IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]

ITA Nos. 2227 & 2229/Mum/2017
ITA Nos. 7345 & 7347/Mum/2018
Assessment years: 2012-13 to 2015-16

Shinhan Bank **……Appellant**
Unit No 701, 7th floor, Peninsulla Tower-1,
Peninsula Corporate Park, G.K Marg, Lower Parel,
Mumbai 400 013 [PAN: AAACC2144A]

Vs.

Deputy Commissioner of Income-Tax (IT) 4(2)(1)
Mumbai **……...……Respondent**

CO Nos.: 17 & 18/Mum/ 2021
Arising out of ITA Nos. 7345 & 7347/Mum/2018
Assessment years 2014-15 & 2015-16

Deputy Commissioner of Income-Tax (IT) 4(2)(1)
Mumbai **……...……Cross Objector**

Vs.

Shinhan Bank **……Respondent**
Unit No 701, 7th floor, Peninsulla Tower-1,
Peninsula Corporate Park, G.K Marg, Lower Parel,
Mumbai 400 013 [PAN: AAACC2144A]

Appearances by:
Madhur Agrawal *for the appellant*
Ajit Pal Singh Daia *for the respondent*

Date of concluding the hearing : 22/09/2022
Date of pronouncing the order : 09/11/2022

O R D E R

Per Pramod Kumar VP:

Assessment year 2012-13

1. This appeal, filed by the assessee, is directed against the order dated 31st January 2017, passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2012-13.

2. In the first ground of appeal, the assessee has raised the following grievance:

Applicable rate of tax.

1. On the facts and the circumstances of the case, and in law, the Hon'ble Dispute Resolution Panel - II ('DRP') erred in directing the Deputy Commissioner of Income-tax (International Taxation)- 4(2)(1), Mumbai, ('AO') to reject the Appellant's claim for the benefit of the non-discrimination clause of the India-Korea Double Taxation Avoidance Agreement ('DTAA') and taxing the Appellant's income at the rate 40% (plus surcharge and education cess) instead of at the rate applicable to a resident tax payer (i.e 30% plus surcharge and education cess).

The Appellant therefore, prays that the benefit of the Article 24 of the DTAA be granted and that its income be taxed at the rate 30% instead of 40% (plus surcharge and education cess).

3. Learned representatives fairly agree that this issue is now covered, against the assessee, by a coordinate bench decision in the assessee's own case for the assessment year 2007-08 **[also reported as Shinhan Bank Vs DDIT (2022) 139 taxmann.com 563 (Mum)]** wherein, speaking through one of us (i.e. the Vice President), the coordinate bench has, inter alia, observed as follows:

> *4. The assessee before us is a banking company incorporated in, and fiscally domiciled in, Korea. It is carrying on business, through its permanent establishment, in India as well. In the income tax return filed by the assessee, it was pointed out that in view of Article 25(1) of the* ***India Korea Double Taxation Avoidance Agreement [(1987) 165 ITR Stat 191; the then Indo Korea tax treaty, in short]****, which provides that "****nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected****" [the corresponding provision in the present Indo Korean treaty are in Article 24(1)], and as, in terms of Article 3(1)(g) resident includes, amongst others, "****any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State****", [the corresponding provision in the present Indo Korean treaty are in Article 3(1)(j)(ii)] the assessee company is also required to be treated as a national of Korea and levy of tax at the same rate as applicable for the Indian companies. It was also pointed out that in terms of the provisions of Article 25(2) of the then India Korea tax treaty, "****the taxation on a permanent establishment which an enterprise of a contracting state has in the other contracting state, shall not be less favourably levied in that other contracting state than the taxation levied on the enterprise of that other contracting state carrying on the same activities****". It was pointed out that the levy of tax, on the profits of the assessee's permanent establishment in India, at a rate higher than the rate at which tax is levied on the Indian entites carrying out the same activities, amounted to impermissible discrimination. It was thus pointed out that on the touchstone of the principles set out in article 25(1) as also 25(2), the rate of taxation of income of the assessee company cannot be more than the rate applicable for the domestic companies engaged in the same or similar activities. The Assessing Officer was thus urged that instead of levy of tax @ 40% plus surcharge etc, the assessee company should be levied tax @ 30% plus surcharge etc, as is applicable on the domestic companies. This plea,*

however, was rejected by the Assessing Officer on the ground that in the light of Explanation 1 to Section 90, the provisions of a double tax avoidance agreement, the tax rate on a foreign company being higher than the tax rate on a domestic company cannot be considered to a less favourable charge or levy of tax in respect of such foreign company, and as such the provisions of Article 25(1) Article 25(2) of the then Indo Korean tax treaty do not come into play. The Assessing Officer proceeded to frame a draft assessment order accordingly. Aggrieved by the draft assessment order, the assessee raised the objections before the Dispute Resolution Panel, but without any success. The stand of the Assessing Officer was approved and reiterated. The Assessing Officer thus proceeded to levy the tax at the rate prescribed for a foreign company, i.e. a company which is not a domestic company. The assessee is not satisfied and is in appeal before us.

5. Learned counsel for the assessee invites our attention to the judgment dated 7th August 2019 passed by Hon'ble Calcutta High Court, in the case of ***Bank of Tokyo Mitsubishi Ltd Vs CIT [(2019) 108 taxmann.com 242 (Cal)]*** *and submits that the issue is covered, in favour of the assessee, by the aforesaid decision of Hon'ble Calcutta High Court. However, when learned counsel's attention was invited to Explanation 1 to Section 90 and he was asked to address us on the implications of this amendment, he simply pointed out that the aforesaid judgment was delivered on 7th August 2019- i.e. after the retrospective amendment was bought to the statute, and yet the issue has been decided in favour of the assessee. He left the matter at that and submitted that he has nothing further to add to what has been held by Hon'ble Calcutta High Court in the case of Bank of Tokyo Mitsubishi (supra). Learned Departmental Representative, on the other hand, submits that there is no discussion at all in the said decision about the Explanation 1 to Section 90, which is in effect with effect from 1st April 1962, though inserted by the Finance Act 2001, and a decision which has been rendered without dealing with this foundational aspect of the matter, cannot be binding on us. Learned Departmental Representative submits that in any case, it is a non-jurisdictional High Court and there is no dispute about the scope of Explanation to Section 90, and the learned counsel for the assessee has not even advanced any arguments on merits. It is pointed out that the learned counsel has simply cited a judicial precedent and left it at that, and, therefore, we should treat this ground as not pressed in effect. We are thus urged to confirm the stand of the authorities below and decline to interfere in the matter.*

6. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position. Considering that this issue raised in the appeal it may affect several non-resident companies, we consider it appropriate to deal with this issue in some detail.

*7. We find that, by Finance Act 2001, an Explanation (now known as Explanation 1) was inserted below Section 90, and it was with retrospective effect i.e. effective 1st April 1962. This Explanation states that "****For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India****". It is important to bear in mind that it is by virtue of Section 90(2), which specifically provides that "****Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee****", that the provisions of the related double taxation avoidance agreement override the provisions of the Income Tax Act, 1961. As a corollary to this legal framework, it is only elementary that once a rider to this override is placed in the statute itself, to that extent the provisions of the Income Tax Act, 1961 will hold the field notwithstanding the more beneficial*

*provisions in the tax treaties. In this light, when we look at the expression "**less favourably levied**" or "**more burdensome…taxation and connected requirement**", appearing in Articles 25(2) and 25(1) respectively, in the then applicable tax treaty, we find that unless such a foreign company makes prescribed arrangements for declaration and payment within India, of the dividend payable out of its income in India, the levy of tax at a higher rate cannot be considered a less favourable levy of tax or more burdensome taxation vis-à-vis the domestic companies. Once this principle is implicit in the very scheme of legislation which provides for the treaty provisions overriding the domestic law provisions, it cannot be open to contend that the provisions of law prescribing the higher rate of taxation for the foreign companies will have to be read down by the treaty provisions. The law is clear and unambiguous. To this extent, therefore, the treaty provisions do not override the provisions of the Income Tax Act, 1961. While the amendment was made by the Finance Act 2001, it was retrospective in effect inasmuch as it was specifically inserted with effect from 1st April 1962, i.e. the point of time when the Income Tax Act 1961 itself came into existence. On the first principles, the reason for the classificatory amendment appears to be that while income earned by the domestic companies is first taxed as corporate profits, and then with respect to taxation of dividends in the hands of the shareholder or at the point of time of distribution, the foreign companies normally (i.e. unless they make arrangements for declaration and payment within India, of the dividend payable out of its income in India) gets taxed only once. As a matter of fact, the terminology used, so far as the tax rate for companies is concerned, in the finance Acts is **'domestic company'** and **'a company other than a domestic company'**. Under section 2(22A), a domestic company is defined as "**an Indian company or any other company, which in respect of its income liable to tax in India makes prescribed arrangements for declaration and payment of dividends within India**", and Section 2(23A), a foreign company is defined as a company "**which is not a domestic company**" i.e. which has not made prescribed arrangements for declaration and payment of dividends in India. The basis of different tax rates being applied is thus not the situs of fiscal domicile or incorporation but simply the arrangement for making arrangements for the declaration of payment of dividends within India. Quite clearly, therefore, the claim of the assessee proceeds on an erroneous assumption about the reason for charging different tax rates. In sharp contrast, under section 6(3) of the Income-tax Act, 1961, a company is said to be resident in India if either it is an Indian company or if control and management of its affairs is situated wholly in India. Thus, a non-resident company if it distributes dividends in India will be treated as a domestic company and will then be subjected to the same rate of tax as a resident company declaring and distributing dividends in India. If a non-resident company can make arrangements for the declaration and payment of dividends, out of income earned in India, in India, that non-resident company will be subjected to the same rate of tax which is levied on the Indian companies. The taxation of the foreign companies at a higher rate therefore at a higher rate vis-à-vis the domestic companies is thus not considered to be discriminatory vis-à-vis the foreign companies. The sharp contrast in the definition of a foreign company under section 2(23A) vis-à-vis the definition of a non-resident company under section 6(3) makes it clear that so far as the charge of tax is concerned, the critical factor is the situs of the control and management of a company, but so far as the rate of tax is concerned, the critical factor is the arrangements for the declaration of dividends out of income earned in India. Clearly, thus, the mere fact that a company which has not made "arrangements for the declaration of dividends out of income earned in India" is charged at a higher rate of tax in India vis-à-vis domestic company, cannot be treated as discrimination on account of the fact that the enterprise belonged to the other Contracting State, i.e. Korea. That is what the clarificatory and retrospective insertion of Explanation 1 to Section 90 reflects. The plea of the assessee, therefore, must be rejected. In our considered view, given the specific provisions of law- as discussed above, there is no occasion for reading down the rate of tax, as applicable for a foreign company, just because the domestic companies are being taxed at a lower rate of taxation.*

*8. As we hold so, however, we may add that we are alive to the fact that in **Bank of Tokyo Mitsubishi** (supra), Hon'ble Calcutta High Court has, though without the benefit of discussions*

on the fact of or scope of this retrospective insertion of Explanation to Section 90, proceeded to decide the matter in favour of the assessee by observing, inter alia, as follows

> ***5. By virtue of Section 90(2) of the Act, since there is a double taxation avoidance agreement between India and Japan, the provisions of the Act shall apply to a permanent establishment of a Japanese entity in India 'to the extent they are more beneficial to that assessee.' Also, in terms of the mandate of clause 24(2) of the agreement, 'the taxation on a permanent establishment…in the other Contracting State shall not be less favourably levied…than the taxation levied on enterprises…carrying on the same activities.' By virtue of Clause 24(2) of the said agreement and the statutory recognition thereof in Section 90(2) of the Act, the permanent establishment of a Japanese entity in India could not have been charged tax at a rate higher than comparable Indian assessees carrying on the same activities.***
>
> ***6. In the instant case, it is evident from the order of the Commissioner as affirmed by the Tribunal by the impugned order of March 31, 1997 that in respect of assessment year 1991-92, the assessee herein was assessed as not being a domestic company. There is no dispute that an Indian company which was a domestic company would have been charged tax at a lower rate than the 65% imposed on the assessee by virtue of the assessee not being regarded as a domestic company. The disparity between the rates applicable to Indian and foreign companies is not in issue. However, since clause 24(2) of the agreement between the two countries provides that a permanent establishment of an entity of one country in the other country shall not be subjected to less favourable terms than an assessee carrying on similar activities in the other country, the assessee in this case was liable to pay tax at the same rate as Indian companies carrying on the same activities were liable to for the relevant assessment year. The effect of the legal fiction envisaged in Article 24(2) of the agreement was that for the purpose of applying the appropriate rate, the permanent establishment of the Japanese entity had to be regarded as a domestic company. That is the effect of the expression 'taxation…not be less favourably levied…than the taxation levied on enterprises of that other Contracting State carrying on the same activities,' in Article 24(2) of the bilateral agreement between India and Japan.***
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> ***7. The stand taken in the Tribunal's order cannot be appreciated or accepted since a similar clause in the double taxation avoidance agreement between India and the Netherlands was interpreted by the Central Board for Direct Taxes and a circular issued thereupon. The Tribunal held, in the present case, that since there was no similar circular, the benefit as available to a permanent establishment of ABN Amro Bank in India could not be extended to this assessee.***
>
> ***8. When there is no dispute that there is a double taxation avoidance agreement in place between India and the country of origin of the assessee in the present case and when such agreement contains a lucid clause as apparent from Article 24(2) thereof quoted above and when Section 90 of the Act itself recognises such an agreement and creates a special status for the relevant permanent establishments, there was no room for either the Commissioner to wait for any dictat from the high command of the CBDT or for the Tribunal to demonstrate similar servile conduct in not appropriately interpreting and giving effect to the clear words of the agreement between the two countries.***
>
> ***9. The reference is concluded by answering the first question raised as follows:-***
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> ***The Tribunal was incorrect in holding that the rate of tax applicable to the assessee was 65%. The Tribunal ought to have held that the rate applicable to the assessee was such rate as applicable to a domestic company carrying on similar activities. In the***

light of such answer, the two other questions need not be addressed since paragraph 8 of the order admitting the reference recognised that the answer to the first question would cover the entire matter.

9. Clearly, Hon'ble Calcutta High Court had no occasion to examine the impact of, or to even take note of the fact of, insertion of Explanation 1 to Section 90, which, even though inserted by the Finance Act 2001, was effective 1st April 1962. This critical development in the law was not brought to Their Lordships' notice. The assessment year involved in this case was 1991-92, i.e. an assessment year much before the insertion of Explanation 1 to Section 90, but the law, as it prevailed, in material respects, at the point of time when the matter came up for consideration before Their Lordships was exactly the same as the law at on now or for the period relevant to this appeal. Neither it was the case of the assessee that retrospectivity of the amendment was unconstitutional nor there are any observations in the judgments to read down the retrospectivity of this amendment which is specifically legislated as a retrospective amendment. It cannot, therefore, even be a reasonable justification, for any judicial forum where this judicial precedent has a binding effect, for not following the Hon'ble Calcutta High Court's judgment in the case of ***Bank of Tokyo Mitsubishi*** *(supra), on the ground that the period for consideration before Their Lordships was a pre-amendment period. Such an approach, given the amendment being admittedly retrospective in effect w.e.f. 1st April 1962, will be superfluous. Therefore, the fact that reference before Their Lordships, which was disposed of vide the judgment dated 7th August 2019 in the case of* ***Bank of Tokyo Mitsubishi*** *(supra), was for the assessment year 1991-92 and in respect of a coordinate bench's order dated 24th November 1997, would not really make a difference. While dealing with judicial precedents from non-jurisdictional High Courts, however, we may also usefully take of the observations of Hon'ble jurisdictional High Court in the case of* ***CIT v. Thane Electricity Co. Ltd. [1994] 206 ITR 727 (Bom.)]****, to the effect "****The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect****". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower forums, even outside the jurisdiction of Hon'ble non-jurisdictional High Court, on account of the persuasive effect of these decisions and on account of the concept of judicial propriety- factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of* ***ACIT v. Saurashtra Kutch Stock Exchange Ltd. [(2008) 173 Taxman 322/305 ITR 227 (SC)]*** *wherein Their Lordships have upheld the plea that "****non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record****". The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble jurisdictional High Court, and it's a conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all the situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from. While on this aspect of the matter, it is also useful to bear in mind the following observations made in a Full Bench decision of Hon'ble Andhra Pradesh High Court, in the case of* ***CIT Vs BR Constructions [(1993) 202 ITR 222 (AP-FB)]:***

29. It may be noticed that <u>precedent ceases to be a binding precedent</u>—

(i) if it is reversed or overruled by a higher court,
(ii) when it is affirmed or reversed on a different ground,
(iii) when it is inconsistent with the earlier decisions of the same rank,
(iv) when it is sub silentio, and
(v) when it is rendered per incuriam,

30. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth edn., the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

31. In Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court [1990] 3 SCC 682, the Supreme Court explained the expression 'per incuriam' thus :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam In Salmond on Jurisprudence, Twelfth edn., at page 151, the rule is stated as follows:

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

32. In Choudry Bros.' case (supra) as noticed above, the Division Bench treated the judgment in Ch. Atchaiah's case [1979] 116 ITR 675, as per incuriam on the ground that the earlier Division Bench did not notice the significant changes, the charging section 3 has undergone by the omission of the words 'or the partners of the firm or the members of the association individually'. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the Court which decided Ch. Atchaiah's case (supra). Merely because the conclusion arrived at on construing the provisions of the charging section under the 1922 Act as well as under the 1961 Act, did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

Though a judgment rendered per incuriam can be ignored even by a lower Court, yet it appears that such a course of action was not approved by the House of Lords in Cassell & Co. Ltd v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam Lord Hailsham observed: "It is not open to the Court

of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way." (p. 809)

33. It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases.

[Emphasis, by underlining, supplied by us]

10. There is no dispute that Hon'ble Calcutta High Court's decision in the case of Bank of Tokyo Mitsubishi (supra) deals with the legal position prevailing prior to the retrospective insertion of Explanation 1 to Section 90, and that the applicable statutory provisions not having been brought to the notice of Their Lordships.

11. The fact that the Bank of Tokyo Mitsubishi decision (supra) is a judgment by the Hon'ble non-jurisdictional High Court and the fact that this decision does not take into account a provision of law which was on the statute at the material point of time apart, even otherwise what really matters for the doctrine of precedents is the ratio decidendi and that must essentially take into account "statements of the principles of law applicable to the legal problems disclosed by the facts". As a corollary to this legal position, unless the relevant legal position has not come up for consideration in the process of decision-making, even though the said decision will undoubtedly settle the matter between the parties and their privies, it would appear that the decision may not have precedence value. Explaining this position, a three-judge bench of Hon'ble Supreme, in the case of ***Mavaliayi Service Cooperative Bank Ltd Vs CIT [(2021) 12 taxmann.com 161 (SC)]****, has observed as follows:*

25. An illuminating discussion is to be found in the dissenting judgment of Justice A.P. Sen in Dalbir Singh v. State of Punjab [1979] 3 SCR 1059. Since the dissenting judgment refers to a principle of general application, not refuted by the majority, it is worth setting out this part of the judgment as follows:

"With greatest respect, the majority decision in Rajendra Prasad case does not lay down any legal principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less "law declared" within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:

"(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;
(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and
(iii) judgment based on the combined effect of (i) and (ii) above."

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. <u>However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi</u>. [R.J. Walker & M.G. Walker: The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24] It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast

(Wolverhampton) Ltd. v. Haynes [LR 1959 AC 743] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

[Emphasis, by underlining, supplied by us]

12. In the case of ***Farhan A Shaikh Vs DCIT [(2021) 125 taxmann.com 253 (Bom FB)],*** *a full bench of Hon'ble jurisdictional High has thoroughly examined, in an extended and profound discussion on the subject, the theory of binding judicial precedents, and felicitously explained the mechanism of its implementation. While it is not possible, given our limited context and purpose, to reproduce the entire profound discussion on the theory of binding judicial precedents, we may refer to a couple of important observations made by the Hon'ble jurisdictional High Court. Their Lordships have, inter alia, observed that "****An issue raised not addressed or an issue that has altogether gone sub silentio cannot support a precedent****". Their Lordships have also observed as follows:*

It is one thing to say that a precedent should be followed; it is another to say what it means to follow a precedent. And what is a precedent, anyway? Before we answer that question, we need to accept that before a court applies the doctrine of stare decisis to a given case, it must first determine what that previous decision purports to establish.

Salmond defines a precedent as a judicial decision, "which contains in itself a principle. The underlying principle, which thus forms its authoritative element, is often termed the ratio decidendi." According to him, it is "the abstract ratio decidendi which alone has the force of law as regards the world at large." Professor John Chipman Gray, in his The Nature and Sources of the Law (2d ed. 1921) 261stresses that "it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter dictum."

125. Putting both the above views in perspective, Allen in his Law in the Making (2d ed. 1930) 155, observes that "any judgment of any Court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was."

[Emphasis, by underlining, supplied by us]

13. Elsewhere in the same full bench judgment, Their Lordships have put a question to themselves as to "what binds" in a judicial precedent, and observed as follows:

What Binds?

142. Then, we can adopt Arthur L. Goodhart's assertion[15] that it is not the rule of law "set forth" by the court, or the rule "enunciated", which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. Goodhart quotes from Oliphant's A Return to Stare Decisis (1927) that the predictable element in a case is "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions."

14. Viewed in the backdrop of these discussions also, and in the light of the undisputed position that retrospective insertion to Explanation to Section 90 did not come up for consideration before the Hon'ble Calcutta High Court, the Bank of Tokyo Mitsubishi judgement (supra) cannot be an authority for the proposition that dehors the insertion of Explanation (now Explanation 1) to Section 90, the levy of the income tax on the assessee company at a rate higher than the domestic companies can be regarded as less favourable charge.

15. In this backdrop, and having noted that this decision is from a non-jurisdictional High Court and without the benefit of analysis of the impact of retrospective insertion of Explanation to Section 90, in the light of specific guidance by Hon'ble jurisdictional High Court in the case of ***Thane Electricity*** *(supra), of Hon'ble Andhra Pradesh High Court's Full Bench guidance in the case of* ***B R Constructions*** *(supra), Hon'ble Supreme guidance in the case of* ***Mavaliayi Service Cooperative Bank Ltd*** *(supra), and Hon'ble jurisdictional High Court's full bench judgment in the case of* ***Farhan A Sheikh*** *(supra), we are of the considered view is that Hon'ble Calcutta High Court's judgment in the case of* ***Bank of Tokyo Mitsubishi*** *(supra), strictly speaking, does not constitute a legally binding judicial precedent to forums like benches of the Tribunal outside the jurisdiction of Hon'ble Calcutta High Court. This judgment, whether for the post-amendment period or the pre-amendment period, is without the benefit of taking note of a critical judicial development, which has not been brought to the notice of the Hon'ble Court. Undoubtedly it has the highest persuasive value, but, in the rare circumstances when admittedly the applicable legal provisions have not been brought to the notice of Their Lordships, even this persuasive value cannot be of any help to the assessee.*

16. As observed by the Hon'ble Supreme Court, in the case of ***CIT Vs Sun Engineering Works Pvt Ltd [(1992) 198 ITR 297 (SC)]****, "****The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court****. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Court must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9 this Court cautioned: "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." This decision, therefore, cannot be an authority on the implication of insertion of Explanation 1 to Section 90, because Their Lordships had no occasion to take a call on the same.*

17. We must, therefore, be rather guided by the plain words of Explanation 1 to Section 90, as we do not have the benefit of Their Lordships' guidance on the scope of this Explanation being inserted in the statute, which is the core issue requiring our adjudication. Learned counsel for the assessee has no other argument in support of the plea raised in the first ground of appeal against the applicable higher rate of tax for foreign companies.

18. In view of these discussions, as also bearing in mind the entirety of the case, we hold that the applicable rate of taxation, under the Income Tax Act 1961, for the assessee company cannot be read down in the light of the provisions of a double taxation avoidance agreement, as is the specific mandate of Explanation 1 to Section 90 or even on the first principles without the benefit of this Explanation.

19. We may also add that as for the mention, in paragraph 7 of the ***Bank of Tokyo Mitsubishi*** *decision (supra), of some clarification issued by the CBDT with respect to ABN Amro Bank, even if that be so, it is only elementary that Section 119(1)(a) does not visualize issuance of a circular "so as to require any income-tax authority to make a particular assessment or to dispose of a particular assessment in a particular manner", and, therefore, such a clarification*

will not have any bearing on cases other than ABN Amro Bank, or the legally binding force of Section 119. In any event, even going by the observations made by the Hon'ble High Court, this communication was issued prior to 24th November 1997 – much before the retrospective insertion of Explanation 1 to Section 90 took place. With the amendment in law and with this significant change in the legal position, even if there is an old circular, issued in the context of pre-amendment law, it will not hold good any longer. Nothing, therefore, turns on the said communication either, and, in any event, even this communication has not been sighted before us.

20. In view of these discussions, and for detailed reasons set out earlier in this order, we are of the considered view that the plea of the assessee is, therefore, devoid of any sustainable merits. We reject the plea of the assessee, and decline to interfere in the matter.

4. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we reject the plea of the assessee as devoid of any legally sustainable merits. We confirm the action of the Assessing Officer and the DRP and decline to interfere in the matter.

5. Ground no. 1 is thus dismissed.

6. In ground no. 2, the assessee has raised the following grievance:

Addition under section 28(iv) in relation to salary paid to expatriates

On the facts and the circumstances of the case, and in law, the Hon'ble DRP erred in directing the AO to make an addition of Rs. 2,94,14,877 to the total income of the Appellant under section 28(iv) of the Act in respect of salary paid by the Shinhan Bank - Head office to expatriates exclusively working for India operations/branch during the year under consideration.

The Appellant prays that the addition of Rs. 2,94,14,877 under section 28(iv) of the Act be deleted.

7. So far as this plea of the assessee is concerned, the material facts of the case are as follows. During the course of the assessment proceedings, the Assessing Officer inter alia noted that the assessee had claimed the deduction of Rs 2,94,14,877 in respect of the salaries paid by its employees working for its permanent establishment in India. It was noted that this amount is not reflected in its Indian books of accounts, and, as such, the related expenditure is not incurred by the Indian PE of the assessee company. The Assessing Officer was thus of the view that this deduction can not be allowed in the computation of the profits of the PE in India, for the reason that the for the purpose of computation of profits, the PE is required to be treated as hypothetically independent of its head office, and when PE does not incur the expenditure, it cannot be allowed a deduction in respect of the same. He noted the contention of the assessee to the effect that this amount represents overseas salaries of eleven expatriate employees deputed exclusively to manage its Indian operations, and the management of the Indian branch consisted of these eleven expatriates deputed from Korea. He also noted the plea of the assessee that the

salaries paid to these employees are in two parts- i.e. salaries paid in Korea and salaries paid in India, and that the entire salary, consisting of these two segments, is offered to tax in India. The Assessing Officer, however, rejected the claim for deduction on the ground that the Indian PE did not incur the expenditure, nor did the Indian PE reimburse its HO for incurring these expenses. There were certain other arguments raised by the assessee which were rejected by the Assessing Officer, but, for the reasons we will set out in a short while, it is not really necessary to deal with those aspects of the matter. When the assessee raised grievances against this stand of the Assessing Officer, before the DRP, the DRP confirmed the stand of the Assessing Officer, and held that the HO's bearing this expenditure, and not seeking its reimbursement from the PE, amounts to a benefit taxable under section 28(iv). The disallowance was thus confirmed. The assessee is aggrieved and is in appeal before us.

8. 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.

9. We find that Article 7(1) of **India Korea Double Taxation Avoidance Agreement [(1987) 165 ITR Stat 191; the then Indo-Korea tax treaty, in short]**, provides that "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. **If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment**" and article 7(2) further makes it clear that "Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, **there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment**". As Shri Agarwal, learned counsel for the assessee, rightly points out, the fiction of the hypothetical independence of a PE, as inherent in the scheme of Article 7(2), is confined to the computation of PE profits under Article 7(2). Under the scheme of Article 7(2), one has to visualize a situation of hypothetical independence of the source jurisdiction's PE vis-a-vis it's GE (i.e. the foreign company, which is also referred to a the 'general enterprise') and other PEs outside the source jurisdiction, but then such a visualization of the state of things is only to compute the profits which the source jurisdiction PE might have made if such hypothetical independence was to exist. This fiction, however, is confined to the computation of profits attributable to the permanent establishment, and, in our considered view, it does not go beyond that. There is no dispute that the assessee company has a PE in India and therefore, the assessee is taxable in India in respect of the profits attributable to the PE. While the taxability is of the foreign company and as such tax subject is the foreign company, the taxation is only in respect of the profits attributable to the Indian PE, and the tax object, as such, is the profits that the PE might be expected to make it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. The entire profit computation is thus based on this fiction. We must also remember that the taxable unit is the foreign company itself, and not the Indian PE. As observed by the Hon'ble Supreme Court in the case of **CIT Vs Hyundai Heavy Industries Co Ltd [(2007) 291 ITR 482 (SC)], "it is clear that under the Act, a taxable unit is a foreign**

company and not its branch or PE in India". It is in this light that one has to analyze the fact situation that we are dealing with. The assessee has eleven Korean expatriates working in India and running the entire show with respect to its Indian banking operations. These persons are employees of the assessee company, but they work exclusively for the Indian PE. As employees of the assessee company and working for its head office, these employees get salaries in Korea, and, in addition to that salary, when they come to India, they get a certain additional amount as compensation for working in India. While the Indian salaries of these eleven expatriates are paid in India, and shown in the books of accounts in India, and, as such duly reflected in the profit and loss account of the PE in India, so far as the salaries paid to these expatriates in Korea are concerned, admittedly these expenses are incurred by the head office, but these expenses are incurred for the benefit of the Indian PE as the related employees are working exclusively for the Indian PE. To put a question to ourselves, would it have been possible in a hypothetically independent situation that the expenses benefiting the Indian PE would have been borne by the Korean head office? The answer, in our humble understanding, is emphatically in negative. Therefore, under fiction envisaged in article 7(2), which requires Indian PE to be treated as wholly independent for the purpose of profit computation of the PE, the expenses incurred by the HO, which are exclusively for the benefit of the PE, are required to be treated as expenses relatable to the PE and, as such, taken into account in the computation of the profits attributable to the Indian PE. It is for this reason that the expenses incurred by the HO, though relatable to the PE, are allowed as a deduction in the computation of income attributable to the PE. The next question is as to what is the impact of the Indian PE not reimbursing the costs so incurred, for the benefit of the Indian PE, by the Korean HO. In our considered view it has no impact on income computation so far as PE profits are concerned, as a taxable unit is only the HO or the Korean company. Its importance, if at all, is only from the point of view of cash flow, but then a cash flow, or absence thereof, is not a critical factor from the taxation point of view since an intra-company cash flow simpliciter is tax neutral- unless it can be seen as a standalone transaction of funding. Quite contrary to the stand of the Assessing Officer, by treating non-reimbursement of expenses by the PE as a cause of action for independent income in the hands of the HO, the hypothetical fiction envisaged in article 7(2) is *de facto* negated. That is incongruous. There cannot be any purpose of expenses incurred by the HO, which are relatable to the Indian PE, being allowed as a deduction in the computation of income of the PE when non-reimbursement of that expenditure by the PE is treated as a source of income of the foreign company itself- particularly when, from the income tax perspective, the taxable unit is the foreign company and not the PE. It is also important to bear in mind the fact that, in the light of the five-member bench decision of this Tribunal, in the case of **Sumitomo Mitsui Banking Corp Vs DDIT [(2012) 19 taxmann.com 364 (SB)]**, the intra-organization transactions, as non-reimbursement of employee costs by the PE to HO, is, are tax neutral. In any case, there cannot be a benefit accruing to the Korean company when the Indian PE of the assessee company does not reimburse its Korean company, because the assessee itself is the Korean company and the transaction in question is a wholly non-business and internal transaction of the Korean company.

10. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assesse on this point. The Assesing Officer is thus directed to delete the impugned disallowance of Rs 2,94,14,877. The assessee gets the relief accordingly. As we have upheld the plea of the assessee on the short ground explained above, all other pleas of the assessee are dismissed as infructuous as of now, but these contentions shall remain open for adjudication in a fit case.

11. Ground no. 2 is thus allowed.

12. In ground no. 3, the assessee has raised the following grievance:

Calculation of deduction under section 44C of the Act

3. On the facts and the circumstances of the case, and in law, the learned AO erred in not considering the income of the overseas branches while computing the "adjusted total income" of the Appellant for the purpose of calculation of deduction under section 44C of the Act.

The Appellant prays that such interest offered to tax in India be considered for the purpose of computing deduction under section 44C of the Act.

13. In the additional ground of appeal, the assessee has raised a connected issue as follows:

Additional Ground

7. Based on the facts and circumstances of the case and in law, the learned AO be directed to allow the deduction for entire expenses incurred at the head office as is attributable to the business of the Appellant in India, and not restrict the same by applying the provisions of section 44C of the Act, on the basis that the provisions of section 44C of the Act does not apply to the Appellant in accordance with the provisions of Article 25 - "Non-Discrimination' of the Double Taxation Avoidance Agreement entered between the Government of India and Government of Korea.

14. Learned counsel for the assessee submits that in the assessee's own case, the additional ground of appeal has been admitted and sent back to the Assessing Officer for adjudication on merits. He further points out that ground no. 3 is a connected issue and as the very application of 44C has been remitted to the file of the Assessing Officer, this issue may also be remitted to the file of the Assessing Officer. We are thus urged that, in accordance with the decision in the earlier years, the ground no. 3 as also the additional ground of appeal may be remitted to the file of the Assessing Officer for fresh adjudication on merits. Learned Departmental Representative graciously leaves the matter to us.

15. We find that a coordinate bench of the Tribunal, in the assessee's own case (supra) and dealing with an earlier assessment year, has observed as follows:

42. Learned counsel for the assessee submits that the issue now being raised is a purely legal issue which could not inadvertently be raised earlier. It is pointed out in the light of NTPC Vs CIT [(1999) 229 ITR 383 (SC)], such an issue can be legitimately raised even at this stage before the Tribunal. He, however, fairly submits that as this aspect of the matter has not been examined by any of the authorities below at any stage, in all fairness, the additional ground is required to be remitted to the file of the Assessing Officer for adjudication on merits. Learned Departmental Representative fairly does not oppose the prayer so made by the learned counsel for the assesseee.

43. In view of the above discussions, as also bearing in mind the entirety of the case, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly.

44. The additional ground of appeal is thus admitted and allowed for statistical purposes.

16. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. As the ground no. 3 is on an aspect connected with the additional ground of appeal, ground no. 3 also stands remitted to the file of the Assessing Officer, along with the additional ground of appeal, for adjudication de novo after giving the assessee an opportunity of hearing, in accordance with the law and by way of a speaking order. Ordered, accordingly.

17. Ground no. 3 and the additional grounds of appeal are thus allowed for statistical purposes in the terms indicated above.

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

19. In ground no. 4, the assessee has raised the following grievance:

Transfer pricing adjustment with respect to interest paid to Head Office

4. On the facts and circumstances of the case and in law, the Hon'ble DRP erred in upholding the action of the learned Deputy Commissioner of Income-tax (Transfer Pricing) - 4(1)(1), Mumbai, ('TPO') in computing the arm's length price of interest paid on foreign currency borrowings by the Appellant from its associated enterprise (AEs') by applying London Inter-Bank Offered Rate ('LIBOR').

5. In doing so the Hon'ble DRP / TPO grossly erred in:

5.1 Failing to appreciate that the interbank borrowings in foreign currency are undertaken based on commercial market driven principles;

5.2 Disregarding the similar third party transaction undertaken by the Appellant for benchmarking the aforesaid international transaction;

5.3 Not following any particular method prescribed under section 92C(1) of the Act for benchmarking the aforesaid transaction and making an adjustment on an adhoc basis.

The Appellant prays that the aforesaid adjustment amounting to Rs. 71,94,026 be deleted.

Transfer pricing adjustment with respect to interest received from Head office

6. On the facts and circumstances of the case and in law, the AO, while giving effect to the directions of the Hon'ble DRP, erred in failing to appreciate the fact that the Appellant had made a suo-moto adjustment amounting to Rs. 17,896 in respect of interest earned on foreign currency lending from its AE and has offered the same to tax in its return of income.

The Appellant prays that the aforesaid adjustment amounting to Rs. 17,896 be deleted.

20. So far as these grievances are concerned, these grievances pertain to ALP adjustments in respect of lending and borrowing transactions that the Indian PE had with its associated enterprise, namely Shihan Bank Europe GmbH. The assessee had several short term transactions, loans extended for a period between 1 to 13 days, and loans taken for a period between 1 to 178 days. While the PE has given loans at the rates of LIBOR+ mark up, there are certain borrowings with rates less than even the LIBOR. These rates were justified on the basis of market exigencies, the amounts being transacted for extremely low period transactions, and based on the transactions that the assessee had with the independent parties. The TPO simply proceeded to apply LIBOR as the ALP, disregarding the assessee's plea that even the assessee has taken the loans, from independent parties at rates higher than LIBOR, and that LIBOR itself is the average inter-bank lending rate. The assessee is aggrieved and is in appeal before us.

21. Having heard the rival contentions and having perused the material on record, we deem it fit and proper to delete the impugned ALP adjustments for the short reason that the LIBOR, even amongst the independent banks, cannot always be the rate at which the intra-bank transactions must take place, and it cannot be open to the TPO to reject the independent party transactions, which are valid input for application of Comparable Uncontrolled Price Method (CUP), simply because the transactions are entered at a rate higher than LIBOR. Such a simplistic approach cannot meet any judicial approval. The ALP adjustment of Rs 71,94,026 in respect of taking loans at a rate higher than LIBOR is thus deleted. As regards the ALP adjustment in respect of the loans given, the amount involved is only Rs 17,896, and looking to the smallness of the amount, we treat this grievance as not pressed.

22. Ground nos. 4 and 5 and 6 are thus partly allowed in the terms indicated above.

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

Assessment year 2013-14

24. This appeal is directed against the order dated 31st January 2017 passed by the learned Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2013-14.

25. In the first ground of appeal, the assessee has raised the following grievance:

Applicable rate of tax.

On the facts and the circumstances of the case, and in law, the Hon'ble Dispute Resolution Panel - II ('DRP') erred in directing the Deputy Commissioner of Income-tax (International Taxation)- 4(2)(1), Mumbai, ('AO') to reject the Appellant's claim for the benefit of the non-discrimination clause of the India-Korea Double Taxation Avoidance Agreement ('DTAA') and taxing the Appellant's income at the rate 40% (plus surcharge and education cess) instead of at the rate applicable to a resident tax payer (i.e 30% plus surcharge and education cess).

The Appellant therefore, prays that the benefit of the Article 24 of the DTAA be granted and that its income be taxed at the rate 30% instead of 40% (plus surcharge and education cess).

26. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13, the appeal for which was heard along with this appeal, will equally apply for this assessment year as well. Vide our discussions earlier in this order, in paragraphs 3 to 5, we have rejected the said plea of the assessee. We see no reasons to take any other view of the matter for the present assessment year. Respectfully following the view so taken for the assessment year 2012-13, we reject this grievance of the assessee.

27. Ground no. 1 is thus dismissed.

28. In ground no. 2, the assessee has raised the following grievance:

Addition under section 28(iv) in relation to salary paid to expatriates

2. On the facts and the circumstances of the case, and in law, the Hon'ble DRP erred in directing the AO to make an addition of Rs. 4,30,46,611 to the total income of the Appellant under section 28(iv) of the Act in respect of salary paid by the Shinhan Bank - Head office to expatriates exclusively working for India operations/branch during the year under consideration.

The Appellant prays that the addition of Rs. 4,30,46,611 under section 28(iv) of the Act be deleted.

29. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13, appeal for which was heard along with this appeal, will equally apply for this assessment year as well. Vide our discussions earlier in this order, in paragraphs 6 to 11, we have allowed the said plea of the assessee, and held that the impugned addition under section 28(iv) is bad in law. We see no reasons to take any other view of the matter for the present assessment year. Respectfully following the view so taken for the assessment year 2012-13, we

uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned addition of Rs 4,30,46,611.

30. Ground no. 2 is thus allowed.

31. In ground no. 3, the assessee has raised the following grievance:

Calculation of deduction under section 44C of the Act

3. On the facts and the circumstances of the case, and in law, the learned AO erred in not considering the income of the overseas branches while computing the "adjusted total income" of the Appellant for the purpose of calculation of deduction under section 44C of the Act.

The Appellant prays that such interest offered to tax in India be considered for the purpose of computing deduction under section 44C of the Act.

32. In a connected grievance of the assessee, i.e. ground of appeal no. 3, which we will take up along with the above ground of appeal, the assessee has raised the following grievance:

Additional Ground

4. Based on the facts and circumstances of the case and in law, the learned AO be directed to allow the deduction for entire expenses incurred at the head office as is attributable to the business of the Appellant in India, and not restrict the same by applying the provisions of section 44C of the Act, on the basis that the provisions of section 44C of the Act does not apply to the Appellant in accordance with the provisions of Article 25 - "Non-Discrimination' of the Double Taxation Avoidance Agreement entered between the Government of India and Government of Korea.

33. We find that a coordinate bench of the Tribunal, in the assessee's own case (supra) and dealing with an earlier assessment year, has observed as follows:

42. Learned counsel for the assessee submits that the issue now being raised is a purely legal issue which could not inadvertently be raised earlier. It is pointed out in the light of NTPC Vs CIT [(1999) 229 ITR 383 (SC)], such an issue can be legitimately raised even at this stage before the Tribunal. He, however, fairly submits that as this aspect of the matter has not been examined by any of the authorities below at any stage, in all fairness, the additional ground is required to be remitted to the file of the Assessing Officer for adjudication on merits. Learned Departmental Representative fairly does not oppose the prayer so made by the learned counsel for the assesseee.

43. In view of the above discussions, as also bearing in mind the entirety of the case, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly.

44. The additional ground of appeal is thus admitted and allowed for statistical purposes.

34. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. As the ground no. 3 is on an aspect connected with the additional ground of appeal, ground no. 3 also stands remitted to the file of the Assessing Officer, along with the additional ground of appeal, for adjudication de novo after giving the assessee an opportunity of hearing, in accordance with the law and by way of a speaking order. Ordered, accordingly.

35. Ground no. 3 and the additional grounds of appeal are thus allowed for statistical purposes in the terms indicated above.

36. In the result, the appeal is partly allowed in the terms indicated above.

Assessment year 2014-15

37. This appeal filed by the assessee and cross-objections filed by the Assessing Officer are directed against the order dated 28th December 2017 passed by the learned Assessing Officer in the matter of assessment under section 143(3) r.w.s. 44C(13) of the Income Tax Act, 1961 for the assessment year 2014-15

38. In the first ground of appeal, the assessee has raised the following grievance:

1. On the facts and the circumstances of the case, and in law, the Hon'ble Dispute Resolution Panel - II ('DRP') erred in directing the Deputy Commissioner of Income-tax (International Taxation)- 4(2)(1), Mumbai, ('AO') to reject the Appellant's claim for the benefit of the non-discrimination clause of the India-Korea Double Taxation Avoidance Agreement ('DTAA') and taxing the Appellant's income at the rate 40% (plus surcharge and education cess) instead of at the rate applicable to a resident tax payer (i.e. 30% plus surcharge and education cess).

The Appellant therefore, prays that the benefit of the Article 24 of the DTAA be granted and that its income be taxed at the rate 30% instead of 40% (plus surcharge and education cess).

39. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13, the appeal for which was heard along with this appeal, will equally apply for this assessment year as well. Vide our discussions earlier in this order, in paragraphs 3 to 5, we have rejected the said plea of the assessee. We see no reasons to take any other view of the matter for

the present assessment year. Respectfully following the view so taken for the assessment year 2012-13, we reject this grievance of the assessee.

