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

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.919/Mum/2023
(Assessment year 2016-17)

BNP PARIBAS 1, NORTH AVENUE MAKE MAXITY BANDRA KURLA COMPLEX BANDRA EAST MUMBAI 400 051 **PAN : AAACB4868Q**	vs	Assistant Commissioner of Income-tax (International Taxation) – Circle 1(3)(1), Mumbai Room No.1810A, 18th Floor Air India Building Nariman Point, Mumbai-400 021
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Farrokh Irani
Department represented by	Shri Sandeep Raj (CIT-DR)

Date of hearing	09-08-2023
Date of pronouncement	18-08-2023

O R D E R

PER : MS PADMAVATHY S. (AM)

This appeal is against the final order of assessment passed under section 147 read with section 144C(13) by the Assistant Commissioner of Income-tax, Circle 1(3)(1), Mumbai dated 20/01/2023 for A.Y. 2016-17.

2. The assessee is a commercial bank having its head office in France. The assessee is having 8 branches in India and is involved in normal banking activities including

financing of foreign trade and foreign exchange transactions. The assessee filed the return of income for A.Y. 2016-17 on 30/11/2016 declaring total income of Rs.705,48,99,620/-. The Assessing Officer noticed from the return of income filed by the assessee

(i) That the assessee has considered the rate of tax applicable to Indian companies carrying on similar business instead of the rate applicable to non-residents and that this issue when contended has been held in favour of the Revenue by the ITAT in the case of the assessee for A.Y. 2004-05, 2008-09, 2009-10 & 2010-11.

(ii) That the data processing fees to the Singapore branch paid by the assessee for Rs.44,56,19,985 was taxed as FTS in the earlier assessment years and that on this issue, against the order of ITAT, the department is in appeal before the Hon'ble High Court.

(iii) That the assessee paid interest of Rs.7,07,97,939/- to the head office and other overseas branches which had not been offered to tax and that the issue was held in favour of the assessee by the ITAT against which the Revenue is in appeal before the High Court.

The Assessing Officer accordingly reopened the assessment as per Explanation 2(a) to section 147. The Assessing Officer following the earlier orders made additions towards all the above 3 issues. The assessee filed its objections before the DRP and the Ld.DRP upheld the disallowance / additions made by the Assessing Officer. The assessee is in appeal before the Tribunal against the final order of assessment passed by the Assessing Officer pursuant to the directions of the DRP.

The assessee raised the following grounds of appeal:-

1. *The learned AO has erred in initiating re-assessment proceedings for the subject AY under section 147 of the Act.*

   Without prejudice to Ground 1, the learned AO has erred on the following grounds:

2. The learned AO has erred in not accepting the claim that the rate of tax applicable to domestic companies and/ or co-operative banks for AY 2016-17 is also applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India - France tax treaty.

3. The learned AO has erred in subjecting to tax, the data processing fees paid by Indian branch offices amounting to Rs 42,43,99,986 (net of proposed deduction of margin on data processing fee of Rs 2,12,19,999) of the Appellant to its Singapore branch, as income of the Appellant.

4. The learned AO has erred in holding that interest payable/ paid by the Indian branch offices of the Appellant to the head office and its other overseas branches amounting to Rs 7,07,97,939 is chargeable to tax.

5. The learned AO has erred in initiating penalty proceedings under section 27 l(l)(c) of the Act.

6. The learned AO has erred in granting short credit of taxes deducted at source (IDS) amounting to Rs 2,14,694

7. The learned AO has erred in computing an incorrect amount of interest leviable under section 234B of the Act.

8. The learned AO has erred in computing an incorrect amount of interest leviable under section 234C of the Act.

9. The learned AO has erred in levying interest under section 234D of the Act."

3. During the course of hearing, the Ld.AR submitted that ground 1 is not pressed, and accordingly, the same is dismissed as not pressed.

Rate of Tax (Ground No.2)

4. The contention of the assessee is that rate of tax applicable to domestic companies is also applicable to assessee company. The Ld.DRP has followed the

directions in assessee's own case for earlier assessment years and dismissed the objections. The Ld.AR fairly conceded that the issue is consistently ruled against the assessee by the co-ordinate bench of the Tribunal for the preceding assessment years. The Ld.DR on the other hand relied on the order of coordinate bench in earlier assessment years.

5. We notice that the issue has been held against the assessee consistently by the co-ordinate bench of the Tribunal. The relevant observations of the latest order of the Tribunal for A.Y. 2018-19 in ITA No.1670/Mum/2022 dated 24/01/2023 are as under:-

"7. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in BNP Paribas vs DCIT, in ITA no.7458/Mum/2018, vide order dated 04/01/2021, for the assessment year 2014-15, decided a similar issue against the assessee by following the judicial precedents in assessee's own case. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

"10. We have perused the various orders of the coordinate benches of the Tribunal in context of the aforesaid issue under consideration and are persuaded to subscribe to the claim of the Id. A.R that the aforesaid issue had consistently been decided by the coordinate benches against the assessee. On a perusal of a recent order of the Tribunal passed in the assessee's own case for A.Y, 2013-14 in ITA No. 552/Mum/2018, dated 22.04.2019, we find, that the Tribunal by relying on its earlier order for AY. 1996-97 in ITA No. 2760/Mum/2008, dated 28.08.2013 had therein concluded that the tax levied at a higher rate in the case of a foreign company is not to be regarded as a violation of the non-discrimination clause. For the sake of clarity the view taken by the Tribunal in context of the aforesaid issue is reproduced as under:

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

4.The third issue is relating to tax rate. The assessee has submitted that the tax levied at higher rate in the case of foreign companies is discriminatory in nature and, accordingly, relief has been sought on this account. The claim has been rejected by the authorities below.

4.1 We have heard both the parties in the matter. We find that this issue has already been examined by the Tribunal in the case of M/s BNP Paribas,

decided in ITA Nos, 4601 & 4602/M/ 2004,vide order dated 1-7-2013. In that case also the tax rate applied in the case of the assessee, a foreign company was 48% compared to 38% applied in case of domestic companies. The assessee had argued that it was discriminatory and not in accordance with law Reference was made to non-discrimination clause in the Treaty, as per which there should not be any discrimination between the domestic and the non-resident company. The Tribunal, however, referred to the Explanation in the Section 90, inserted in the IT Act with retrospective effect from 01-04-1962 as per which the higher tax rate in case of foreign company, should not be regarded as violation of nondiscrimination clause. The Tribunal also referred to the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. J.K. Synthetics The Tribunal accordingly, rejected the ground raised by the assessee. The facts in the present appeal are identical and, therefore, respectfully following the decision of the Tribunal in the case of M/s BNP Paribas(supra), we dismiss this ground raised by the assessee." Following the same, we uphold the order of the Ld. CIT(A) and dismiss the 1 ground of appeal. As the facts and the issue in the present appeal of the assessee remains the same, therefore, we respectfully follow the aforesaid order of the Tribunal. Accordingly, the Ground of appeal No. 1 is dismissed." 8. Thus, from the above, it is evident that this issue is recurring in nature and has been decided against the assessee by the coordinate bench of the Tribunal in preceding assessment years. Therefore, respectfully following the decision of the coordinate bench of the Tribunal cited supra, ground no.1 raised in assessee's appeal is dismissed. "

8. Thus, from the above, it is evident that this issue is recurring in nature and has been decided against the assessee by the coordinate bench of the Tribunal in preceding assessment years. Therefore, respectfully following the decision of the coordinate bench of the Tribunal cited supra, ground no.1 raised in assessee's appeal is dismissed.

6. This issue is recurring in nature as observed by the coordinate bench and that the same is decided against the assessee by the coordinate bench consistently. Therefore, respectfully following the decision of the coordinate bench as cited above, this ground of the assessee is dismissed.

Ground 2: Taxability of Data Processing Fees (FTS) paid by the assessee to its overseas branch

8. During the financial year ended March, 2015, the assessee has paid an amount of Rs.44,56,19,985/- towards data processing fees for the services rendered by its Singapore Branch. In this respect taxes have been deducted and paid by the assessee. The assessee had claimed the said amount net of margins as a deduction in computing the taxable income in accordance with Article 7(3)(b) or of the India France Tax Treaty. The assessee submitted that within the Singapore Branch of the assessee a separate unit Asia Regional Computer Centre (ARCC) was established in the year 2000. To serve as a single point contact for data processing, providing technical support, system management and assistance in all technical issues for all operating units of BNB Paribas group across Asia Pacific Region including India. The BNB India branch entered into service agreement dated 01/01/2001 in this regard with ARCC. BNB India branch and the ARCC have additionally executed a memorandum of understanding for understanding the nature of service to be provided by the ARC to BNP India branch and to affirm that the services have indeed been provided in the manner agreed in MOU. ARCC is entitled to an annual fee based on the actual cost incurred by ARCC plus a 5% mark up towards the services rendered as per the terms of the agreement. The assessee contended that since the transaction is between two branches of the same entity no income accrues to the assessee towards the payment. Without prejudice to the above, the assessee submitted that the data processing charges are also not taxable in India and the same do not constitute 'fees for technical services' under Article 13 of the India-France Double Taxation Avoidance Agreement ('DTAA') read with clause 7 of the Protocol to the DTAA. The DRP relied on its own order

for the earlier assessment years and accordingly dismissed the objection raised by the assessee.

9. The Ld.AR submitted that this issue is also covered by the decision of the co-ordinate bench in assessee's own case for A.Y. 2014-15 in ITA no.7458/Mum/2018, vide order dated 04/01/2021where the Tribunal has allowed the ground in favour of the assessee by following the judicial precedents in assessee's own case and that the same is followed in the latest decision rendered for A.Y. 2018-19 (supra) also. The Ld.AR further submitted that the Hon'ble Bombay High Court in assessee's own case for A.Y. 2006-07 to 2009-10 has considered the similar issue and held in favour of the assessee. The Ld.DR relied on the orders of the lower authorities.

10. We heard the parties and perused the material available on record. We notice that the co-ordinate bench has been consistently holding the view that the payment made by the assessee to Singapore branch cannot be treated as FTS. The relevant observations of the coordinate bench in assessee's own case for AY 2014-15 (supra) is as given below –

> *"14. We have deliberated at length on the contentions advanced by the authorised representatives for both the parties in the backdrop of the orders of the lower authorities and have also perused the material available on record. On a perusal of the aforesaid ground, we find, that the issue herein involved is about taxability of data processing fees paid by the Indian branch offices of the assessee to its Singapore branch (service agent) to the tune of Rs 40.78 10,733/ under Article 13 of the India-France Tax Treaty. We find that the Tribunal while disposing off the appeal of the assessee for A.Y. 2013- 14 in ITA No. 552/Mum/2018, dated 22.04.2019 had adjudicated the said issue by relying on its earlier order passed in the assessee's own case for AY. 2009-10 in ITA No. 3541/Mum/2014, dated 31.03.2016, observing as under:–*

"In the above ground of appeal, the issue is about data processing fees paid by Indian Branch Office of the assessee to Singapore Branch to the tune of Rs 325,963,282/- under Article 13 of the India-France treaty. We find that while deciding the appeal for AY 2009-10 (ITA No. 3541/Mum/2014 dated 31.03 2016), the Tribunal has decided the issue as under.

5. Ground No.3 pertains to subjecting the data processing charges paid to the Singapore branch of the assessee amounting to Rs. 132,335,594/-applying the provisions of Article 13(Royalties, fees for technical services and payments for use of equipment) of the India-France Tax Treaty. This issue is also covered by the order of the Tribunal in assessee's own case for AY 2001-02 to 2003-04 wherein interest paid by assessee to Head Office/overseas branches was held to be not liable to tax, following was the precise observation of the Tribunal in its order dated 20-6-2012 for AY 2002-03:-

"3. The solitary issue involved in the appeal of the assessee for, the AY 2002-03 relates to the addition of Rs 1,48,30,613/- made by the A.O. and confirmed by the Ld CIT (A) on account of "interest" paid by the Indian Branches of the assessee bank to its head office and other overseas branches.

4. The assessee, in the present case is a commercial bank having its Head Office in France. It cames on the normal banking activities Including financing of foreign trade and foreign exchange transactions in India through its eight branches situated at Mumbai, New Delhi, Kolkata, Bangalore. Pune Ahmedabad, Chennai and Hyderabad During the previous year relevant to AY 2002-03, the Indian Branches of the assessee bank have paid total interest of Rs 1.48,30,613/- to its Head office and overseas branches and the same was claimed as a deduction while determining the profits attributable to Indian Branches, which was chargeable to tax in India. The said interest was treated by the AO as income of the assessee's Head office/overseas branches chargeable to tax in India. This decision of the A.O. was challenged by the assessee in the appeal filed before the Ld CIT(A) and the contention raised before the Ld. CIT (A) in this regard was that the Head office of the assessee bank as well as all its branches being the same person and one taxable entity as per the Indian Income tax Act, interest paid by Indian Braches head office and other overseas Branches was payment to se which did not give rise to any income as per the income-tax Act. In support of this contention, reliance was placed on behalf of the assessee on the decision of Hon'ble Supreme Court in the case of Sir Kikabhai Premchand CIT (Central) 24 (TR 506 as well as the decision of Kolkata Special Bench of the ITAT in the case of ABN Amro Bank NV vs. Asst. Director of Income-tax 98 TTJ 295. The contention of the assessee, however, was not accepted by the Ld CIT (A) and relying on the decision of Mumbai Bench of the ITAT in the case of Dresdner Bank AG vs Add1. CIT 108 ITD 375, he held that the

interest paid by the Indian branches of the assessee bank to its head office and overseas branches was chargeable to tax in India. Accordingly, the addition made by the A.O. on this issue was confirmed by the Ld. CIT(A)

5. We have heard the arguments of both the sides and perused the relevant material on record. As agreed by the Ld. Representatives of both the sides. the issue involved in this appeal of the assessee now stands squarely covered by the decision of Special Bench of the ITAT in the case of Sumitomo Banking Corp Mumbai wherein it was held, after elaborately discussing the legal position emanating from the interpretation of relevant provisions of Indian Income tax Act as well as treaty, that interest paid to the head office of the assessee bank as well as its overseas branches by the Indian branch cannot be taxed in India being payment to self which does not give rise to income that is taxable in India as per the domestic law or even as per therelevant 'tax treaty' Respectfully following the said decision of Special Bench of the ITAT which is directly applicable in the present case, we delete the addition of Rs. 1.48.30.613/- made by the AO. and confirmed by the Ld. CIT (A) on this issue and allow the appeal of the assessee."

5.1 The issue has also been dealt by the Special Bench of the Tribunal in the case of Sumitomo Mitsui Banking Corporation (supra), wherein the observation of the Bench at para 88 is as under:-

"88. Keeping in view all the facts of the case and the legal position emanating from the interpretation of the relevant provisions of domestic law as well as that of the treaty as discussed above, we are of the view that although interest paid to the head office of the assessee bank by its Indian branch which constitutes its PE in India is not deductible as expenditure under the domestic law being payment to self, the same is deductible while determining the profit attributable to, the PE which is taxable in India as per the provisions of art. 7(2) and 7(3) of the Indo-Japanese Treaty read with, para 8 of the Protocol which are more beneficial to the assessee. The said interest. however, cannot be taxed in India in the hands of assessee bank, a foreign enterprise being payment to self which cannot give rise to income that is taxable in India as per the domestic law. Even otherwise, there is no express provision contained in the relevant tax treaty which is contrary to the domestic law in India on this issue, This position applicable in the case of interest paid by Indian branch of a foreign bank to its head office equally holds good for the payment of interest made by the Indian branch of a foreign bank to its branch offices abroad as the same stands on the same footing as the payment of interest made to the head office. At the time of hearing before us, the learned representatives of both the sides have also not made any separate submissions on this aspect of the matter specifically. Having held that the interest paid by the Indian branch of the assessee bank to its head office and other branches outside India is not chargeable to tax in

India, it follows that the provisions of s. 195 would not be attracted and there being no failure to deduct tax at source from the said payment of interest made by the PE. the question of disallowance of the said interest by invoking the provisions of s 40 (a)(i) does not arise. Accordingly we answer question No. 1 referred to this Special Bench in the negative ie in favour of the assessee and question No. 2 in affirmative Le again in favour of the assessee."

As the facts and circumstances of the case during the year under consideration are perimateria, where payment made by assessee to Singapore Branch for data processing was brought to tax. Respectfully following the order of the Tribunal in assessee's own case as well as the order of the Special Bench of the Tribunal in the case of Sumitomo Mitsu Banking Corporation (supra), we hold that the department was not justified in taxing the data processing charges to the Singapore Branch of the assessee by applying the provisions of Article 13 of the India-France Tax Treaty."

13. In effect thus, reversing the stand of the DRP, the coordinate bench has come to the conclusion that the payment on account of data processing charges paid toBNP Singapore cannot be taxed in the hands of the assessee. The conclusion arrived at by the coordinate bench, whatever may have been the path traversed by the coordinate bench to reach this point, are the same as arrived at by us. Of course, our reasons are different, as set out earlier in this order, but that does not really matter as of now. We fully agree with the conclusions arrived at by the coordinate bench. We, therefore, direct the Assessing Officer to delete the impugned disallowance of Rs 13.10,97,790 The assessee gets the relief accordingly.

14. Ground no 2 is thus allowed."

6. We see no reasons to take any other view of the matter than the view so taken in assessee's own case in assessment year 2008-09. Respectfully following the same, we direct the Assessing Officer to delete the impugned disallowance of Rs 18,53,83,446/- The assessee gets the relief accordingly."

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

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

As the facts in context of the aforesaid issue under consideration remains the same as was there before the Tribunal in the assessee's own case for A.Y. 2013-14, therefore, we respectfully follow the view therein taken. Accordingly. we herein direct the AO to delete the impugned addition of Rs 40,78,10.733/- The Ground of appeal No. 2 is allowed."

We further notice that the Hon'ble Bombay High Court in assessee's own case for A.Y. 2009-10 has considered the following question of law and held as under:-

"Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the payment of data processing fees paid by the assessee to its overseas branch at Singpore is in the nature of income and are not liable to tax?"
"The question as proposed has became academic in view of the fact that the alternative submission made by the respondent before the authorities was that the payment made to its overseas branch at Singapore in respect of the data processing fees was really in the nature of reimbursement. The impugned order of the Tribunal has on facts found that the payment made by the respondent assessee to its overseas branch at Singapore was in the nature of reimbursement of expenses. The aforesaid findings of fact by the Tribunal is not the subject matter for challenge before us by the Revenue. It is also an agreed position between the Counsel that the issue of reimbursement of expenses is now in similar circumstances been held that to be chargeable to tax by the Apex Court in ***Director of Income Tax vs A.R. Moller Maersk A/S, 392 ITR 186.***

In the above view, the question of law as proposed being academic, does not give rise to any substantial question of law . Therefore, not entertained."

11. We find that the issue under consideration is a recurring one and that the coordinate bench has been consistent in holding this issue in favour of the assessee. The revenue did not bring any new material on record for us to deviate from the view taken by the coordinate bench for earlier years. Therefore respectfully following the decision of Hon'ble High Court and the decision of the coordinate bench, we hold this issue in favour of the assessee.

Taxability of Interest paid by branch office to Head Office

12. During the year under consideration, the assessee has paid a sum of Rs.7,07,97,939/- to its head office as interest. The interest expenses have been claimed as not taxable in accordance with the provisions of Article 7(3) the India France Tax Treaty. The assessee submitted that BNB India Branch and the head office along with its overseas branch are one person as per the provisions of the Act and, therefore, the interest has been claimed as non-taxable. However, based on the interpretation of Article 7(2) of the India France Tax Treaty, the Assessing Officer considered the assessee and the head officer as distinct entities for all purposes under the Income-tax law by placing reliance on circular No.740 dated 7/04/1996. The Assessing Officer further stated that interest payable by the branch to its head office is covered by the explanation inserted to section 9(1)(v)(c) by the Finance Act 2015 w.e.f. 01.04.2016 and held that the said amendment is retrospective being clarificatory in nature. The Assessing Officer also held that the assessee should be considered as a separate person from its PE for the purpose of taxation under the Act in respect of interest received by the assessee and that the business activity conducted by the PE and the head office business are not governed by the principle of mutuality.

The assessee raised further objections before the DRP and submitted that

(i) A branch of a foreign bank is not a separate taxable unit under the definition of person under section 2(31) of the Act. Under the provisions of the India France tax treaty BNP India Branch does not qualify as a separate person vis-à-vis its HO

(ii) The deeming fiction created by Article 7(2) of the India-France Tax Treaty is only for the limited purpose of determination of profits attributable to PE in India and the same cannot be extended and applied to Article 12 of the Treaty or any other provisions under the Act or the Treaty.

(iii) In assessee's own case for earlier assessment years, the ITAT has held that the interest income shall not be taxable in the hands of the assessee.

However the DRP, rejected the objections of the assessee by placing reliance on its own findings for the earlier assessment years.

13. The Ld.AR submitted that this issue is also covered by the decision of the co-ordinate bench in assessee's own case for A.Y. 2018-19. The Ld.AR brought to our attention that for the year under consideration, the revenue had made the addition for the reason that Explanation was inserted to section 9(1)(v)(c) whereby the payments made by the PE to its head office is to be brought to tax if income deemed to accrue in India and accordingly should be taxed in India. The Ld.AR in this regard submitted that the co-ordinate bench in assessee's own case for A.Y. 2018-19 has considered the insertion of the Explanation with effect from 01/04/2016 and has given an elaborate finding to hold that as per DTAA, the said payment are not taxable in India and, therefore, the Explanation cannot be applied in assessee's case. The Ld.DR relied on the order of the lower authority.

14. We heard the parties and perused the material available on record. We notice that the co-ordinate bench in assessee's own case for AY 2018-19 has given a detailed finding with regard to the issue under consideration and held that –

"21. We have considered the rival submissions and perused the material available on record. During the year, the Indian branch office paid interest to its

head office and other overseas branches on debt and overdrafts. In the present case, it is undisputed that the various branches of the assessee in India constitute the PE of the assessee under the provisions of the India France DTAA. Further, it can also not be disputed that in terms of section 90(2), the provisions of the Act or the DTAA, whichever is more beneficial to the assessee shall be applicable. Thus, being an entity covered under the provisions of the India-France DTAA, the payment of interest to the head office and other overseas branches was claimed as a deduction by the Indian branch office under the provisions of Article 7(3) of the DTAA. The Revenue, in the present case, has not disputed the deduction claimed by the Indian branch office. However, as per the Revenue, the interest received by the head office/overseas branches is taxable under the provisions of section 9(1)(v)(c) of the Act.

22. Since the India-France DTAA is applicable in the present case, therefore, before proceeding further it is pertinent to consider the relevant provisions of the said DTAA vis-à-vis the facts of the present case. As per Article 12(1) of the DTAA, interest arising in a contracting state (i.e. say India) and paid to a resident of the other contracting state (i.e. say France) may be taxed in the other contracting state (i.e. France). Further, under Article 12(2) of the DTAA, such interest may also be taxed in the contracting state in which it arises (i.e. say India), and according to the laws of that state, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10% of the gross amount of interest. Para 5 of Article 12 provides that the provisions of para 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a contracting state (i.e. say France), carries on the business in the other contracting state (i.e. say India) in which interest arises, through a PE situated therein, or performs in that other contracting state independent personal services from a fixed base situated therein, and the debt claim in respect of which the interest is paid is effectively connected with such PE or fixed base. Para 5 further provides that in such a case, the provisions of Article 7 or Article 15 as the case may be shall apply. Article 15 deals with independent personal services, which is not relevant to the present case. Since the assessee has PE in India, therefore, Article 7 which deals with business profits, becomes relevant for consideration in the present case. As per Article 7(1) of the DTAA, the profit of an enterprise is taxable in the other contracting state to the extent it is attributable to the PE. Further, Article 7(2) of the DTAA provides that the profit attributed to the PE shall be the profit 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 PE. Article 7(3)(b) deals with payment by the PE to the head office of the enterprise and vice versa, and the same reads as under:

> *"(b) However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices."*

23. Thus, in the case of a banking enterprise, any payment by the PE to the head office of the enterprise by way of interest on money lent to the PE shall be allowed as a deduction. Further, the amount charged by the PE to the head office of the enterprise by way of interest on money lent to the head office of the enterprise shall be considered for the determination of profits of the PE. In the present case, it is not in dispute that the money has been lent to the PE and not the other way around. Thus, the first part of Article 7(3)(b) of the Act is only applicable in the present case, as the second part of this Article deals with the case wherein money is lent by the PE to the head office. Accordingly, in the present case, the assessee has claimed a deduction in respect of interest paid by the PE to its head office/overseas branches.

24. Further, in view of Article 7 of the India-France DTAA, the Revenue though has rightly accepted that the fiction of hypothetical independence or a separate entity approach, as stated in this Article, comes into play for the limited purpose of computing the profit attributable to the PE. However, extended this fiction of hypothetical independence also for the computation of profit of the head office, for bringing to tax the interest received from the Indian branch office under the provisions of the Act. We are of the considered opinion that the latter approach is flawed. This aspect was extensively dealt with by the coordinate bench of the Tribunal in assessee's own case in BNP Paribas SA vs ADIT, in ITA No. 3422/Mum/2009, for the assessment year 2004-05. In the aforesaid decision, the coordinate bench held that the principles for determining the profits of the PE and GE/head office are not the same, and the fiction of hypothetical

independence does not extend to the computation of the profit of the GE/head office. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"22. 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 computation of profit of the GE. The principles of computing separate profits for the PE and the GE treating them as distinct entities, in the case of Dresdner Bank AG (supra),was in the context of Section 5(2). The separate profit centre accounting approach for the HO does not hold good in the treaty context, because, even if it is an income of the GE as a profit centre, all that is taxable as business profits of the GE is the income attributable to the PE. As regards its 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 of the interest, being a resident of a contract state, carries on business in the other contracting state in which the interest arises through a permanent establishment situated therein" 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 arises to a GE even if that be so, the taxability under article 12 will not apply, and it will remain restricted to taxability of profits attributable to the permanent establishment under article 7. The profits attributable to the PE have anyway been offered to tax. As regards the theory, as advanced by learned Assessing Officer in considerable detail, that for taxing the GE, the taxability has to be in respect of (i) income attributable to the permanent establishment as a profit centre; and (ii) income of the GE in its own capacity by treating it as another independent separate profit centre, for the detailed reasons set out above and particularly as the fiction of hypothetical independence does not extend to the computation of GE profits, we reject the same. The authorities below were, therefore, clearly in error in holding that the interest of Rs.1,59,32,854 paid by the Indian PE to the GE, or its constituents outside India are taxable in India. 23. 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. 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. For this reason also, the grievance of the assessee deserves to be upheld."

25. From the aforesaid findings, it is also relevant to note that the coordinate bench of the Tribunal came to the conclusion that the interest paid by the Indian branch/PE to the head office/GE is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). Thus, in view of the above, even though the submission of the Revenue that the amendment by Finance Act 2015, whereby Explanation to section 9(1)(v) of the Act was inserted specifically to overcome the decision in Sumitomo Mitsui Banking Corporation (supra), is accepted, the same would still not lead to taxation of the interest paid to the head office/overseas branches under the provisions of the DTAA. Accordingly, in view of aforesaid findings and respectfully following the judicial precedent in assessee's own case cite supra, we direct the AO to delete the addition on account of interest income received by the head office/overseas branches. As a result, ground no.4 raised in assessee's appeal is allowed."

15. Respectfully following the above decision of the co-ordinate bench, we hold that the payment of interest by branch to head office is not taxable in India and accordingly, the addition is deleted.

16. Ground No.5 is with respect to initiation of penalty proceedings which is premature not warranting adjudication.

17. Through Ground No.6, the assessee is contending the issue of short credit of TDS amounting to Rs.2,14,694/-. In this regard, we issue a direction to the Assessing Officer to examine the claim of the assessee and allow in accordance with law after giving reasonable opportunity of being heard.

18. Grounds 7 to 9 pertain to the levy of interest under section 234B, 234C and 234D of the Act. The Ld.AR in this regard submitted that the assessee has filed a rectification application dated 23/03.2023 before the Assessing Officer in order to rectify the computation of interest under the above sections. The Ld.AR submitted that no order against the said rectification petition has been passed till date. Accordingly, we issue a direction to the Assessing Officer to dispose of rectification petition filed by the assessee in accordance with law after giving a reasonable opportunity of being heard. These grounds are allowed for statistical purpose.

19. In the result, appeal is partly allowed.

Order pronounced in the open court on 18/08/2023.

Sd/-	**sd/-**
(VIKAS AWASTHY)	**(PADMAVATHY S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 18th August, 2023
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai