR in this regard is dismissed. In view of the aforesaid observations, the ground No.1 raised by the revenue is dismissed.

5. With regard to taxability of income of foreign branches for which the revenue has raised the ground Nos.2&3 reproduced supra, the assessee submitted that income of its foreign branches is not liable to tax in India. The assessee also placed reliance on the following decisions before the ld. AO:-

- *Special Bench of ITAT in PAVL Kulandagan Chettiar (3 ITD 426); view upheld by the High Court and Supreme Court in 267 1TR 654 [review petition before the Supreme Court was dismissed (300 ITR 5)]*
- *GIT v. VRSRM Firm (208 ITR 401) (Madras High Court)*
- CTT *V. R.M. Muthiah (202 ITR 508) (Karnataka High Court)*
- *DCITv. Paini Computer Systems Limited (2007) (114 ITD 159) (Pune Tribunal)*
- *DOT v. Torqouise Investment & Finance Ltd. (2008) (300IR 1) (Supreme Court)*
- *Pooja Bhatt v. DOT (2008) (26 SOT 574) (Mum)*
- *DOT v. Mideast India Ltd. (2009) (28 SOT 395) (Del)*
- *DOT v. Essar Oil Limited (2011) (47 SOT 139) (Mum)*
- *CIT v. Patni Computer Systems Limited (ITA No. 1148 of 2012) (Bombay*

High Court).

5.1. Apart from the above, the assessee also placed reliance on the decision of this Tribunal in the case of Bank of India vs. DCIT reported in 27 taxmann.com 335 in support of its contentions. The assessee submitted before the ld. AO that pursuant to these judicial pronouncements, it had been held that when under the relevant tax treaty, it is provided that tax "may be" charged in particular state in respect of the specified income, it is implied that tax will not be charged by the other state. It has also been held that once income is held to be taxable in a particular jurisdiction under the tax treaty, unless there is a specific mention that it can be taxed in the other jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. Accordingly, the assessee pleaded that income earned by the branches of the assessee bank located outside India is not taxable in India in the light of tax treaties between India and the respective countries where foreign branches are located as the income thereon had already been subjected to tax in the foreign countries. The ld. AO however, disregarded the aforesaid contentions of the assessee and merely placed reliance on the decision of this Tribunal in the case of Bank of Baroda in ITA No.3667/Mum/2011 for A.Y.2005-06 and held that income of the branches of the assessee would also be taxable in India. We find that the ld. CIT(A) observed that the said issue is already decided by this Tribunal in the case of Bank of India in ITA No.2781/Mum/2011 in favour of the assessee and accordingly granted relief to the assessee.

5.2. Before us, the ld. DR submitted that there is no dispute that the assessee bank has got foreign branches in different countries with whom tax treaties had been entered or might not be entered for the

relevant year. He submitted that assessee treated such foreign branches as Permanent Establishment (i.e "PE") . He pleaded that the examination of terms and conditions and Articles in the DTAA with such countries is most relevant for the issue. These facts according to the ld. DR were not examined by the ld. AO or by the ld. CIT(A). He further argued that in all the decisions cited by the assessee, various Articles and Clauses of DTAA were closely examined by the revenue authorities. He also argued that the assessee had placed reliance on its own decision for A.Y.2008-09 and argued that the same is distinguishable in as much as the details of contents provided in various Articles in Tax Treaties were duly submitted before the ld. AO by the assessee for verification in that case, which is not so in the present case before us.

5.3. We find that the ld. CIT(A) had granted relief to the assessee by placing reliance on the decision of this Tribunal in the case of Bank of India in ITA No.2781/Mum/2011 which was subsequently approved by the Hon'ble Jurisdictional High Court in the Income Tax Appeal No.1639 of 2012 dated 07/01/2015. A copy of the said order of the Hon'ble Jurisdictional High Court was placed on record by the ld. AR at the time of hearing. On perusal of the said order of the Hon'ble Jurisdictional High Court, we find that the Hon'ble High Court had observed that the ld. AO was satisfied that the benefit of DTAA is admissible provided the proof is produced in relation to the payment of tax by the assessee abroad. The relevant observations of the Hon'ble High Court are as under:-

> *"4. With the assistance of Mr. Suresh Kumar and Sanjiv Shah, we have perused the memo of Appeal. The Assessing Officer was satisfied that, the benefit of the Double Taxation Avoidance Agreement is admissible provided the proof is produced in relation to payment of taxes by the*

> *Assessee abroad. In other words, if the Assessee has permanent establishment abroad, then, the Assessee would have to produce evidence regarding payment of taxes pertaining to the income of these, establishments abroad. On production of such evidence, the Assessee would be entitled to the benefit. That evidence was always available and as noted by the Commissioner of Income Tax (Appeals) and the Tribunal. In the circumstances, the authorities did nothing but follow their earlier orders based on identical facts and circumstances. The finding of fact, therefore, cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. The Appeal does not raise any substantial question of law. It is devoid of merits and is, accordingly, dismissed. No costs."*

5.4. From the aforesaid order of the Hon'ble Jurisdictional High Court in the case of Bank of India, it could be seen that relevant materials and information were made available before the ld. AO by the assessee in the case of Bank of India, whereas, in the instant case before us, there is absolutely no finding recorded either by the ld. AO or by the ld. CIT(A) with regard to availability of relevant information with regard to payment of taxes in foreign countries by the assessee in respect of income of the foreign branches. Hence, we find considerable force in the argument advanced by the ld. DR that this aspect needs to be factually verified by the ld. AO. Hence, we deem it fit and appropriate to remand this issue to the file of the ld. AO only for the limited purpose of making following verifications:-

(a) The details of branches located in country with which DTAA has been entered into, by India

(b) The details of branches located in the Country with which DTAA has not been entered into, by India

(c) The details of taxes paid by the foreign branches in respect of its income earned outside India.

5.5. The assessee is directed to provide the aforesaid details before the ld. AO. The ld. AO after verification of the aforesaid details is directed to decide the issue in the light of the decision of Bank of India decision in ITA No.2781/Mum/2011 rendered by this Tribunal and which was subsequently approved by the Hon'ble Jurisdictional High Court vide order dated 07/01/2015 referred to supra. Accordingly, the ground Nos.2 & 3 raised by the revenue are allowed for statistical purposes.

6. The ground No.4 raised by the revenue is with regard to the adjustment of refund granted by the revenue to the assessee. The revenue has raised the following ground of appeal in this regard:-

> *"4. On the facts and in the circumstances of the case and in Law, the CIT(A) has erred in directing the Assessing Offier to adjust the refund granted, first towards interest amount refundable and thereafter consider the balance against tax amount refundable which will lead to excess grant of interest, contrary to the practice followed by the department and the intenation of the legislation."*

6.1. We have heard rival submissions. We find that there is absolutely no discussion regarding this aspect in the assessment order, whereas, the ld. CIT(A) had granted relief to the assessee by placing reliance on the order of his predecessor in assessee's own case for A.Y.1995-96 wherein reliance had been placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. HEG Limited reported in 324 ITR 331 and decision of the Hon'ble Delhi High Court in the case of India Trade Promotion Organisation vs. CIT reported in 361 ITR 646. We find that the ld. DR fairly agreed that this issue is covered in favour of the assessee by the decision of this Tribunal rendered in the case of State Bank of Indore in ITA No.2972/Mum/2011. We also find that this Tribunal had also held in the case of Bank of Baroda in ITA

No.1646/Mum/2017 dated 20/12/2018 (authored by the undersigned) wherein it was held that the refund granted by the revenue should be first adjusted against the interest portion of refund due and balance, if any, is to be adjusted against the tax portion of refund due and interest for the subsequent period shall be calculated on such tax portion of refund due. It was also held that this would not tantamount to interest on interest claimed by the assessee and the assessee was right in claiming interest on such portion. Respectfully following the aforesaid decisions, the ground No.4 raised by the revenue is dismissed.

7. The ground No.5 raised by the revenue is general in nature and does not require any specific adjudication.

8. In the result, the appeal of the revenue is partly allowed for statistical purposes.

Order pronounced on 21/10/2020 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(JUSTICE P P BHATT)	**(M.BALAGANESH)**
PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 21/10/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai