

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA No.4941/Mum/2007

ITA No.8841/Mum/2010

ITA No.5740/Mum/2011

(A.YS. 2003-04, 2005-06 & 2006-07)

The Bank of Nova Scotia Mittal Towers, B Wing Nariman Point Mumbai - 400 020	Vs.	Assistant Director of Income Tax (IT) -3(2) Scindia House Ballard Pier Mumbai - 400 038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACB1536H		
Appellant	..	Respondent

ITA No.4036/Mum/2012

IT(TP)A. No.3862/Mum/2013

ITA No.4980/Mum/2017

(A.Y.2007-08 to 2009-10)

The Bank of Nova Scotia Mittal Towers, B Wing Nariman Point Mumbai - 400 020	Vs.	Additional Director of Income Tax (IT) -3 Air India Building Nariman Point Mumbai - 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACB1536H		
Appellant	..	Respondent

ITA No.5634/Mum/2011

ITA.No.3989/Mum/2012

ITA No.3828/Mum/2013

(A.Y.2005-06, 2007-08 & 2008-09)

Deputy Director of Income Tax (IT) -3(2) Scindia House Ballard Pier, N. M. Road Mumbai - 400 038	Vs.	M/s The Bank of Nova Scotia, Mittal Towers, B Wing, Nariman Point Mumbai - 400 021
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACB1536H		
Appellant	..	Respondent

ITA No.4655/Mum/2007
(A.Y.2003-04)

ADIT(IT)-3(2) Scindia House Room No. 132, 1 st Floor, N. M. Road Mumbai – 400 038	Vs.	M/s The Bank of Nova Scotia, Mittal Towers, B Wing, Nariman Point Mumbai – 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACB1536H		
Appellant	..	Respondent

ITA No.4898/Mum/2017
(A.Y.2009-10)

The DCIT(IT)-1(2)(1) Room No. 106, Scindia House, 1 st Floor, Ballard Estate, N. M. Road Mumbai – 400 038	Vs.	M/s The Bank of Nova Scotia, Mittal Towers, B Wing, Nariman Point Mumbai – 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACB1536H		
Appellant	..	Respondent

Appellant by :	Nishant Thakkar & Ms. Jasmin Amalsadwala
Respondent by :	Anil Sant

Date of Hearing	17.01.2024
Date of Pronouncement	29.01.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

All these cross appeals filed by the assessee and the revenue are pertained to assessment year 2003-04 to 2009-10 arised from the different order of CIT(A). Since, common issue on identical facts are involved in these appeals, therefore, all these appeals are adjudicated

together by taking the ITA No. 5634 & 5740/Mum/2011 as a lead case and its finding will be applied mutatis mutandis to the other appeals wherever it is applicable.

ITA No. 5740/Mum/2011 (Assessee's Appeal) AY: 2005 -06:

- “1. *In upholding, in principle, the learned AO's action for disallowance under section 14A of the Act and enhancing the disallowance computed by the learned AO.*
2. *In disallowing the salary paid to expatriate employee of the Indian branches in respect of services rendered wholly and exclusively in connection with the Indian operations of the Appellant*
3. *In confirming the transfer pricing adjustment of Rs.1,737,912 made by the learned Transfer Pricing Officer ('the learned TPO').*
4. *In upholding the taxation by the learned TPO of the mark-up in respect of provision of services rendered by the Appellant to its head office/ overseas branches in contradiction of Article 7(3) of the Double Taxation Avoidance Agreement between India and Canada.*
5. *In upholding the inclusion of comparable companies selected by the learned TPO in determining the arm's length price in respect of transactions relating to the provision of correspondent banking services rendered by the Appellant to its HO/ overseas branches.*
6. *In upholding that the margin range of 38.74% to 78.94% of the comparable companies selected by the learned TPO cannot be considered to be wide and it proves that the companies engaged in these financial spaces have generally returned better profits during the financial year*
7. *In upholding the use of data pertaining to the financial year 2004-05 in determining the arm's length price, which was not available in the public domain at the time when the Appellant was required to comply with the requirements under the Act and the relevant Rules.*
8. *In disregarding the margin analysis undertaken by the Appellant using the financial data of the comparable companies for the financial year 2004-05 which was submitted with the learned TPO as well as during the course of the Appeal hearing.*
9. *In wrongly computing the benefit of 5 percent variation from the operating cost as against the revised arm's length price for the international transaction relating to the provision of correspondent banking services under the provisions of section 92C(2) of the Act.*

The Appellant craves leave to add, alter, amend or delete the above grounds, at or before hearing of the appeal.”

2. The fact in brief is that return of income declaring a total loss of Rs. 944,90,280/- was filed on 31.10.2005. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 01.08.2006. The assessee is a banking company incorporated in Canada. It had obtained a license from the RBI to carry out banking activities in India. The assessee (Bank of Nova Scotia 'BNS') has been operating in India through branches in Mumbai, Delhi, Bangalore, Coimbatore and Hyderabad. The assessment u/s 143(3) of the Act was finalized on 30.12.2008 and total loss was assessed at Rs.218,61,193/- after making various additions and disallowances. The further facts of the case are discussed while adjudicating various grounds of appeal filed by the assessee.

Ground No.1: Disallowance of expenditure towards earning interest income exempt u/s 10(15):

3. During the course of assessment the assessing officer noticed that assessee has earned interest income of Rs.2,77,57,534/- from 1997-1998 series of NABARD Bonds which has been claimed as exempt from income tax u/s 10(15)(iv)(h) of the Act. After referring the tax free funds the assessee submitted that no disallowance u/s 14A should have been made. However, the AO has not agreed with the submission of the assessee and disallowed an amount of Rs.9,56,892/- u/s 14A r.w.Rule 8D towards expenditure incurred for earning the exempt income.

4. The assessee filed the appeal before the ld. CIT(A). However, the ld. CIT(A) further made enhancement to the disallowance by Rs.3,21,184/- and sustained the total amount of disallowance of Rs.12,78,076/- as an expenditure incurred towards earning the exempt income.

5. During the course of appellate proceedings before us the ld. Counsel submitted that the issue of disallowance of expenditure

towards earning exempt income is fully covered in favour of the assessee as per the various decision of the ITAT, Mumbai in the case of the assessee itself as under:

- “1. ITAT Order in the Appellants own case for AY 2004-05 [ITA No 3530/MUM/2009 (Mum)]
2. ITAT Order in the Appellants own case for AY 2002-03 [ITA No 6818/MUM/2006(Mum)]
3. ITAT Order in the Appellants own Case for AY 1998-99 [ITA 5351/M/2001 (Mum.)]”

6. Heard both the sides and perused the material on record. We have considered the decisions of the ITAT in the case of the assessee as referred by the Id. Counsel. With the assistance of Id. Representative we have perused the decision of ITAT Mumbai for A.Y. 2004-05 vide ITA No. 3530/Mum/2009. The relevant operating part of the decision is reproduced as under:

“5. We have heard the submissions made by rival sides and have examined the orders of authorities below. The ground No.1 and 2 of appeal by the assessee are against disallowance made u/s 14A of the Act. We find that the manner and reasons for disallowance u/s. 14A of the Act in the impugned assessment year is similar to the one in Assessment Year 2002-03. The Co-ordinate Bench deleted the disallowance by observing as under:

“6.2 We have heard the submissions made by rival sides and have examined the orders of authorities below. The CIT(A) in the impugned order has given finding of fact that the assessee has surplus interest free funds in the form of capital and reserves to cover the investment made. Purportedly, no fresh investments were made in the impugned assessment year. The assessee had made investments in NABARD tax free bonds in assessment year 1996-97 and 1997-98. Similar disallowance u/s. 14A of the Act was made by the Assessing Officer in assessment year 1998-99 for earning tax free interest income. The Co-ordinate Bench vide order dated 24/03/2006 (supra) deleted the disallowance. The Hon'ble Apex Court in the case of South Indian Bank Ltd. vs. CIT (supra) has reiterated the legal position, "that the proportionate disallowance of interest is not warranted u/s.14A of the Income Tax Act for investment made in tax free bonds/ securities which yielded tax free dividend and interest to assessee bank in those situation where, the interest free own funds available with the assessee, exceeded their investment.". The Revenue has not disputed the fund position as highlighted by the CIT(A) in the impugned order. Thus, taking into consideration entire facts of the case and the law expounded by Hon'ble

Apex Court in this regard, we find no merit in ground No 1 of the appeal, hence, the same is dismissed.”

Since it is undisputed fact that during the year under consideration also the available tax free funds were more than the investment made on which exempt income was earned therefore, following the decision of ITAT on the similar fact and identical issue as discussed supra we direct the assessing officer to delete the disallowance made u/s 14A r.w.Rule 8D in the case of the assessee. Accordingly, this ground of appeal of the assessee is allowed.

Ground No. 3 to 8: Transfer Pricing adjustment in respect of Correspondent banking services and Correspondent Banking Charges – whether to be excluded in view of Article 7(3) of the India-Canada DTAA and Upholding the inclusion of comparable selected by the TPO in respect of correspondent banking services and Upholding the use of single year data in determining arm’s length price in respect of Correspondent banking services:

7. All these grounds are not pressed therefore the same stand dismissed.

Ground No. 2: Expatriate Salary:

8. During the course of assessment the assessing officer noticed that assessee has claimed deduction for salary paid to expatriate employees to the amount of Rs.106,08,973/-. However, the assessing officer was of the view that the aforesaid expenses had been incurred as overseas salaries of the expatriate was in the nature of head office expenditure, therefore, same was disallowed u/s 44C of the Act.

9. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) held that expenditure so claimed on the salary of expatriate employees is found to be deductible and allowable only to the extent of the evidence produced in respect of presence of Shri Denis Vaz till 30.10.2014.

Therefore, 7/12 of the salary pertaining to M/s Danis Vaz which comes to Rs.35,25,270/- was allowed and the remaining amount of Rs.70,83,703/- was disallowed.

10. During the course of appellate proceedings before us the Id. Counsel submitted that two employees Mr. Danis Vaz and Mr. Tery Watkins were the Canadian nationals who were on secondment to Indian operations of BNS and during the year under consideration relevant to assessment year 2005-06 have continually rendered services exclusively for the assessee company. The Id. Counsel further submitted that in the case of both the employees their global income were offered to tax in India, therefore, disallowance of claim of deduction of the salary paid to these employees is not justified. The Id. Counsel has also filed details of salary paid to these employees from A.Y. 2002-03 to A.Y. 2005-06.

On the other hand, the Id. D.R supported the order of lower authorities.

11. Heard both the sides and perused the material on record. The assessee has claimed deduction of salary paid to the expatriate employees as under:

- | | | |
|------|--------------|-----------------|
| (i) | Denis Vaz | Rs. 60,43,321/- |
| (ii) | Tery Watkins | Rs.45,65,652/- |

We have seen from the detail of expatriate salary paid to these employees that they were continually working with the assessee from assessment year 2002-03 to 2005-06 and detail of salary paid to them for these years are as under:

Bank of Nova Scotia Details of Expat salary paid during the year				
Name of the Employee	Assessment Year			
	AY 2005-06	AY 2004-05	AY 2003-04	AY 2002-03
Dennis Vaz	60,43,321	60,15,171	55,78,832	52,51,183
Terry Watkins	45,65,652	44,45,290	40,93,022	33,82,476
Peter Nesbitt	-	7,60,785	29,80,670	27,85,087
David Tait	-	-	-	21,16,473
Total amount of Salary paid	1,06,08,973	1,12,21,246	1,26,52,524	1,35,35,218

12. Mr. Danis Vaz was working as a Chief Executive Officer for Bank of Nova Scotia India branch assignment ended on 31.10.2004. Mr. Terry Watkins the other employee has worked as Assistant General Manager –Administration of Bank of Nova Scotia India branches for assessment year 2004-05 and assessment year 2005-06. Their global income have been offered to tax. Before the lower authorities the assessee has also submitted the copy of returns of these employees showing that their global income has been offered to tax in India. After perusal of the material placed on record we find that the lower authorities has not contrary disproved the material fact that both these employees have continually worked for the Indian branches of the assessee bank and both have offered their global income in India for tax. The assessee has also provided copy of document showing that necessary approval as per Sec. 35B of the Banking Regulation Act, 1949 for appointment of Mr. Danis Vaz as Chief Executive Officer of the India branches was obtained. The assessee has demonstrated from the return of income filed in the case of both these employees that their global income has been offered to tax in India for the assessment year 2005-06 to the amount of Rs.60,43,321/- in respect of Mr. Denis Vaz and amount of Rs.45,65,652/- in the case of Mr. Terry Watkins. The assessee has brought on record the relevant return of income of both the employees showing that global income was offered to tax in India in accordance with provision of Sec. 5 and Sec. 6 of the Income Tax Act for remaining present in India on secondment with Indian Branch of BNS. The

revenue has not brought on record any relevant materials to disprove these material facts and evidences. Considering the above facts and material we find that decision of Id. CIT(A) in sustaining the disallowance is not justified. Accordingly, this ground of appeal of the assessee is allowed.

ITA No. 5634/Mum/2011 (Revenue's Appeal)

- “1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that the interest under section 115A has to be computed on the gross interest income and not on the net interest income and accordingly directing the Assessing Officer to levy tax on interest of Rs. 83,714,078/- as per section 115A and not as per normal rates.
2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that an amount of Rs. 59,128,408/- is deductible as per Article 7(2) and Article 7(3) of the India- Canada Double Taxation Avoidance Agreement (IC Treaty) in respect of interest paid by the Assessee's Indian branch to its Head Office/ Overseas Branch.
3. On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in deleting the addition made by the Assessing Officer of Rs.35,25,270/- in respect of salary paid to expatriate employees working in India on the ground that expenditure is not covered by section 44c of the Act.”

Ground No.1: Applicability of Sec. 115A to interest income from Foreign Currency Loan:

13. At the time of assessment the AO noticed that the assessee has reduced interest earned in foreign currency of Rs.8,37,14,078/- from business income and offered to tax at the rate of 20 percent under section 115 of the Act. However, the Id. CIT(A) has taxed the interest income as per the provision of Sec. 115A of the Act after following the decision of earlier years in the case of the assessee. During the course of appellate proceedings before us at the outset the Id. Counsel submitted that similar issue on identical facts has been adjudicated by the ITAT in the case of the assessee itself for the earlier years in favour of the assessee. He referred the following judicial pronouncements made by the ITAT on similar issue:

- “1. ITAT Order in the Appellants own case for AY 2004-05 [ITA No 3530/MUM/2009 (Mum)]
2. ITAT Order in the Appellants own case for AY 2002-03 [ITA No 6818/MUM/2006(Mum)]
3. ITAT Order in the Appellants own Case for AY 1998-99 [ITA 5351/M/2001 (Mum.)]
4. ITAT Order in the Appellants own Case for AY 1997-98 [ITA No. 306/Mum/2001(Mum.)]”

14. Heard both the sides and perused the material on record. With the assistance of Id. Representative we have perused the decision of ITAT for assessment year 2004-05 vide ITA No. 3530/Mum/2009. The relevant operating part of the decision is reproduced as under:

“12. Both sides heard. The Revenue in ground No.1 of appeal has assailed the findings of CIT(A) in deleting disallowance of interest expenditure towards earning income on foreign currency loan. We find that this issue is recurring and was considered by the Tribunal in Assessment Years 1997-98, 1998-99 and 2002-03 in appeal by the Department for the respective Assessment Years. The Tribunal in Assessment Year 2002-03 decided the issue against the Department holding as under:

“7.1 We have heard the submissions made by rival sides. We find that in assessment year 1997-98 identical disallowance was made by Assessing Officer, the CIT(A) deleted the same, the Revenue carried the issue in appeal before the Tribunal in ITA No.306/Mum/2001. The Co-ordinate Bench vide order dated 21/04/2004 dismissed the ground raised in the appeal of Revenue by observing as under:-

“ 3. We have heard the rival submissions and also perused the orders of authorities below. Parties appearing before us have respectively relied upon the order of A.O and CIT(A). Since the introduction of section 115A certain changes have been made and with the passage of time the Finance Act 1994 has also carried out certain amendments in the said section w.e.f. 1/4/95 the scope and effect of the amendments was explained by CBDT in Circular No.684 dated 6/6/94(208 ITR 08(St.), relevant page-43. This CBDT circular and related provisions of IT Act has been elaborately discussed by the first appellate authority. On careful examination of the entire issue it is abundantly clear that the legislature has intended to tax the interest only on gross basis. Further in support of his arguments Id. A.R has also cited Article 10& 11 of DTAA with Canada. Notification No.10503(F No.505/2/87-FTD) reference 229 ITR 44(St.) Further it has also been mentioned that section 90(2) of IT Act also provides that the provisions of this Act shall apply to the extent they are more beneficial to that assessee. The order of the first appellate authority is quite elaborate on this subject and needs no

interference, therefore, under the totality of the circumstances and in view of the specific provisions of the Act we hereby dismiss this ground of the Revenue.”

The Revenue has failed to distinguish the above order of Tribunal. Hence, following the order of Co-ordinate Bench in assessee’s own case on the same issue, we have no hesitation in dismissing ground No.2 of the Department’s appeal.”

There being no change in the facts, ground No.1 of appeal by the Revenue is dismissed for similar reasons.”

Following the decision of ITAT as referred above we don’t find any merit in this ground of revenue, therefore, the same stand dismissed.

Ground No. 2: Deduction of interest paid by Indian branch to Head Office:

15. The Indian branches of the assessee bank has paid interest of Rs.591,28,408/- to the head office/overseas branches. The AO had not allowed the deduction in respect of payment of interest to the HO.

16. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the deduction of interest payment made by the Indian branches to the H.O after following the decision of Hon’ble Calcutta High Court in the case of ABN Amro Bank.

17. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that similar issue on identical facts has been adjudicated by the ITAT in the case of the assessee itself for the earlier years in favour of the assessee. He referred the following judicial pronouncements made by the ITAT on similar issue:

- “1. *Sumitomo Mitsui Banking Corp vs DDIT [19 taxmann.com 364 (Mum)(SB)]*
2. *ITAT Order in the Appellants own case for AY 04-05 [ITA No 3530/MUM/2009 (Mum)]*
3. *ITAT Order in the Appellants own case for AY 02-03 [ITA No 6818/MUM/2006 (Mum)]”*

18. Heard both the sides and perused the material on record. We have gone through the decision of ITAT for A.Y. 2004-05. The relevant part of the decision is reproduced as under:

“3.1 In respect of ground No.3 relating to interest paid by Indian Branch to Head Office, the ld. Authorized Representative of the assessee submitted that similar issue was considered by the Tribunal in appeal by the Revenue in Assessment Year 2002-03 (supra). The Tribunal decided the issue in favour of assessee and dismissed the ground raised in appeal by the Revenue. There is no change in facts in the impugned Assessment Year.”

Following the decision of ITAT we don't find any merit in this ground of appeal, therefore the same stand dismissed.

Ground No. 3: (Whether salary paid to Expatriate staff at branch is hit by Section 44C of the Act:

19. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that similar issue on identical facts has been adjudicated by the ITAT in the case of the assessee itself for the earlier years in favour of the assessee. He referred the following judicial pronouncements made by the ITAT on similar issue:

- “1. ITAT Order in the Appellants own case for AY 04-05 [ITA No.3530/MUM/2009 (Mum)]*
- 2. ITAT Order in the Appellants own case for AY 02-03 [ITA No.6818/MUM/2006 (Mum)G*
- 3. PCIT vs The Bank of Mitsubishi UFJ Ltd. ITA 604 of 2015(Del.)”*

20. Heard both the sides and perused the material on record. We have perused the decision of ITAT for A.Y. 2004-05. The relevant part of the decision is reproduced as under:

“13. In ground No.2 of appeal, the Revenue has assailed deletion of addition in respect of salary paid to expatriate employees working in India. We find that the issue in the impugned assessment year is similar to the one considered by the Co-ordinate Bench in Assessment Year 2002-03. The Tribunal decided the issue against the Revenue holding as under:

“11.3 Both sides heard. Undisputedly, the salary expenditure of expatriate employees was for rendering services wholly and exclusively for assessee in India. The quantum of expenditure and payment of salary

to employees expatriated to India by head office has not been doubted by the Assessing Officer. The solitary objection of Assessing Officer for disallowing expenditure is that no debit note was raised by head office . The CIT(A) has negated the objection raised by the Assessing Officer by placing reliance on the decision in the case of Kedarnath Jute Manufacturing Co. 82 ITR 353(SC). Regarding applicability of section 44C of the Act, the CIT(A) placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Emirates Commercial Bank (supra) to conclude that payment of salary to expatriate employees paid by the head office is an allowable expenditure in view of Article 7(3) of the DTAA and section 37 of the Act and such expenditure does fall within the ambit of section 44C of the Act. We find no infirmity in the findings of CIT(A) on this issue, hence, ground No.6 of the appeal is dismissed”

No contrary material has been placed on record by Revenue, hence, we see no reason to take a different view. The ground No.2 of appeal is thus, dismissed.

We have also adjudicated the similar issue on identical facts while adjudicating ground no. 2 of the appeal of the assessee vide ITA No. 5740/Mum/2011 as discussed supra in this order. Following the decision of ITAT as supra in this order, we don't find any merit in this ground of appeal, therefore the same stand dismissed.

ITA No. 4541/Mum/2007 (Assessee's Appeal) A.Y. 2003-04

Ground No. 1: Disallowance of interest paid to head office/overseas branches of Rs.84,05,943/-:

21. On similar issue on identical facts we have adjudicated the appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 in respect of ground no. 2 of the revenue and the ground of appeal the revenue has been dismissed after following the decision of the ITAT in the case of the assessee for assessment year 2004-05. Therefore, applying the finding of the same as mutatis mutandis this ground of appeal of the assessee is allowed.

ITA No. 4655/Mum/2007 (Revenue's Appeal) AY: 2003-04

Ground No. 1: Disallowance of expenditure amounting to Rs.86,35,941 expended towards earning interest income exempt under section 10(15):

22. We have adjudicated similar issue on identical facts in favour of the assessee as per the ground no. 1 of appeal of the assessee for assessment year 2005-06 vide ITA No. 5740/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No. 2: Applicability of S.115A to interest income from Foreign Currency Loan:

23. We have dismissed the ground of appeal of the Revenue on the similar issue and identical facts as per ground no. 1 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.3: Interest paid by Indian branch to Head office of Rs.84,05,943/- taxed as income in the hands of Head office:

24. We have dismissed the similar ground of appeal on identical facts as per ground no. 2 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.4: Restriction of Claim of bad debts in terms of the proviso to Sec. 36(1)(vii):

25. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that similar issue on identical facts has been decided by the ITAT in the case of the assessee for the earlier years in favour of the assessee.

“1. *ITAT Order in the Appellants own case for AY 04-05 [ITA No.3530/MUM/2009 (Mum)]*

2. *ITAT Order in the Appellants own case for AY 02-03 [ITA No.6818/MUM/2006 (Mum).]*

26. Heard both the sides and perused the material on record. With the assistance of the Id. Representative we have perused the decision of ITAT for assessment year 2004-05. The relevant operating part of the decision is reproduced as under:

14. In ground No.3 of appeal, the Revenue has assailed the findings of CIT(A) in holding that while computing deduction u/s. 36(1)(vii) closing balances for provision for bad debt should be considered. We find that the issue in the present appeal is similar to the one considered by the Co-ordinate Bench in appeal of the Revenue for Assessment Year 2002-03. The Tribunal placing reliance on the decision in the case of CIT vs.UTI Bank Ltd., 29 taxmann.com 79 (Guj) and CBDT Instruction No.17/2008 dated 26/11/2008 dismissed the ground raised in appeal by the Department. No fresh material has been placed on record by the Revenue to distinguish the findings of the Co-ordinate Bench on this issue, hence, following the decision of Co-ordinate Bench ground No.3 of appeal is dismissed.”

Following the decision of the ITAT as referred supra this ground of appeal of the revenue is dismissed.

Ground No. 5: Whether salary paid to Expatriate Staff deputed at branch is hit by S. 44C:

27. We have decided similar issue on identical grounds in favour of the assessee as per ground no. 2 of appeal of the assessee for assessment year 2005-06 vide ITA No. 5740/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is allowed.

ITA No. 3862/Mum/2013 (Assessee’s Appeal) AY: 2008-09

Ground Nos. 1 to 8: Transfer pricing adjustment in respect of Correspondent banking services and Upholding the use of single year data in determining arm’s length price in respect of correspondent banking services and Disregarding margin analysis using the financial data of comparable companies for F.Y. 2006-07

and Correspondent Banking Charges – whether to be excluded in view of Article 7(3) of the India-Canada DTAA:

28. All these grounds of the assessee are not pressed therefore the same stand dismissed.

Ground Nos. 9 to 13: (Transfer Pricing adjustment for administrative support services in relation to inter bank indemnities:

29. During the course of assessment the assessing officer noticed that assessee's overseas branches have executed interbank indemnities against which assessee has issued guarantees on behalf of the clients of overseas branches and vice versa. Bank of Nova Scotia India received a commission of USD 125 per transaction for guarantees issued by it on behalf of its overseas branches and paid a commission of USD 100 for the guarantees issued by the overseas branches on its behalf. The assessee also submitted that the guarantee issued by the assessee bank branch was fully secured by a back to back interbank indemnity issued by overseas branches. The assessee has benchmarked the above transaction of interbank indemnities by using TNMM method. The comparability analysis made by the assessee Nova Scotia India Branch showed an arithmetic mean margin (operating profit to operating cost) of 15.28%.

30. However, the TPO has not agreed with the submission of the assessee bank branch. The assessee charges 1% for the guarantee of Rs.1 crores or more and 1.5% for guarantee less than a crore where there is no back to back guarantee. The assessing officer was of the view that for the similar kind of bank guarantee for third party transactions the banks always secured itself fully with collateral security to cover against risk. The TPO also stated that in these cases the bank was secured itself with almost 100% of cover of asset/securities form their

clients. The TPO has applied internal comparable uncontrolled price CUP for benchmarking this international transaction of the assessee against TNMM Transactional Net Margin Method used by the assessee and computed the transfer pricing adjustment on this account as under:

<i>Description</i>	<i>Amount (Rs.)</i>
<i>1% Commission on guarantees of amounting more than Rs.1 crore (A)</i>	<i>36,30,595</i>
<i>1.5% Commission on guarantees of amounting less than Rs.1 crore (B)</i>	<i>5,67,881</i>
<i>Less: Commission received from overseas branches (C)</i>	<i>139,918</i>
<i>Adjustment proposed now (A+B-C)</i>	<i>40,58,558</i>

The total adjustment as have been made were summarized as under:

Sr. No.	Description	Amount (in Rs.)
1.	Adjustment in view of undercharging the AE, below the ALP(which has been determined at Rs.93,07,975/-) for providing corresponding banking services. The assessee has already recovered an amount of Rs.48,36,568/-. Further Adjustment is of Rs.44,71,407/-.	44,71,407
2.	Adjustment in view of undercharging the AE relating to commission on guarantees	40,58,558
	Total	85,29,965

31. The assessing officer made the adjustment to the arm's length price as recommended by the TPO.

32. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed this ground of appeal of the assessee.

33. During the course of appellate proceeding before us the ld. Counsel submitted that Indian branch is the PE of the foreign bank and the counter guarantee given by it was fully protected. Therefore, the India branch has only charged administration cost and same cannot be compared with the local guarantee given by the bank. The ld. Counsel further submitted that TNMM is the most appropriate method and TPO has determined the arm's length price without rejecting the TNMM. The ld. Counsel also submitted that CUP method is not applicable for

determination of arm's length price in respect of provision of interbank indemnity services transaction provided to related parties. The ld. Counsel further submitted that identical issue on similar fact has been adjudicated by the ITAT, Mumbai in the case of Australia & New Zealand Banking Group Ltd. Vs. DCIT (2022) 140 taxmann.com 574 (Mum Trib) in favour of the assessee. He further submitted that vide letter dated 11.10.2011 the assessee has brought to the information of the transfer pricing officer that CUP method cannot be applied in the case of the assessee as no public information is available with regard to the similar transaction with the third parties. He also referred page no. 21 and page 22 of the paper book pertaining to The Transfer Pricing Report where specifically mentioned that entire risk of discharging the bank guarantees was borne by the overseas branches issuing the bank guarantee and BNS India only provides support services in connection with the processing of the bank guarantee.

On the other hand, the ld. D.R supported the order of lower authorities.

34. Heard both the sides and perused the material on record. During the year BNS Overseas Branches executed interbank indemnities against which the BNS India issued guarantee on behalf of the clients of the overseas branches and vice-versa. BNS India received a commission of USD 125 per transactions for guarantee issued by it on behalf of its overseas branches and paid commission of USD 100 for the guarantees issued by the overseas branches on its behalf. Before us the ld. Counsel referred the various submission made before the lower authorities and stating that the assessee bank has not faced any risk as the guarantees issued was fully secured by back to back interbank indemnity issued by overseas branches. The assessee has benchmarked this transaction after following the TNMM and comparability analysis

showed an arithmetic mean margin (operating profit to operating cost) of 15.28%. However, the TPO has applied internal CUP method and computed an upward adjustment of Rs.40,58,558/-. In the TP study report the assessee has given the analysis of the aforesaid transactions that Inter-Bank indemnity is a financial arrangement wherein a bank branch will be compensated for any financial liability that it incur on behalf of its co-branch. The issuance of these arrangement is standard practice in international banking service. The assessee explained that by issuing a guarantee on behalf of the clients of BNS overseas branches, the assessee did not fall under any default/credit risk as it is secured by a back to back inter-bank indemnity issued by overseas BNS branches to the assessee. In a reverse scenario where the associated enterprises of the assessee issues guarantees on behalf of the assessee, the remuneration charges by them to the assessee was only the administrative services provided by them and not based on the rates that would have been charged to third parties.

After perusing the material placed on record we find in the case of BNS India no public information on third party to third party transaction of similar or identical services was found that reflects the characteristics of the services provided by BNS India. Further as per provision of Rule 10B of the I.T Rules comparables for provision of interbank indemnity services would have to be companies which provide same or similar services as BNS India, and are comparable in terms of function performed, risk assumed and asset utilized. As per the information provided by BNS India it had earned operating margin of 25.41% on operating cost which was higher than the arm's length margin of 15.28% on operating cost. The lower authority has not brought on record any relevant material to contrary to the material facts as discussed supra in this order.

We have gone through the decision of ITAT in the case of Australia & New Zealand Banking Group Ltd. Vs. DCIT (2022) 140 taxmann.com 574 (Mum Trib) wherein it is held that where TPO observed that assessee had earned processing fees for issuing guarantees on behalf of its associated enterprises and rejected TNMM adopted by the assessee and proceeded to benchmark guarantee transaction using external CUP method, since data under CUP method was not available and data margins under TNMM was readily available and held that it would be appropriate to apply TNMM as most appropriate method. In the aforesaid decision it is held that TNMM method would be the most appropriate method in the facts and circumstances of the case and CUP could not be applied because of non-availability of data. The relevant operating part of the decision is reproduced as under:

“3.6 Hence, from the aforesaid modus operandi, it could be concluded that assessee acts as a beneficiary bank Je issue guarantee in India on behalf of clients of overseas branches of ANZ based on the counter guarantee issued by such overseas ANZ branches. Since assessee is acting as the beneficiary, the entire risk of discharging the bank guarantees is borne by overseas ANZ branch issuing the counter guarantee. The assessee merely provides support service in connection with processing of the guarantees, typing out the guarantee agreement based on swift message received and issuing the said agreement to the beneficiary The aforesaid functions performed by the assessee are not disputed by the lower authorities. When assessee is fully protected by overseas counter guarantee, we are unable to comprehend ourselves as to how CUP method could be applied thereon as it would be impossible to make adjustment for the differences as per rule 10B(1)(a) of the Income- tax Rules In effect, we find that assessee is merely providing secretarial services or which can be loosely called as carrying out administrative functions. It is not in dispute that the assessee does not bear any risk in its books as it is fully protected by overseas counter guarantee/indemnity In fact even assessee would not have to face the foreign exchange risk in view of the fact that whenever assessee is called upon to discharge the guarantee on behalf of the overseas branches, the assessee would first receive the monies from overseas branch because of the existing counter guarantee, and then discharge the same. The assessee is receiving processing fees from its AEs in foreign currency and the said fee is received immediately after the invoice is raised for the same, thereby the risk of exchange fluctuation would be very very negligible due to reduced time span involved therein. Given these undisputed facts, it would be appropriate to consider assessee as the tested party as it would be the least complex entity and its profitability could be reliably ascertained Admittedly, the transaction which requires to be benchmarked is the receipt of processing fees by the assessee for the guarantees issued by rendering the aforesaid secretarial

services Hence, what is to be looked into is under similar terms and conditions and under similar circumstances what is the guarantee fee charged by the third party comparables from the AEs. This is what precisely assessee has done in the instant case. The assessee had taken into account the third party comparable margins and compared the same with its margins using Transactional Net Margin Method. For this purpose, the assessee had taken the third party comparables which are engaged in providing liasoning services, managerial services, marketing services, administrative services and information services. Effectively all these services could be loosely termed as business support services. Hence, when the data under CUP method is not available and data of margins under TNMM is readily available, then it would be appropriate to apply TNMM method as the Most Appropriate Method (MAM) in the facts and circumstances of the instant case.

3.7 We find that assessee had explained the entire transactions and the modus operandi applied by it in respect of the guarantee transactions before the Id TPO which are evident vide letter dated 9-10-2015 together with the fee charged for each type of services tendered by it. These details are enclosed in pages 316 to 322 of the paper book filed before us. We also find the assessee vide its letter dated 28-10-2015 had filed a detailed annexure enclosed in pages 328-331 of the paper book listing the guarantees issued by it based on counter guarantee received from overseas branches of ANZ The assessee also furnished the sample documents enclosing the copy of swift message received from ANZ New York advising the assessee to issue guarantee to Indian beneficiaries like Reliance Infrastructure Ltd., and providing counter guarantee.

3.8 The assessee also placed on record the copy of the swift message from assessee to ANZ New York confirming that guarantee has been issued to Reliance Infrastructure Ltd, confirming that guarantee has been Issued by ANZ Mumbai. By all these documents, the Id. AR was vociferous in driving home the point that the entire risk of discharging the bank guarantees is borne by the overseas ANZ branch issuing the counter guarantees wherein the assessee merely provides support services in connection with processing of the guarantees The Id AR also referred to page 380 of the paper book containing various swift messages received The assessee also placed on record the reply letter dated 18-12-2015 filed before the Id TPO in response to show-cause notice as to why 1% guarantee fee charged by thud party Indian banks should not be considered as the arm's length price, placed reliance on the decision of the Mumbai Tribunal in the case of Addl. CIT V. Asian Paints Ltd [2014] 44 taxmann com 422 wherein specifically in the context of guarantee fees, this Tribunal had deleted the adjustment made as the said judgement was rendered simply relying on certain data from the market. The facts of the case before us squarely fit into the facts prevailing in the case of Asian Paints Ltd (supra).

3.9 The assessee before the Id. DRP made an alternative submission that the fee of 1% proposed by the Id TPO may be applied in respect of fresh guarantees issued during the year. The details of fresh guarantees issued during the year were also furnished before the Id. DRP in pages 577-579 of the paper book vide letter dated 27- 4-2016 But we find that the Id DRP had merely brushed aside the same and grossly erred in stating that no details were filed by the assessee.

3.10 In view of the aforesaid observations, we hold that INMM method would be the Most Appropriate Method in the facts and circumstances of the instant

case and CUP could not be applied herein because of non availability of data. In any case in respect of adjustment made simply relying on 133(6) information from the market had been deleted by this Tribunal in the case of Asian Paints Ltd, referred to supra. It is also prudent to note that the same transactions were accepted by the Id. TPO upto A Y2012-13 in the case of the assessee Hence, even going by the rule of consistency as has been held by the Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT [1992] 60 Taxman 248/ 193 ITR 321, there is no need for the Id. TPO to take a divergent stand when there is no change in the facts and circumstances during the year with that of earlier years Hence, we direct the Id TPO to delete the adjustment made in respect of guarantee fees in the sum of Rs. 10,94,55,035/. Accordingly, the ground Nos 1 & 2 raised by the assessee are allowed.”

We have also perused the decision of ITAT Delhi in the case of Bank of Tokyo Mitsubishi UFJ Ltd. Vs. The DDIT (IT), Circle 1(1) vide ITA No.1162/Del/2014 wherein identical issue on similar fact was decided in favour of the assessee. Considering the facts and judicial pronouncements as discussed supra in this order the issue in the appeal is squarely covered by the decision of the ITAT Mumbai therefore, the decision of Id. CIT(A) in sustaining the arm's length price addition made by the assessing officer is not justified. Accordingly, ground nos. 9 to 13 are allowed.

ITA No.3828/Mum/2013 (Revenue's Appeal) AY: 2008-09

Ground No. 1: Applicability of S.115A to interest income from Foreign Currency Loan:

35. We have dismissed the ground of revenue on the similar issue and identical facts as per ground no. 1 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.2: Disturbing the set of comparable of the TPO and not appreciating the reasons given by TPO in respect of comparable disturbed by CIT:

36. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that this ground of appeal is conceded on account of smallness of amount, therefore, this ground of appeal is allowed.

ITA No.8841/Mum/2010 (Assessee's Appeal) AY: 2006-07

Ground No. 1: Applicability of S. 115A to interest income from Foreign Currency Loan:

37. On similar issue and identical fact we have dismissed the ground no. 1 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.2: Not allowing deduction of interest paid by India Branch to head office:

38. On similar issue and identical fact we have dismissed the ground no. 2 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground Nos. 3 to 5: (Transfer pricing adjustment in respect of Correspondent banking services:

39. These grounds of appeal are not pressed, therefore, the same stand dismissed.

Ground No.6: Correspondent Banking Charges – Whether to be excluded in view of Article 7(3) of the India – Canada DTAA:

40. This ground of appeal is also not pressed, therefore, the same stand dismissed.

Ground No. 7: Transfer Pricing adjustment in respect of Inter-Bank Indemnity services making upward adjustment:

41. On similar issue and identical fact we have adjudicating the ground nos. 9 to 13 of appeal of the assessee in favour of the assessee for assessment year 2008-09 vide ITA No. 3862/Mum/2013 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is allowed.

ITA No.4036/Mum/2012 (Assessee's Appeal) AY: 2007-08

Ground No. 1 to 6: (Transfer pricing adjustment in respect of Correspondent banking services and Upholding the use of single year data in determining arm's length price in respect of correspondent banking service and Disregarding margin analysis using the financial data of comparable companies for FY. 2006-06 and Correspondent Banking Charges – whether to be excluded in view of Article 7(3) of the India – Canada DTAA:

42. All these grounds of appeal are not pressed, therefore, the same stand dismissed.

Ground No.7 to 9: Transfer pricing adjustment for administrative services in relation to guarantee transaction and Transfer pricing adjustment in respect of Inter-bank Indemnity and TPO's action of selecting CUP as the most appropriate method to benchmark the international transaction of issue of back to back guarantee and by selecting domestic guarantees issued by the Appellant as comparable transaction.

43. On similar issue and identical fact we have decided the ground nos. 9 to 13 of appeal of the assessee in favour of the assessee for assessment year 2008-09 vide ITA No. 3862/Mum/2013 as above in

this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is allowed.

ITA No. 3989/Mum/2012 (Revenue's Appeal) AY: 2007-08

Ground No.1: Applicability of S. 115A to interest income from Foreign Currency Loan:

44. On similar issue and identical fact we have dismissed the ground no. 1 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.2: Deleting addition of interest paid to Head Office/Overseas Branches:

45. On similar issue and identical fact we have dismissed the ground no. 2 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.3: CIT(A) has erred in not appreciating the correct reasons given by TPO in rejecting the variable, as done by the TPO

46. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that this ground of appeal is conceded on account of smallness of amount, therefore, this ground of appeal is allowed.

ITA No.4898/Mum/2017 (Revenue's Appeal) AY: 2009-10

Ground No.1: Applicability of S. 115A to interest income from Foreign Currency Loan:

47. On similar issue and identical fact we have dismissed the ground no. 1 of appeal of the revenue for assessment year 2005-06 vide ITA No. 5634/Mum/2011 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the revenue is dismissed.

Ground No.2: In Holding that Allianz Securities Ltd. is not comparable with BNS on functional differences for correspondent banking services:

48. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that this ground of appeal is conceded on account of smallness of amount, therefore, this ground of appeal is allowed.

ITA No.4980/Mum/2017 (Assessee's Appeal) AY. 2009-10

Ground No. 1 to 4: (Transfer pricing adjustment in respect of Correspondent banking services:

49. These grounds of appeal are not pressed, therefore, the same stand dismissed.

Ground No.5 & 6: (Upholding the use of single year data in determining arm's length price in respect of correspondent banking services:

50. These grounds of appeal are not pressed, therefore, the same stand dismissed.

Ground No. 7: (Correspondent Banking Charges – whether to be excluded in view of Article 7(3) of the India – Canada DTAA)

51. This ground of appeal is not pressed, therefore, the same stand dismissed.

Ground No.8 to 12: (Transfer pricing adjustment for administrative support services in relation to interbank indemnities:

52. On similar issue and identical fact we have adjudicated the ground nos. 9 to 13 of appeal of the assessee in favour of the assessee for assessment year 2008-09 vide ITA No. 3862/Mum/2013 as above in this order. Applying the finding of the aforesaid decision as mutatis mutandis this ground of appeal of the assessee is allowed.

53. In the result, the appeals of the assessee are partly allowed and appeals of the revenue are also partly allowed.

Order pronounced in the open court on 29.01.2024

Sd/-

(Vikas Awasthy)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 29.01.2024

PS: Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.