40. Ground no. 1 is thus dismissed.

41. In ground no. 2, the assessee has raised the following grievance:

> **2. On the facts and the circumstances of the case, and in law, the Hon'ble DRP erred in directing the AO to make an addition of Rs. 3,70,52,544 to the total income of the Appellant under section 28(iv) of the Act in respect of salary paid by the Shinhan Bank - Head office to expatriates exclusively working for India operations/branch during the year under consideration.**
>
> **The Appellant prays that the addition of Rs. 3,70,52,544 under section 28(iv) of the Act be deleted..**

42. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13, the appeal for which was heard along with this appeal, will equally apply for this assessment year as well. Vide our discussions earlier in this order, in paragraphs 6 to 11, we have allowed the said plea of the assessee, and held that the impugned addition under section 28(iv) is bad in law. We see no reasons to take any other view of the matter for the present assessment year. Respectfully following the view so taken for the assessment year 2012-13, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned addition of Rs 4,30,46,611.

43. Ground no. 2 is thus allowed.

44. In ground no. 3, the assessee raised the following grievance:

> **On the facts and circumstance of the case and in law, the Hon'ble DRP erred in directing the AO to make an addition of Rs. 43,61,670 to the total income of the Appellant, treating the interest paid by Indian branch of the Bank to its overseas branches as taxable in the hands of the Indian branch.**

45. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by a decision of the coordinate bench in the assessee's own case for the assessment year 2007-08 *(supra)*, wherein the coordinate bench has, inter alia, observed as follows:

> ***31. The next question is whether the said interest of Rs 2,34,51,979 paid by the PE to GE (i.e. PE-GE interest) can be taxed in the hands of the assessee company as income of the GE, as has been done by the Assessing Officer. The Assessing Officer***

has brought this interest income, paid by the permanent establishment to its head office and which is allowed as a deduction in the computation of profits attributable to the PE, to tax under Article 12 of the then India Korea tax treaty.

32. The approach so adopted by the revenue authorities, on the first principles, is simply contrary to the scheme of the tax treaties. The fiction of hypothetical independence of a PE vis-a-vis it's GE and other PEs outside the source jurisdiction is confined to the computation of profits attributable to the permanent establishment and, in our considered view, it does not go beyond that, such as for the purpose of computing profits of the GE. Article 7(2) of the then Indo-Korea tax treaty specifically provides that when an enterprise of a treaty partner country carries out business through a permanent establishment, " there shall be in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment" This fiction of hypothetical independence comes into play for the limited purposes of computing profits attributable to permanent establishment only and is set out under the specific provision, dealing with the computation of such profits, in the tax treaties, including in the then Indo-Korean DTAA. There is nothing, therefore, to warrant or justify the application of the same principle in the computation of GE profits as well. Clearly, therefore, the fiction of hypothetical independence is for the limited purpose of profit attribution to the permanent establishment.

33. To that extent, this approach departs from the separate accounting principle in the sense that the GE, to which PE belongs, is not seen in isolation with it's PE, and a charge, in respect of PE - GE transactions, on the PE profits is not treated as income in the hands of the GE.

34. As far as the treaty situations, as in the case of the then Indo-Korea tax treaty, are concerned, once an enterprise is found to be carrying on the related business or profession through a permanent establishment or a fixed base in the other contracting state, the scheme of taxability on the gross basis, as implicit in the taxation of dividend, interest, royalties and fees for technical services, and other incomes, under the tax treaties, comes to an end. Article 11(5) specifically provides that the provisions of Article 12(1),(2) and (3) will not come into play "if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein…….and the debt-claims in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base". There is no occasion thus to additionally bring to tax the interest income received by the head office. In any event, the PE GE interest is allowed as a deduction, in the computation of the profit of the PE, and the same addition being made as independent income in the hands of the GE, will render the deduction meaningless.

35. The incomes, so relatable to the PE, are then taxable on the net basis as the PE income in the sense when these are earned from third parties through the PE, these receipts constitute incomes attributable to the PE, and when these receipts are by the enterprise from the PE itself, the entire income, generated by the business with the help of the inputs for which payments are made by the PE to the HO, is taxed as income attributable to the income of the PE.

36. It is also important to bear in mind the fact that a deduction, in respect of an internal charge, as is the inherent nature of intra-GE interest payment, 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 contemporary international tax scholar, 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]", made the following observations:

"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, <u>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</u> and, correspondingly, a smaller amount of foreign income in respect of which the residence state needs to provide the relief I must admit that my attempts to get these views across have met with varying levels of success- particularly students with an accounting background tend to be on the sceptical side……..".

[Emphasis, by underlining, supplied by us]

37. We are in considered agreement with the views so expressed by the eminent international tax scholar. Clearly, the principles for determining the profits of the PE and GE are not the same, and the fiction of hypothetical independence does not extend to the computation of profit of the GE. As regards the GE-PE interest being treated as interest income of the assessee, arising in the source jurisdiction, i.e. India, can only be taxed under Article 12 but then as provided in article 12 (5), the charging provisions of Article 12(1) and (2), which deal with taxability of interest in the source state, will not apply "if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein……and the debt-claims in respect of which the interest is paid is effectively connected with such permanent establishment" and that in such a case the provisions of Article 7, which deal with taxability of profits of the permanent establishment alone will apply. In plain words, when interest income can be said to so arise to the GE, the taxability under article 12 will not apply, and it will remain restricted to the taxability of profits attributable to the permanent establishment under Article 7. The profits attributable to the PE have anyway been offered to tax.

38. We may also add that in the case of Sumitomo Mitsui Banking Corpn. (supra),a five-member bench has held that interest payment by PE to the GE is a payment by a foreign company's Indian PE to the foreign company itself, it cannot give rise to any income, in the hands of the GE, which is chargeable to tax under the Income Tax Act, 1961 itself, and, as such, treaty provisions are not really relevant. We humbly bow before the conclusions arrived at in this judicial precedent. The theory of tax neutrality for intra-GE payments within an entity, even in the context of cross-border PE situations, is somewhat unique to our tax jurisprudence, but even without the benefit of this theory, the same conclusions are arrived at so far as the taxability of PE-GE

interest is concerned. The situation in the present case is somewhat peculiar because of the assessees' stand of accepting the taxability in respect of interest received from the head office, i.e. GE-PE interest, the tax neutrality theory for payments within the entity is, even if partially, abandoned. With the benefit of the Sumitomo decision (supra), one can understand the provisions of the tax treaty being invoked for examining the tax treatment of the interest payments by the PE, and the provisions of the domestic law being invoked for the interest receipts by the PE, but then even vis-à-vis the taxability of GE-PE interest by the PE having been accepted on the treaty principles, it may perhaps be too much to contend that the taxability of PE-GE interest receipt is required to be considered on the basis of the domestic law provisions, but even this discussion seems entirely academic in the light of our finding, as above, that an internal charge for the PE profit attribution does not amount to taxable income in the hands of the GE anyway. Be that as it may, having decided this aspect of the matter on the treaty principles so far as taxability of PE-GE interest in the hands of the GE is concerned, we need not examine that aspect any further. In our considered view, for the detailed reasons set out in this order, dehors this theory of tax neutrality for intra-GE transactions also, this PE-GE interest is not taxable in the hands of the assessee. Of course, we have reached the same destination by following a different path but then as long as reach the same destination, our traversing through a different path does not really matter at all.

39. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee that the interest of Rs 2,34,51,979 paid by the PE to the GE cannot be brought to tax in the hands of the assessee company, even though it is to be allowed as a deduction in the computation of profits attributable to the permanent establishment. The Assessing Officer is directed to grant the relief accordingly. The assessee has already offered to tax the interest income received from its head office, and there is no surviving dispute in respect of the same.

46. We see no reasons to take any other view of the matter than the view so taken by us in assessee's own case for a preceding assessment year. Respectfully following the same, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned addition of Rs 4,36,167. The assessee gets the relief accordingly.

47. Ground no. 3 is thus allowed.

48. In ground no. 4, the assessee has raised the following grievane:

On the facts and circumstances of the case and in law, the Hon'ble DRP erred in upholding the action of the learned Additional Commissioner of Income-tax Transfer Pricing - 4(1), Mumbai, (TPO') in computing the arm's length price of interest paid on foreign currency borrowings by the Appellant from its associated enterprise ('AEs') by applying London Inter-Bank Offered Rate ('LIBOR') instead of interest rate (i.e., LIBOR plus margin) determined by the assessee.

In doing so the Hon'ble DRP / TPO grossly erred in:

a) Failing to appreciate that the interbank borrowings in foreign currency are undertaken based on commercial market driven principles;

b) Disregarding the similar third party transaction undertaken by the Appellant for benchmarking the aforesaid international transaction;

c) Not following any particular method prescribed under section 92C(1) of the Act for benchmarking the aforesaid transaction and making an adjustment on an adhoc basis.

The Appellant prays that the book value of the tested transactions be held to be the arm's length price of the transactions and aforesaid adjustment amounting to Rs. 29,31,131 be deleted.

49. Learned representatives fairly agree that an identical issue has come up for our consideration in a preceding assessment year, i.e. 2012-13, and whatever we decide on the appeal for the assessment year 2012-13, will apply mutatis mutandis for this assessment year as well. In the present year, however, the ALP adjustment is only in respect of the loans given, and not loans received from the AE. Vide our order in paragraphs 19-22 earlier, we have upheld this plea of the assessee. We have no reasons to take any other view of the matter than the view so taken for the assessment year 2012-13. Respectfully following the same, we uphold the plea of the assesse, and direct the Assessing Officer to delete the impugned ALP adjustment of Rs. 29,31,131. The assessee gets the relief accordingly.

50. Ground no. 4 is thus allowed.

51. The assessee has also raised an additional ground of appeal which is as follows:

Additional Ground

Based on the facts and circumstances of the case and in law, the learned AO be directed to allow the deduction for entire expenses incurred at the head office as is attributable to the business of the Appellant in India, and not restrict the same by applying the provisions of section 44C of the Act, on the basis that the provisions of section 44C of the Act does not apply to the Appellant in accordance with the provisions of Article 25 - "Non-Discrimination' of the Double Taxation Avoidance Agreement entered between the Government of India and Government of Korea.

52. We find that a coordinate bench of the Tribunal, in the assessee's own case (supra) and dealing with an earlier assessment year, has observed as follows:

42. Learned counsel for the assessee submits that the issue now being raised is a purely legal issue which could not inadvertently be raised earlier. It is pointed out in the light of NTPC Vs CIT [(1999) 229 ITR 383 (SC)], such an issue can be

legitimately raised even at this stage before the Tribunal. He, however, fairly submits that as this aspect of the matter has not been examined by any of the authorities below at any stage, in all fairness, the additional ground is required to be remitted to the file of the Assessing Officer for adjudication on merits. Learned Departmental Representative fairly does not oppose the prayer so made by the learned counsel for the assesseee.

43. In view of the above discussions, as also bearing in mind the entirety of the case, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly.

44. The additional ground of appeal is thus admitted and allowed for statistical purposes.

53. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Accordingly, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly

54. The additional ground of appeal is thus admitted and remitted to the file of the Assessing Officer for adjudication on merits.

55. In the result, the appeal is allowed.

56. In the cross-objections filed by the Assessing Officer, the following grievances are raised:

Cross objection No. 1- On disallowance of Interest paid to Head office:-

(a) If the decision of Special Bench in the case of Sumitomo Mitsui Banking Corporation 136 ITD 66 (Mum) (SB) holding that the interest received by Head office from its branch in India was covered by the principles of mutuality is sought to be applied by assessee, then the interest expenditure incurred by the branch should be disallowed u/s 14A in view of the decision of Hon'ble ITAT Mumbai in the case of Oman International Bank SAOG 35 CCH 207 Mum Trib.

(b) The Special bench having held that the interest income earned by HO is covered by principles of mutuality, hence not taxable under the Act, then option of claiming the interest expenditure under the DTAA cannot be exercised n respect of the same transaction in view of the decision Hon'ble ITAT in Dresdner Bank 108 ITD 375 (mum) wherein the ITAT in para 78 has held that once the assessee accepts applicability of Act for one purpose, then it cannot go back to seek relief under the DTAA in respect of some other item from taxability under the Act.

(c) By holding the interest received by HO from BO to be not taxable under the Act being covered by mutuality and at the same time allowing the deduction of very same interest while computing income of the BO under the DTAA, there is a manifest absurdity where in effect, the taxability of income will stand shifted from India to overseas, and the deductibility of related expenditure will stand shifted

from overseas, and the deductibility of income will stand shifted from India to overseas, and the deductibility of related expenditure will stand shifted from overseas to India, which is neither intended under the Act nor under the scheme of attribution of income between Non-resident Head office and branch office under the DTAA or the Act.

Cross objection No. 2- On applicability of principles of mutuality on payment of interest by BO to HO:-

(a) Without prejudice to above objections, if the decision of Special bench (supra)is sought to be applied by the assessee, the ratio of decision of Supreme Court in case of Bangalore Club Ltd. 350 IT 509 (SC) rendered subsequently to the special Bench decision, be applied as per which what is exempt under principle of mutuality is the surplus from mutual activity and not profits out of business activity with third parties. In the instant case, the source of interest earned by HO is out of the funds place by BO with third parties which are commercial transactions not limited amongst the HO and BO but extended to third parties also. Hence as per ratio of Bangalore Club Ltd. (supra), the privity of mutuality is ruptured and the commercial relationship is established between BO and HO.

(b) The application of principal of mutuality on transactions between BO and HO of a nonresident will defeat the principles of attribution of profits of a non-resident between operations carried in India and outside India, as enshrined under the DTAA and also recognized in Explanation 1 of section 9(i), 44C, 80HHC(2)(b) and Section 92(1)of the Income Tax Act.

57. Learned representatives fairly agree that these issues are covered, against the assessee, by decisions of the coordinate benches for the assessment year 2007-08 and 2008-09. Copies of these decisions were placed before. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer.

58. We see no reasons to take any other view of the matter than the view so taken by us in the assessee's own cases for the preceding assessment years. Respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

59. In the result, the cross-objection is dismissed.

60. To sum up, while the appeal of the assessee is partly allowed, the cross-objection filed by the Assessing Officer is dismissed.

Assessment year 2015-16

61. This appeal filed by the assessee and cross-objections filed by the Assessing Officer are directed against the order dated 23rd October 2018 passed by the learned Assessing Officer in the matter of assessment under section 143(3) r.w.s. 44C(13) of the Income Tax Act, 1961 for the assessment year 2015-16

62. In the first ground of appeal, the assessee has raised the following grievance:

> **On the facts and the circumstances of the case, and in law, the Hon'ble Dispute Resolution Panel - II ('DRP') erred in directing the Deputy Commissioner of Income-tax (International Taxation)- 4(2)(1), Mumbai, ('AO') to reject the Appellant's claim for the benefit of the non-discrimination clause of the India-Korea Double Taxation Avoidance Agreement ('DTAA') and taxing the Appellant's income at the rate 40% (plus surcharge and education cess) instead of at the rate applicable to a resident tax payer (i.e. 30% plus surcharge and education cess).**
>
> **The Appellant therefore, prays that the benefit of the Article 24 of the DTAA be granted and that its income be taxed at the rate 30% instead of 40% (plus surcharge and education cess).**

63. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13, the appeal for which was heard along with this appeal, will equally apply for this assessment year as well. Vide our discussions earlier in this order, in paragraphs 3 to 5, we have rejected the said plea of the assessee. We see no reasons to take any other view of the matter for the present assessment year. Respectfully following the view so taken for the assessment year 2012-13, we reject this grievance of the assessee.

64. Ground no. 1 is thus dismissed.

65. In ground no. 2, the assessee has raised the following grievance:

> **On the facts and circumstances of the case and in law, the Hon'ble DRP erred in directing the AO to make an addition of Rs. 1,16,50,204 to the total income of the Appellant, treating the interest paid by Indian branch of the Bank to its overseas branches as taxable in the hands of the Indian branch.**

66. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by a decision of the coordinate bench in the assessee's own case for the assessment year 2007-08 *(supra)*, wherein the coordinate bench has, inter alia, observed as follows:

31. The next question is whether the said interest of Rs 2,34,51,979 paid by the PE to GE (i.e. PE-GE interest) can be taxed in the hands of the assessee company as income of the GE, as has been done by the Assessing Officer. The Assessing Officer has brought this interest income, paid by the permanent establishment to its head office and which is allowed as a deduction in the computation of profits attributable to the PE, to tax under Article 12 of the then India Korea tax treaty.

32. The approach so adopted by the revenue authorities, on the first principles, is simply contrary to the scheme of the tax treaties. The fiction of hypothetical independence of a PE vis-a-vis it's GE and other PEs outside the source jurisdiction is confined to the computation of profits attributable to the permanent establishment and, in our considered view, it does not go beyond that, such as for the purpose of computing profits of the GE. Article 7(2) of the then Indo-Korea tax treaty specifically provides that when an enterprise of a treaty partner country carries out business through a permanent establishment, " there shall be in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment" This fiction of hypothetical independence comes into play for the limited purposes of computing profits attributable to permanent establishment only and is set out under the specific provision, dealing with the computation of such profits, in the tax treaties, including in the then Indo-Korean DTAA. There is nothing, therefore, to warrant or justify the application of the same principle in the computation of GE profits as well. Clearly, therefore, the fiction of hypothetical independence is for the limited purpose of profit attribution to the permanent establishment.

33. To that extent, this approach departs from the separate accounting principle in the sense that the GE, to which PE belongs, is not seen in isolation with it's PE, and a charge, in respect of PE - GE transactions, on the PE profits is not treated as income in the hands of the GE.

34. As far as the treaty situations, as in the case of the then Indo-Korea tax treaty, are concerned, once an enterprise is found to be carrying on the related business or profession through a permanent establishment or a fixed base in the other contracting state, the scheme of taxability on the gross basis, as implicit in the taxation of dividend, interest, royalties and fees for technical services, and other incomes, under the tax treaties, comes to an end. Article 11(5) specifically provides that the provisions of Article 12(1),(2) and (3) will not come into play "if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein…….and the debt-claims in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base". There is no occasion thus to additionally bring to tax the interest income received by the head office. In any event, the PE GE interest is allowed as a deduction, in the computation of the profit of the PE, and the same addition being made as independent income in the hands of the GE, will render the deduction meaningless.

35. The incomes, so relatable to the PE, are then taxable on the net basis as the PE income in the sense when these are earned from third parties through the PE, these receipts constitute incomes attributable to the PE, and when these receipts are by the

enterprise from the PE itself, the entire income, generated by the business with the help of the inputs for which payments are made by the PE to the HO, is taxed as income attributable to the income of the PE.

36. It is also important to bear in mind the fact that a deduction, in respect of an internal charge, as is the inherent nature of intra-GE interest payment, 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 contemporary international tax scholar, 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]", made the following observations:

"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, <u>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</u> and, correspondingly, a smaller amount of foreign income in respect of which the residence state needs to provide the relief I must admit that my attempts to get these views across have met with varying levels of success- particularly students with an accounting background tend to be on the sceptical side……..".

[Emphasis, by underlining, supplied by us]

37. We are in considered agreement with the views so expressed by the eminent international tax scholar. Clearly, the principles for determining the profits of the PE and GE are not the same, and the fiction of hypothetical independence does not extend to the computation of profit of the GE. As regards the GE-PE interest being treated as interest income of the assessee, arising in the source jurisdiction, i.e. India, can only be taxed under Article 12 but then as provided in article 12 (5), the charging provisions of Article 12(1) and (2), which deal with taxability of interest in the source state, will not apply "if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein……and the debt-claims in respect of which the interest is paid is effectively connected with such permanent establishment" and that in such a case the provisions of Article 7, which deal with taxability of profits of the permanent establishment alone will apply. In plain words, when interest income can be said to so arise to the GE, the taxability under article 12 will not apply, and it will remain restricted to the taxability of profits attributable to the permanent establishment under Article 7. The profits attributable to the PE have anyway been offered to tax.

38. We may also add that in the case of Sumitomo Mitsui Banking Corpn. (supra),a five-member bench has held that interest payment by PE to the GE is a payment by a foreign company's Indian PE to the foreign company itself, it cannot give rise to any income, in the hands of the GE, which is chargeable to tax under the Income Tax Act, 1961 itself, and, as such, treaty provisions are not really relevant. We humbly bow

before the conclusions arrived at in this judicial precedent. The theory of tax neutrality for intra-GE payments within an entity, even in the context of cross-border PE situations, is somewhat unique to our tax jurisprudence, but even without the benefit of this theory, the same conclusions are arrived at so far as the taxability of PE-GE interest is concerned. The situation in the present case is somewhat peculiar because of the assessees' stand of accepting the taxability in respect of interest received from the head office, i.e. GE-PE interest, the tax neutrality theory for payments within the entity is, even if partially, abandoned. With the benefit of the Sumitomo decision (supra), one can understand the provisions of the tax treaty being invoked for examining the tax treatment of the interest payments by the PE, and the provisions of the domestic law being invoked for the interest receipts by the PE, but then even vis-à-vis the taxability of GE-PE interest by the PE having been accepted on the treaty principles, it may perhaps be too much to contend that the taxability of PE-GE interest receipt is required to be considered on the basis of the domestic law provisions, but even this discussion seems entirely academic in the light of our finding, as above, that an internal charge for the PE profit attribution does not amount to taxable income in the hands of the GE anyway. Be that as it may, having decided this aspect of the matter on the treaty principles so far as taxability of PE-GE interest in the hands of the GE is concerned, we need not examine that aspect any further. In our considered view, for the detailed reasons set out in this order, dehors this theory of tax neutrality for intra-GE transactions also, this PE-GE interest is not taxable in the hands of the assessee. Of course, we have reached the same destination by following a different path but then as long as reach the same destination, our traversing through a different path does not really matter at all.

39. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee that the interest of Rs 2,34,51,979 paid by the PE to the GE cannot be brought to tax in the hands of the assessee company, even though it is to be allowed as a deduction in the computation of profits attributable to the permanent establishment. The Assessing Officer is directed to grant the relief accordingly. The assessee has already offered to tax the interest income received from its head office, and there is no surviving dispute in respect of the same.

67. We see no reasons to take any other view of the matter than the view so taken by us in the assessee's own case for a preceding assessment year. Respectfully following the same, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned addition of Rs 1,16,50,204. The assessee gets the relief accordingly.

68. Ground no. 2 is thus allowed.

69. The assessee has also raised an additional ground of appeal which is as follows:

Additional Ground

Based on the facts and circumstances of the case and in law, the learned AO be directed to allow the deduction for entire expenses incurred at the head office as is attributable to the business of the Appellant in India, and not restrict the same by applying the

provisions of section 44C of the Act, on the basis that the provisions of section 44C of the Act does not apply to the Appellant in accordance with the provisions of Article 25 - "Non-Discrimination' of the Double Taxation Avoidance Agreement entered between the Government of India and Government of Korea.

70. We find that a coordinate bench of the Tribunal, in the assessee's own case (supra) and dealing with an earlier assessment year, has observed as follows:

> **42. Learned counsel for the assessee submits that the issue now being raised is a purely legal issue which could not inadvertently be raised earlier. It is pointed out in the light of NTPC Vs CIT [(1999) 229 ITR 383 (SC)], such an issue can be legitimately raised even at this stage before the Tribunal. He, however, fairly submits that as this aspect of the matter has not been examined by any of the authorities below at any stage, in all fairness, the additional ground is required to be remitted to the file of the Assessing Officer for adjudication on merits. Learned Departmental Representative fairly does not oppose the prayer so made by the learned counsel for the assesseee.**
>
> **43. In view of the above discussions, as also bearing in mind the entirety of the case, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly.**
>
> **44. The additional ground of appeal is thus admitted and allowed for statistical purposes.**

71. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Accordingly, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly

72. The additional ground of appeal is thus admitted and remitted to the file of the Assessing Officer for adjudication on merits.

73. In the result, the appeal is allowed.

74. In the cross-objections filed by the Assessing Officer, the following grievances are raised:

Cross objection No. 1- On disallowance of Interest paid to Head office:-

(a) If the decision of Special Bench in the case of Sumitomo Mitsui Banking Corporation 136 ITD 66 (Mum) (SB) holding that the interest received by Head office from its branch in India was covered by the principles of mutuality is sought to be applied by assessee, then the interest expenditure incurred by the branch should be disallowed u/s 14A in view of the decision of Hon'ble ITAT Mumbai in the case of Oman International Bank SAOG 35 CCH 207 Mum Trib.

(b) The Special bench having held that the interest income earned by HO is covered by principles of mutuality, hence not taxable under the Act, then option of claiming the interest expenditure under the DTAA cannot be exercised n respect of the same transaction in view of the decision Hon'ble ITAT in Dresdner Bank 108 ITD 375 (mum) wherein the ITAT in para 78 has held that once the assessee accepts applicability of Act for one purpose, then it cannot go back to seek relief under the DTAA in respect of some other item from taxability under the Act.

(c) By holding the interest received by HO from BO to be not taxable under the Act being covered by mutuality and at the same time allowing the deduction of very same interest while computing income of the BO under the DTAA, there is a manifest absurdity where in effect, the taxability of income will stand shifted from India to overseas, and the deductibility of related expenditure will stand shifted from overseas, and the deductibility of income will stand shifted from India to overseas, and the deductibility of related expenditure will stand shifted from overseas to India, which is neither intended under the Act nor under the scheme of attribution of income between Non-resident Head office and branch office under the DTAA or the Act.

Cross objection No. 2- On applicability of principles of mutuality on payment of interest by BO to HO:-

(a) Without prejudice to above objections, if the decision of Special bench (supra)is sought to be applied by the assessee, the ratio of decision of Supreme Court in case of Bangalore Club Ltd. 350 IT 509 (SC) rendered subsequently to the special Bench decision, be applied as per which what is exempt under principle of mutuality is the surplus from mutual activity and not profits out of business activity with third parties. In the instant case, the source of interest earned by HO is out of the funds place by BO with third parties which are commercial transactions not limited amongst the HO and BO but extended to third parties also. Hence as per ratio of Bangalore Club Ltd. (supra), the privity of mutuality is ruptured and the commercial relationship is established between BO and HO.

(b) The application of principle of mutuality on transactions between BO and HO of a nonresident will defeat the principles of attribution of profits of a non-resident between operations carried in India and outside India, as enshrined under the DTAA and also recognized in Explanation 1 of section 9(i), 44C, 80HHC(2)(b) and Section 92(1)of the Income Tax Act.

75. Learned representatives fairly agree that these issues are covered, against the assessee, by decisions of the coordinate benches for the assessment year 2007-08 and 2008-09. Copies of

these decisions were placed before. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer.

76. We see no reasons to take any other view of the matter than the view so taken by us in the assessee's own cases for the preceding assessment years. Respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

77. In the result, the cross-objection is dismissed.

78. To sum up, while the appeal of the assessee is partly allowed, the cross-objection filed by the Assessing Officer is dismissed.

Pronounced in the open court today on the 09th day of September, 2022.

Sd/-	***Sd/-***
Sandeep S Karhail	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 09th day of November, 2022

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

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai