IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 552/MUM/2018
Assessment Year: 2013-14

BNP Paribas, BNP Paribas House, 1 North Avenue, Maker Maxity Bandra-Kurla Complex, Bandra (East) Mumbai-400051. **PAN No. AAACB4868Q**	Vs.	Deputy Commissioner of Income Tax (International Taxation)-1(3)(1), Mumbai Room No. 110, First Floor, Scindia House, Ballard Estate Mumbai-400038.
Appellant		**Respondent**

Assessee by : Mr. Farrokh Irani, AR
Revenue by : Mr. Samuel Darse, CIT DR

Date of Hearing : 31/01/2019
Date of pronouncement: 22/04/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the assessment order dated 28.11.2017 passed by the Assessing Officer (AO) u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

The AO has erred in not accepting the claim that the rate of tax applicable to domestic companies and/or co-operative banks for AY 2013-14 is also

applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India-France tax treaty.

3. The Ld. counsel of the appellant fairly agrees that the above issue is covered against the assessee by a series of orders passed by various Co-ordinate Benches in assessee's own case.

We find that while deciding the appeal for AY 1996-97 (ITA No. 2760/Mum/2008 dated 28.08.2013), the Tribunal has decided the issue as under:

> "4.The third issue is relating to tax rate. The assessee has submitted that the tax levied at higher rate in the case of foreign companies is discriminatory in nature and, accordingly, relief has been sought on this account. The claim has been rejected by the authorities below.
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> 4.1 We have heard both the parties in the matter. We find that this issue has already been examined by the Tribunal in the case of M/s BNP Paribas, decided in ITA Nos. 4601 & 4602/M/ 2004,vide order dated 1-7-2013. In that case also the tax rate applied in the case of the assessee, a foreign company was 48% compared to 38% applied in case of domestic companies. The assessee had argued that it was discriminatory and not in accordance with law. Reference was made to non-discrimination clause in the Treaty, as per which there should not be any discrimination between the domestic and the non-resident company. The Tribunal, however, referred to the Explanation in the Section 90, inserted in the IT Act with retrospective effect from 01-04-1962 as per which the higher tax rate in case of foreign company, should not be regarded as violation of non-discrimination clause. The Tribunal also referred to the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. J.K. Synthetics. The Tribunal accordingly, rejected the ground raised by the assessee. The facts in the present appeal are identical and, therefore,

respectfully following the decision of the Tribunal in the case of M/s BNP Paribas(supra), we dismiss this ground raised by the assessee."

Following the same, we uphold the order of the Ld. CIT(A) and dismiss the 1st ground of appeal.

4. The 2nd ground of appeal

The AO has erred 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.325,963.282/- under Article 13 (Royalty and fees for technical services) of the India-France tax treaty.

5. Before us, the Ld. counsel of the assessee submits that the above issue has been decided in favour of the assessee by the Tribunal in assessee's own case from AY 2005-06 to AY 2010-11. Further, it is stated by him that the High Court has not admitted the Department's appeal on this ground for AYs 2006-07 and 2007-08.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record.

In the above ground of appeal, the issue is about data processing fees paid by Indian Branch Office of the assessee to Singapore Branch to the tune of Rs.325,963,282/- under Article 13 of the India-France treaty. We find that while deciding the appeal for AY 2009-10 (ITA No. 3541/Mum/2014 dated 31.03.2016), the Tribunal has decided the issue as under:

"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 Braches 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 whish 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."

Also, the above order has been followed by ITAT 'L' Bench, Mumbai in assessee's own case in A.Y.2010-11 (ITA No. 1182/Mum/2015). Further, the Hon'ble Bombay High Court has not admitted the Department's appeal on this ground for AYs 2006-07 and 2007-08.

Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 2nd ground of appeal.

7. The 3rd ground of appeal

Without prejudice to Ground No. 2 above, the AO has erred in levying surcharge of 2 percent and education cess of 3 percent on the tax computed under Article 13 of the India-France tax treaty.

The 4th ground of appeal

Without prejudice to Ground 2 above, the AO has erred in not re-computing the deduction under section 44C of the Act on the basis of the income assessed in the hands of the Appellant and thereby granted a short deduction, amounting to Rs.15,803,943/- u/s 44C of the Act.

8. As we have decided the 2nd ground of appeal in favour of the assessee, the above 3rd and 4th grounds of appeal become academic in nature and thus allowed.

9. The 5th ground of appeal is regarding the short credit of taxes given by the AO of tax deducted at source amounting to Rs.39,306,931/-. We direct the AO to verify the facts and grant credit of taxes deducted at

source as per the provisions of the Act, after giving reasonable opportunity of being heard the assessee.

10. The 6th ground of appeal regarding charging of interest is consequential.

11. As the penalty u/s 271(1)(c) has been initiated only, the 7th ground of appeal is premature.

12. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 22/04/2019

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 22/04/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai