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

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

AND

SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

ITA NO.1407 & 2936/MUM/2019
(A.Ys: 2002-03 & 2003-04)

Asst. CIT (I.T)- 4(2)(2) Room No. 1624, 16th Floor Air India Building, Nariman Point Mumbai - 400021	*v.*	M/s. Standard Chartered Bank Ltd., Crescenzo, 7th Floor C-38/39, G-Block Behind MCA Club, Bandra Kurla Complex Bandra (E), Mumbai – 400051 **PAN: AABCS4681D**
(Appellant)		**(Respondent)**

ITA NO.1683 & 2839/MUM/2019
(A.Ys: 2002-03 & 2003-04)

M/s. Standard Chartered Bank Ltd., Tax Department Crescenzo, 7th Floor C-38/39, G-Block Behind MCA Club, Bandra Kurla Complex Bandra (E), Mumbai – 400051 **PAN: AABCS4681D**	*v.*	Asst. CIT (Intl. Taxation)- 4(2)(2) 17th Floor, Air India Building Nariman Point Mumbai - 400021
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Porus Kaka & Shri Manish Kanth**
Department Represented by	**:**	**Shri Anil Sant**
Date of conclusion of Hearing	**:**	**21.02.2024**
Date of Pronouncement	**:**	**15.03.2024**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These cross appeals are filled by the assessee and revenue against different orders of Learned Commissioner of Income Tax (Appeals)-57, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.12.2018 for the A.Ys.2002-03 and 2003-04.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order.

REVENUE APPEALS

ITA No. 1407/MUM/2019 (A.Y. 2002-03)

3. Revenue has raised following grounds in its appeal: -

> *"1. "On the facts of the case and in law, the Ld CIT(A), while allowing the expenditure the expenditure incurred by the HO for salary paid to the expatriate employees for rendering services to PE, erred in not considering at the same time that these expenses being not recorded in books of assessee (PE) in India, were neither actually paid nor shown payable in books of Indian PE and as the assessee did receive the services of such value through its HO, simultaneously there was equivalent income also accruing to assessee u/s 28(iv) and once the AO having not made any separate addition u/s 28(iv), the disallowance of*

expenses claimed directly in computation of income was merely to bring tax neutrality."

2. "On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in holding that the interest received by HO of the non-resident bank from its PE in India is not taxable under the Act."

3. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in not considering section 9(1)(v)(e) of the Act as a charging section as held by the Hon'ble Supreme Court in the case of A. Sanyasi Rao (1996) 3 SCC 465 and reiterated by the Hon'ble Supreme Court in the case of Sedco Forex International Inc in Civil Appeal No. 4906 of 2010."

4. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in not taking into account paragraph 6 of Article 12 of India-UK DTAA which provides for applicability of source rule of taxation in the State of source of income in case of payment of interest made by a PE in relation to the business activity in India."

5. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in applying the principle of mutuality as laid down by the Hon'ble Special Bench of the Mumbai ITAT in the case of Sumitomo Mitsui Banking Corporation when in fact the assessee has been taxed as per the beneficial provisions of the DTAA under which the Head office and the Branch office of the assessee bank are two distinct and separate entities under Article 7(2)/7(3) of the said DTAA and which allows for deduction of interest expense as also for taxation in source State of the payment of interest by a PE to its HO."

6. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in applying the principle of mutuality to when in fact the assessee has been taxed as per the beneficial provisions of the DTAA under which the Head office and the Branch office of the assessee bank are two distinct and separate entities under Article 7(2)/7(3) of the said DTAA and which principle has also been upheld by the Hon'ble Kolkata High Court in the case of ABN Amro Bank in L.T.A. No. 458 of 2005."

7. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in holding that the interest paid by the Branch office to the Head office/Overseas branches is a deductible expenditure without appreciating that as such interest was an income chargeable to tax in India, tax was liable to be deducted on the same in accordance with the provisions of Section 195 of the Act."

8. On the facts of the case and in law, the Ld CIT(A) erred in allowing interest paid by the Branch office to the Head office/Overseas branches without deduction of the tax under the Income-tax Act and Indo-UK DTAA as the assessee is a banking company without appreciating that as per Paragraph 5 of Article 7 of the India-UK DTAA income of the permanent establishment is to be computed in accordance with domestic law and therefore as tax was not deducted on such interest payment the same was an ineligible deduction u/s 40(a)(ia) of the Income-tax Act."

9. On the facts of the case and in law, the Ld CIT(A) erred in directing that 75% of the expenses of Rs 5,56,40,717-(incurred on refurbishment of leasehold premises) be treated as revenue expenses and 25% of the expenditure be considered as capital expenses, without considering the fact that there is no provision under the Act to estimate certain percentage of the total expenditure related to a particular asset as revenue expenditure or capital expenditure and that the expenditure incurred in relation to any particular asset is either entirely on capital or on revenue account"

10. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

4. At the time of hearing, both the counsels fairly agreed that the issues raised in this appeal are covered and adjudicated by the Coordinate Bench of the Tribunal in assessee's own case for the A.Ys. 1994-95 to 2001-02. Copies of the orders are placed on record.

5. We proceed to dispose off this appeal by adjudicating the issues ground wise.

6. With regard to Ground No. 1, which is in respect of salaries paid to Expatriates, Ld DR brought to our notice the relevant facts and fairly agreed that the issue under consideration is similar to the issue raised by the tax authorities in the earlier assessment years. He submitted that the proposed addition is proper as per law and relies on the orders of lower authorities.

7. On the other hand, Ld.AR of the assessee submitted that the expatriate employees were seconded to India and they worked exclusively for India business. Most of them are heads of various business division and support function in India. Certain portion of their salary was paid in their home country (outside India) which has been claimed as deduction by India Branch and the said portion of salary is a subject matter of dispute. This component of salary has been offered to tax as salary income in India by the employees in their individual tax returns and has already been subjected to tax deduction at source as salary by India Branch of the Bank. Further, he submitted that Assessing Officer disallowed the claim u/s 37(1) and section 44C of the Act which

was set-aside by the Ld.CIT(A) relying on ITAT orders in assessee's own case and Ld.CIT(A) orders for the past assessment years. The Department raised this new ground of taxability of salaries to expatriates under section 28(iv) of the Act for the first time before the Hon'ble ITAT bench, the basis of put forth by them are viz., these salaries are actually paid by India Branch to HO, etc.

8. Further, Ld.AR of the assessee brought to our notice that the issue under consideration in this appeal has considered by the Co-ordinate Bench of this Tribunal in assessee's own case and decided the issue in favour of the assessee and against the department.

9. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y. 2001-02. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 4934/Mum/2001 dated 13.11.2023 held as under: -

> *"The Assessee submits that this issue is covered in favor of the Assessee by a decision of the Co-ordinate bench of the Tribunal in the Assessee's own case for the assessment year 1999-2000, wherein the Tribunal followed the Assessee's own case Tribunal order of A.Y. 1997-98 and dismissed the ground raised by the Revenue (Copy of A.Y. 1999-00 ITAT order is enclosed in the*

Bank's legal paper book - refer Page 191, para 34) which reads as under:

> *"34. since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 1997-98 and also following rule of consistency, we dismiss the grounds raised by the revenue."*

Further, with respect to the contention of the department that equivalent income accruing to the Appellant under section 28(iv) of the Act (being raised for the very first time directly before the Hon'ble ITAT), the Appellant submit that this issue is covered in favor of the Appellant by the decision of the Mumbai Tribunal in case of Shinhan Bank vs. DCIT [2022] 144 taxmann.com 182(Mumbai ITAT) (Copy of the decision is enclosed in the Department's appeal legal paper book at page no. 1), wherein the Hon'ble Tribunal has inter alia held that non-reimbursement of expenses incurred by HO for salary of employees of Indian PE did not result in taxable income in the hands of PE/HO under section 28(iv) of the Act. Relevant para is reproduced as under:

> *"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 v. Hyundai Heavy Industries Co. Ltd. [2007] 161 Taxman 191/291 ITR 482, "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 nonreimbursement 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 Corpn. v. Dy. CIT (IT) [2012] 19 taxmann.com 364/136 ITD 66 (Mum.), 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."*
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> *In view of the above, the Appellant submits before us to follow the own case ITAT order for A.Y. 1999-00 dated 27 September 2022 and decision of Mumbai Tribunal in case of Shinhan Bank(supra) and allowed the deduction of INR 3,25,01,633/- by dismissing the ground raised by the Revenue.*
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> *Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 1997-98 and 1999-00 and also following rule of consistency, we dismiss the grounds raised by the revenue."*

10. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, ground raised by the revenue is accordingly dismissed.

11. With regard to Ground Nos.2 to 6 which are in respect of Taxability of interest income in the hands of Head Office, Ld.DR brought to our notice the relevant facts of the issues raised by the revenue and submitted that the issue brought on record by the lower authorities are proper and he justified the additions, at the same time, he has fairly agreed that the issue under consideration is similar to the issues raised in the earlier assessment years.

12. On the other hand, Ld AR of the assessee submitted that as the assessee is engaged into banking business in India through its branches, the said India Branches borrow from its Head Office / Overseas Branches (HO). On this borrowings, India Branches have paid interest to the HO. The India Branches have claimed deduction of this interest expenses and since, the said interest is not taxable in the hands of the HO, there is no question of tax deduction at source on such interest expense. Further, he submitted that the Assessing Officer held that interest income is taxable under DTAA at 10% in the hands of the HO. The Ld.CIT(A) held that interest is not chargeable to tax in the hands of the HO relying upon the decision in the case of Sumitomo Mitsui Banking Corporation [136 ITD 66] (Mum ITAT -SB), ABN Amro Bank N.V. vs. CIT [2012] 343 ITR 81 (Cal. HC) and the Bank's own case CIT(A) order for AY 2001-02)].

13. Further, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this tribunal in assessee's own case and decided the issue in favour of the assesse and against the department.

14. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y. 2001-02. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 4934/Mum/2017 dated 13.11.2023, held as under: -

> *"6.1 Ground:*
>
> *On the facts of the case and in law, the Ld CIT(A) erred in holding that the interest paid to the HO represent payments made to self on principles of mutuality, without appreciating the fact that under International taxation principles the income of the PE has to be computed as independent entity by attributing appropriate portion of income arising from transaction between the PE and its HO.*
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> *.....*
>
> *The Assessee submits that this issue is covered in favor of the Assessee by the decision of the Special bench of the Mumbai Tribunal in case of Sumitomo Mitsui Banking Corporation vs. DDIT (2012) (136 ITD 66).The Hon'ble Tribunal has inter alia held that since the interest payment by branch to HO is in the nature of payment to self, (the HO and branch being one legal entity), the same should not be chargeable to tax in the hands of the HO under the provisions of the Act. It was also held that this interest cannot be taxed in the hands of the HO / overseas branch of the Bank even under the provisions of the tax treaty.*

(The relevant portion of Mumbai Special Bench order is already reproduced at para 3.5 of Ground 3 above.)

Further, the Assessee submits that the amendment under the provisions of section 9(1) (v) of the Act, is applicable prospectively with effect from 1 April 2016 (i.e., AY 2016-17 onwards). Hence, the interest paid by Branch to the Head office is not taxable under the domestic laws for the year under consideration.

In view of the above, the Assessee submits before the Hon'ble ITAT to dismiss the ground raised by the Revenue. In view of the above, the Assessee/respondent submits before us to follow its own case for A.Y. 1999-00 dated 27 September 2022 and upholds the decision of the Ld. CIT (A) by dismissing the ground raised by the Revenue. We have gone through the relevant orders of Ld. CIT (A) and coordinate bench for A.Y.'s 1994-95 to 1997-98 and 1999-00 respectively. Continuously this issue is being raised by the revenue, but the same is decided in favour of assessee by the Ld. CIT (A) and coordinate bench as mentioned (supra) and Revenue is not in a position to controvert the same with any decision in their favour by any higher judicial forum. Hence, following the legal precedent continuously up till in favour of assessee, Ground raised by the Revenue is dismissed."

15. Respectfully following the above decision and following the principle of consistency, the view taken by the coordinate bench in A.Y.2001-02 is respectfully followed, accordingly, grounds raised by the revenue are dismissed.

16. With regard to Ground Nos. 7 and 8 which are in respect of disallowance of interest paid to Head Office, Ld.DR brought to our notice the relevant facts of the issue raised by the revenue and submitted that

the issue brought on record by the lower authorities are proper and he justified the additions, at the same time, he has fairly agreed that the issue under consideration is similar to the issues raised in the earlier assessment years.

17. Ld.AR of the assessee submitted that Assessing Officer held that interest income is taxable under DTAA at 10% in the hands of the HO and disallowed the claim of deduction on account of non-deduction of tax which is allegedly deductible at source. On appeal, Ld. CIT(A) allowed the deduction relying on the decision in the case of Sumitomo Mitsui Banking corporation [136 ITD 66] (MUM ITAT – Special Bench). Further, Ld.AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this tribunal in assessee's own case and decided the issue in favour of the assesse and against the department.

18. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 4867/Mum/2017 dated 13.11.2023 held as under: -

3.1 Ground

3.1 The learned CIT(A) erred in law and on facts to disallow interest payable to head office/ overseas branches on the ground that the Act does not allow deduction of interest paid by Branch to Head office.

3.2 The learned CIT(A) ought to have considered that a combined reading of Articles 7(2) and 7(5) of DTAA entered into by India with UK provides that interest paid by the Permanent Establishment (PE) on moneys lent to it by the Head Office / overseas branches of any banking enterprise would be taken into consideration in determining the profits attributable to that PE.

3.3 The learned CIT (A) ought to have allowed deduction for interest payment by the Appellant to its Head Office / overseas branches and accordingly, disallowance should be deleted.

.....

*At the outset, the Appellant wish to highlight that this issue of disallowance of interest paid to HO was first time raised in AY 2000-01. The Appellant submits that this issue is covered in favor of the Appellant by the decision of the Mumbai Special Bench of the Tribunal in case of **Sumitomo Mitsui Banking Corporation vs. DDIT (2012) (136 ITD 66) (SB-Mumbai ITAT),** wherein the Special Bench of the Tribunal has inter alia held that since the interest payment by branch to HO is in the nature of payment to self, (the HO and branch being one legal entity), the same should not be chargeable to tax in the hands of the HO under the provisions of the Act. It was also held that this interest cannot be taxed in the hands of the HO / overseas branch of the Bank even under the provisions of the tax treaty and hence the same should not be subject to TDS / consequent disallowance under section 40(a) (i) of the Act **(copy enclosed at page247 of the Bank's Appeal legal paper book),** which read 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 article 7(2) & 7(3) of the Indo-Japanese treaty read with paragraph 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 section 195 of the Act 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 section 40(a)(i) of the Act does not arise. Accordingly we answer question No.1 referred to this Special Bench in the negative i.e. in favour of the assessee and question No.2 in affirmative i.e. again in favour of the assessee.

89. before parting, we may clarify that there may arise a situation where interest is payable by PE to GE and also there is interest receivable by PE from GE in the same year. A similar situation may arise where there are internal dealings of the Indian Branch of a foreign bank

with its head office as well as other overseas branches. In such a situation, the issue may arise whether only the net interest would be allowable as deduction while determining profits attributable to the PE in India. This issue, however, has neither been referred to this Special Bench nor any arguments have been advanced by both the sides thereon specifically during the course of hearing. We may further clarify that the issue referred to this Special Bench in question No. 2 has been raised by Antwerp Diamond Bank NV in its appeal by way of an additional ground. Although the said issue which is also involved in the case of Sumitomo Mitsui Banking Corporation and which is referred to this Special Bench in question No. 2 has been decided by us in principle, the application of Antwerp Diamond Bank NV for admission of additional ground raising the said issue will be considered by the Division Bench while disposing of the relevant appeal on merits.

90. We may also clarify that all the judicial pronouncements cited by the learned representatives of both the sides and the relevant portion of commentaries referred to in support of their respective stand have been considered and deliberated upon by us while arriving at our conclusions. Some of them, however, are not specifically mentioned or discussed in the order as the same have been found to be not directly relevant to the issue or the proposition therein is found to be repetitive in nature which has already been considered by us. We take this opportunity to place on record our appreciation for the assistance provided by the learned representatives of both the sides by making elaborate submissions which has helped us to analysis the legal position emanating from the interpretation of the relevant provisions of the domestic law as well as the relevant tax treaties and apply the same to the facts of the cases before us.

91. The matter will now go before the respective Division Bench for disposing off the appeals keeping in view our decision rendered above."

> *In view of the above, the Appellant submits before us to allow the deduction of interest paid of INR 32, 44,183/- to HO/OB in line with the decision of the Mumbai Special Bench in case of in case of Sumitomo Mitsui Banking Corporation (supra). Further, the Appellant submit that Special Bench decision in case of Sumitomo (supra) is not only dealing with India-Japan Tax Treaty but also dealt with IndiaNetherland Tax Treaty. Your Honour will appreciate that the language of India-UK Tax Treaty (applicable in case of the Appellant) is in line with India-Netherland Tax Treaty. Revenue is not able to produce any argument to controvert the facts of the ground raised by the assessee and also not able to controvert the stand taken by the special bench in the case of* ***Sumitomo Mitsui Banking Corporation vs. DDIT (2012) (136 ITD 66) (SB-Mumbai ITAT)****. Hence, in the given situation respectfully following the decision of special bench (supra),* ***ground raised by the assessee is allowed****."*

19. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2000-01 is respectfully followed, accordingly, grounds raised by the revenue are dismissed.

20. With regard to Ground No. 9 which is in respect of disallowance of expenditure on Refurbishment, Ld.DR brought to our notice the relevant facts of the issues raised by the revenue and submitted that the issue brought on record by the lower authorities are proper and he justified the additions, at the same time, he has fairly agreed that the issue under consideration is similar to the issues raised in the earlier assessment years.

21. Ld. AR of the assessee submitted that these expenses incurred on refurbishment of various branch premises like electrical works, cabling and wiring, etc. Assessing Officer held that these expenses are capital in nature (and not revenue) disallowed the same. Assessing Officer allowed depreciation on the said expenses. Since the facts of this case are same as earlier assessment years, the Ld.CIT(A) (by relying on its own past orders), held that 75 percent of the expenses are allowable as revenue in nature and remaining 25 percent are capital in nature on which depreciation was allowed. The Department is in appeal now with respect to the allowance of 25 percent of expenses as decided by the Ld. CIT(A). Further, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this tribunal and decided the issue in favour of the assessee and against the revenue.

22. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

23. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench ITA.No. 4867/Mum/2017 dated 13.11.2023 held as under: -

*"**Ground No. 4: <u>Expenditure on refurbishment of premises</u>***

<u>4.1 Ground</u>

4.1 The learned CIT (A) erred in law and on facts to disallow 25% of the expenditure incurred on refurbishment of leasehold premises as capital in nature.

4.2 The learned CIT (A) ought to have allowed the said expenditure as revenue in nature and accordingly disallowance should be deleted.

……

*The Appellant submits that this issue is covered in favor of the Appellant by the decision of the Co-ordinate bench of the Tribunal in the Appellant's own case for the assessment year 1999-2000, wherein the Tribunal following the decision of Hon'ble Supreme Court in the case of Madras Auto Service Pvt. Ltd. [233 ITR 468] **(Copy of decision is enclosed in the Bank's legal paper book at page 336)** allowed the deduction for the entire refurbishment expenses **(Copy of A.Y. 1999-00 ITAT order is enclosed in the Bank's legal paper book -refer page 157, para 13 and 14)** which reads as under**:***

> *"13. Considered the rival submissions and material placed on record, we observed that Hon'ble Supreme Court in the case of Madras Auto Services Pvt. Ltd., (supra) on similar issue adjudicated in favour of the assessee. While holding so Hon'ble Supreme Court held as under: -*
>
> > *"The assessee is a limited company carrying on the business of sale of motor parts. Its head-office is at Madras. It has a branch at Bangalore. Under an agreement of lease dated 1st of February, 1966, the assessee obtained from M/s. Hajira Comer and Mrs. Rabia Bai Razack a lease of premises Nos. 64 and 64/1 situated at Sri Narasimharaja Road, Bangalore for a period of 39 years commencing from 1st of January, 1966. Under the terms and conditions of the lease, the lessee (that is to say the assessee), had the right to demolish at its own expense the existing premises and appropriate to itself all the material thereof without paying to the lessors any compensation and construct a new building thereon to suit the purpose of their business as*

per the plan approved by the lessors. Under Clause 2 of the lease deed, the lessee was required to pay a rent of Rs. 1000/- per month for the first fifteen years, Rs. 1500/- per month for the next ten years, Rs. 1650/- per month for the next ten years and Rs. 2000/- per month for the remaining years. The lease deed further provided that the new construction shall, right from the commencement of the work, be the property of the lessors; and upon completion of the work of construction the lessee will have only the right to be a tenant for a period of 39 years under the existing lease subject to the payment of rent and observation of other terms and conditions of the lease. The lessee shall not be entitled under any circumstances for any compensation whatsoever on account of its putting up the new construction in the place of the old.

Acting under the lease agreement the assessee invested a sum of Rs. 1, 62, 835/- in the previous year relevant to the assessment year 1968/69 and Rs. 50, 937/- during the succeeding year in constructing a new building on the said land. The assessee claimed before the Income-tax Officer the expenditure of the said sums of Rs. 1, 62,835/- and Rs. 50, 937/- in the relevant assessment years as capital loss. In the alternative, the assessee claimed depreciation on capital investment; in the alternative, the assessee claimed deduction of the payments as business expenditure or as extra rent for the lease. Ultimately, the Income-tax Tribunal has held that the expenditure of the said two amounts for the construction of a new building is in the nature of business expenditure for proper carrying on of the business of the assessee. The Tribunal has, therefore, treated these amounts as revenue expenditure and allowed a deduction in that regard to the assessee. The claim of the department that the expenditure was capital expenditure and was, therefore, not deductible was negatived by the Tribunal.

On the application of the department the Tribunal referred the following question to the High Court for its determination under Section 256(1) of the Income-tax Act, 1961:

> *"Whether on the fact and in the circumstances of the case the Appellate Tribunal was right in holding that the building expenses of Rs. 1,62,835/- are not liable to be taken into account as deductible expenditure in arriving at the real income of the assessee for the assessment year 1968-69?"*

For the next assessment year, a similar question was raised in regard to the second sum of Rs. 50,937/-The High Court has, by the impugned judgment, upheld the view of the Tribunal and has held that the two amounts constitute revenue expenditure for the concerned assessment years and are deductible in order to arrive at the income of the assessee for the said assessment years. The present appeals are filed by the department from the impugned judgment of the High Court.

The assessee in the present case has spent the amounts in question in order to construct a new building after demolishing the old building. The new building, however, from inception was to belong to the lessor and not to the assessee. The assessee, however, had the benefit of the existing lease in respect of the new building at the agreed rent for a period of 39 years. The Tribunal has found, as a fact, that the rent as stipulated in the lease was extremely low. It rental rate for the area in which the building was situated was much higher and would be not less than Rs. 12,000/- as against which the maximum rent the assessee would be paying was only Rs. 2,000/-. This concessional rent was on account of the fact that the new building was constructed by the assessee at its own cost.

In order to decide whether this expenditure is revenue expenditure or capital expenditure, one has to look at the expenditure from a commercial point of view. What advantage did the assessee get by constructing a building which belonged to somebody else and spending money for such construction? The assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent. The expenditure, therefore, was made in order to secure a long lease of new and more suitable business premises at a lower rent. In other words, the assessee made substantial savings in monthly rent for a period of 39 years by expending these amounts. The saving in expenditure was saving in revenue expenditure in the form of rent. Whatever, substitutes for revenue expenditure, should normally be considered as revenue expenditure. Moreover, assessee in the present case did not get any capital asset by spending the said amounts. The assessee, therefore, could not have claimed any depreciation. Looking to the nature of the advantage which the assessee obtained in a

commercial sense, expenditure appears to be revenue expenditure.

The test for distinguishing between capital expenditure and revenue expenditure in our country was laid down by this Court in Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax, West Bengal (27 ITR 34). In that case, the appellant-company had acquired from the Government of Assam lease of certain lime-stone quarries for a period of 20 years for the purpose of manufacture of cement. The lessee had, inter alia, agreed to pay an annual sum during the whole period of the lease as a protection fee and in consideration of that payment, the lessor undertook not to grant to any person any lease, permit or prospecting license for lime-stone. This Court examined tests laid down in various cases for distinguishing between capital expenditure and revenue expenditure. One of the standard tests now in use was laid down in the case of Atherton v. British Insulated and Helsby Cables Ltd. ([1925] 10 Tax Cases 155). It said: "When an expenditure is made, not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capita." Whether by spending the money any advantage of an enduring nature has been obtained or not will depend upon the facts of each case. Moreover, as the above passage itself provides, this test would not apply if there are special circumstances pointing to the contrary. This Court in the above case summarised the tests as follows :(p. 44):

1. *Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment.*

2. *Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade...........If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether.*

3. *Whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in*

as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. (Underlining ours)

Relying upon the second test enumerated above, learned counsel for the appellant has submitted that the assessee got enduring benefit of a capital nature by spending the amount because the assessee obtained a new building for a period of 39 years. The difficulty, however, in the present case, arises from the fact that this building was never to belong to the assessee. Right from inception, the building was of the ownership of the lessor. Therefore, by spending this money, the assessee did not acquire any capital asset. The only advantage which the assessee derived by spending the money was that it got the lease of a new building at a low rent. From the business point of view, therefore, the assessee got the benefit of reduced rent. The High Court has, therefore, rightly considered this as obtaining a business advantage. The expenditure is, therefore, to be treated as revenue expenditure.

Although there are a number of cases dealing with this question, we will limit ourselves to examining a few cases where the assessee, by expending money, created and asset of an enduring nature. However, the asset so created did not belong to the assessee. In such a situation the courts have held that the expenditure was for better carrying on of the business of the assessee and could be allowed as revenue expenditure, looking to the circumstances of each of those cases. Thus in Lakshmiji Sugar Mills Co. P. Ltd. v. Commissioner of Income-tax, New Delhi (82 ITR 376) the assessee company was carrying on the business of manufacture and sale of sugar. It paid to the Cane Development Council certain amounts by way of contribution for the construction and development of roads between various sugarcane-producing centers and the sugar factories of the assessee. The roads remained the property of the Government. This Court held that the expenditure was not of a capital nature and had to be allowed as an admissible deduction in computing the profits of the assessee's business. The expenditure was incurred for the purpose of facilitating the running of the assessee's motor vehicles and other means employed for transportation of sugarcane to its factories.

In the case of L.H. Sugar Factory and Oils Mills (P) Ltd. v. Commissioner of Income-tax, U.P. (125 ITR 293), the assessee was carrying on the business of manufacture and sale of sugar. It has its factory in U.P. The assessee paid a contribution towards meeting the cost of construction of roads in the area around its factory under a sugarcane development scheme. The question was whether this amount was deductible in computing the assessee's profits. The Court held that it was. Because although the advantage secured was of long duration, it was not an advantage in the capital field because no tangible or intangible asset was acquired by the assessee; nor was there any addition to or expansion of the profit making apparatus of the assessee. The amount was contributed for the purpose of facilitating the business of the assessee and making it more efficient and profitable. It was, therefore, revenue expenditure.

In the case of Commissioner of Income-tax, Bombay City- I v. Associated Cement Companies Ltd. (172ITR 257) the respondent-company entered into an agreement to supply water to the municipality and provide water pipelines as also to supply electricity for street lighting and put up a transmission line for that purpose. The assessee also agreed to concrete the main road from the factory to the railway station. The amounts expended for these purposes were held to be revenue expenditure since the installations and accessories were the assets of the municipality and not of the assessee. The expenditure, therefore, did not result in creating any capital asset for the company. The advantage secured by the respondent was immunity from liability to pay municipal rates and taxes for a period of 15 years. This Court said that had these liabilities been paid, the payments would have been on revenue account. Therefore, the advantage secured was in the field of revenue and not capital.

In the case of Commissioner of Income-tax v. Bombay Dyeing and Manufacturing Co. Ltd. (219 ITF 521) the company contributed to the State Housing Board certain amounts for construction of tenements for its workers. The tenements remained the property of the Housing Board. It was held that the expenditure was incurred wholly and exclusively on the welfare of the employees and, therefore, constituted legitimate business expenditure. As the assessee company acquired no ownership rights in the tenements, this Court said that the expenditure was incurred merely with a view to carry on the business of the company more efficiently by having a contented labour force.

All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as

> *revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expense has been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also, since the asset created by spending the said amounts did not belong to the assessee but the assessee got the business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the High Court have rightly come to the conclusion that the expenditure should be looked upon as revenue expenditure.*
>
> *In the premises, the appeals are dismissed with costs."*
>
> *14. respectfully following the above said decision, we allow ground No.2 raised by the assessee".*

*In view of the above, the Appellant submits before us to follow its own case vide ITAT order for A.Y. 1999-00 dated 27 September 2022 and allow deduction for the entire amount incurred on refurbishment of premises. Revenue is not able to produce any argument to controvert the facts of the ground raised by the assessee and also not able to controvert the stand taken by the coordinate bench in assessee's own case. Hence, in the given situation respectfully following the decision of coordinate bench in assessee's own case for A.Y. 1999-00, dated 17 October 2022, **ground raised by the assessee is allowed**."*

24. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, accordingly, ground raised by the revenue is dismissed.

25. In the result, appeal filed by the revenue is dismissed.

ITA No. 2936/MUM/2019 (A.Y. 2002-03)

26. Coming to the appeal relating to A.Y. 2003-04, since facts and the grounds raised by the revenue in this appeal are identical to A.Y.2002-03, therefore the decision taken in A.Y. 2002-03 are applicable mutatis mutandis to this assessment year also. Accordingly, the appeal filed by the revenue is dismissed.

Assessee Appeals

ITA No.1683/MUM/2019 (A.Y. 2002-03)

27. Assessee has raised following grounds in its appeal: -

> *"1. **TRANSFER PRICING ASSESSMENT IS BAD IN LAW (Pages 78-81 of CIT(A)'s order)***
>
> *1.1 The learned CIT(A) erred on facts and in law in holding that transfer pricing assessment order is valid. The learned CIT(A) erred in not appreciating, in proper perspective, Appellant's submission that Transfer Pricing Adjustments/ additions / variations made by the authorities is bad in law, illegal, without inherent jurisdiction and contrary to and / or beyond and in excess of the express statutory provisions of the Act including sections 4, 5, 9, 92, 92C, 92CA, etc. The approval of the CIT under section 92CA(1) appears to be not in accordance with law.*
>
> *1.2 Without prejudice to the above, the learned CIT(A) also erred in holding that Additional Commissioner of Income Tax (Transfer Pricing -II), Mumbai who passed the relevant Transfer Pricing Order had legal authority to act as section 2(28D) specifies that Joint Commissioner includes Additional*

Commissioner. The Ld CIT(A) erred in disregarding the detailed submissions made by the appellant that notification No S.O. 994(E), [NO. 278/2004], dated 1-9- 2004_issued by the CBDT do not include authorisation to the Additional Commissioner of Income-tax (TP - (II)), Mumbai and consequently the order passed by him is bad in law and illegal.

1.3 The Appellant submits that CIT(A) ought to have considered the submissions of the Appellant that Transfer Pricing Order is bad in law and accordingly adjustments made by the AO in the Assessment Order in relation to the Transfer Pricing Adjustment/additions/variations is also bad in law and illegal.

2. ***EXPENSES DIRECTLY ATTRIBUTABLE TO OPERATIONS IN INDIA - RS. 86,99,22,880/- (Pages 5-31 of CIT(A)'s Order)***

2.1 The learned CIT(A) erred in law and on facts to confirm the disallowance towards part of the expenses directly attributable to operations in India.

2.2 The learned CIT(A) erred in confirming the disallowance of expenses incurred outside India for the Appellant's operations aggregating to Rs. 76,93,01,880 without appreciating that appellant has produced details with respect to Rs. 34.97 crores and certificate of auditor is provided for the entire deduction which specified the nature and quantum of expenses claimed as deduction.

The learned CIT(A) also erred in holding that the entire amount is royalty/Fees for Technical Services in nature and disallowable under section 40(a)(ia) without appreciating the detailed submissions made by the Appellant inter alia that it is not service but cost allocation by the HO/offshore branches to PE in India, HO and branches are part of same entity and no payment has been made by India PE to HO thereby TDS mechanism fails.

The learned CIT(A) also erred in ignoring the submissions made by the Appellant that provisions of section 92 are not applicable in view of explicit provisions of India UK Double Tax Avoidance Agreement.

3. SALARY PAID TO EXPATRIATES CIT(A)'s Order) RS. 5,56,66,866/- (Pages 31-30 of

3.1. The learned CIT(A) erred in referring the matter to the Assessing Officer by holding that deduction of salary paid to

expat employees be allowed only if TDS has been deducted on such salary without appreciating the fact that concerned employees have already offered the relevant income to tax in India and this fact has not been disputed by the Assessing Officer.

3.2. The learned CIT(A) ought to have allowed the said expenditure and accordingly disallowance should be deleted without remanding the matter to the Assessing Officer.

3.3. Without prejudice to the above, the Appellant also submits that action of CIT(A) in remanding the matter back to the Assessing Officer without granting any opportunity to the Appellant is not in accordance with law.

4. EXPENDITURE ON REFURBISHMENT - RS. 5,56,40,717/- (Pages 45-52 of CIT(A)'s Order)

4.1. The learned CIT(A) erred in law and on facts to disallow 25% of the expenditure incurred on refurbishment of leasehold premises as capital in nature.

4.2. The learned CIT(A) ought to have allowed the said expenditure as revenue in nature and accordingly disallowance should be deleted.

5. EXPENSES ATTRIBUTABLE TO EXEMPT INCOME (Pages 52-58 of CIT(A)'s Order) RS. 17,89,18,946/-

5.1. The learned CIT(A) erred in law and on facts that Rule BD is to be applied for arriving at the disallowance of expenditure attributable to earning taxable income.

5.2. The learned CIT(A) ought to have considered the Appellant's submission that the expression in relation to under section 14A means dominant and immediate connection which is not applicable in the case of the Appellant.

5.3. The learned CIT(A) also erred by disregarding the submissions made by the Appellant that Appellant Bank has its own and non-interest bearing funds far in excess of investments yielding tax-free interest which demonstrates that no cost of borrowing is attributable to exempt income.

5.4. The learned CIT(A) erred in law and on facts in disallowing the expenditure under section 14A of the Act and accordingly, the disallowance should be deleted.

5.5. The learned CIT(A) erred in relying on the order of his predecessor for confirming disallowance of expenditure attributable to earning exempt income.

6. RECOVERIES MADE AGAINST SECURITIES LOSSES RS. 10,68,03,977/- (Pages 63-64 of CIT(A)'s Order)

6.1. The learned CIT(A) erred in confirming the action of the Assessing Officer of making additions of recovery of securities losses of Rs. 10,68,03,977 without appreciating the fact that the losses incurred by the Appellant pertaining to the earlier years is subject matter of litigation.

6.2. The CIT(A) ought to have considered the submissions of the Appellant that losses allowed in earlier year are subjudice and accordingly, the recovery of the amounts should not be taxed.

7. PREMIUM ON ACQUISITION OF RETAIL ASSET PORTFOLIO RS. 20,30,00,000/- (Page 64 of CIT(A)'s Order)

7.1. The learned CIT(A) erred in confirming the action of the Assessing Officer of for disallowance of premium paid on acquisition of retail assets by holding that the same is capital in nature and not revenue relying on the decision in the case of Sitalpur Sugar Works v CIT 49 ITR 160 (SC) which was with respect to expenditure incurred in dismantling and refitting existing plant at a better site and in the case of Abdul Khayoom v CIT 44 ITR 689 (SC) wherein the issue was in respect to payment made for acquiring monopoly right over a long period of time from producer of goods.

7.2. It is respectfully submitted that both these decisions deals with totally different facts and ratio thereof cannot be applied to Appellant's case.

7.3 The learned CIT(A) ought to have considered the submissions of the Appellant that expenditure on the acquisition of retail asset portfolio does not result in the acquisition of any capital asset or an advantage of enduring benefit the same cannot be regarded as capital in nature.

8. DENIAL FOR DEDUCTION OF HEAD OFFICE EXPENDITURE OF RS. 94,26,40,311 IN ENTIRETY (Pages 72-78 of CIT(A)'s order)

8.1. The learned CIT(A) erred disallowing the claim of the appellant towards Head Office Expenditure of Rs. 94,26,40,311 in entirety by holding that Article 26 of the DTAA entered into by

India with UK is not applicable to the provisions of section 44C and the provisions of section 44C does not create a situation of discrimination vis-à-vis an Indian resident tax payer and the ratio of Mumbai Tribunal decision in the case of Metchem Canada is not applicable in Appellant's case.

8.2. The learned CIT(A) ought not to have restricted the claim of head-office expenses to 5% under section 44C of the Act and accordingly, should have allowed the head-office expenses in entirety.

9. The Appellant craves leave to add and/or alter and/or amend one or more of the above grounds of appeal."

28. At the time of hearing, both the counsels fairly agreed that some of the issues raised in this appeal are covered and adjudicated by the Coordinate Bench of the Tribunal in assessee's own case for the A.Ys. 1994-95 to 2001-02. Copies of the orders are placed on record.

29. We proceed to dispose off this appeal by adjudicating the issues ground wise.

30. With regard to Ground No. 1, Assessee has raised ground against the transfer pricing assessment order is bad in law without inherent jurisdiction in excess of express statutory provisions of the Act, by relying on decision of DCIT *v.* M/s. Tata Consultancy Services Ltd., [174 TTJ 570 (Mumbai ITAT)] and Tata Sons *v.* ACIT (162 ITD 450). At the time of hearing, it was submitted that this ground of appeal is requested to be kept open and adjudication of this ground serves for academic purpose

only. Accordingly, this ground of appeal is kept open and not adjudicated at this stage.

31. With regard to Ground No. 2 which is in respect of disallowance of expenses directly attributable to operation in India, the relevant facts on record are, assessee has declared its financial performance for the year ended 31.03.2002 and since assessee has entered international transactions as reflected in the Form 3CEB on account of costs directly attributable to the Indian Branch. These costs are incurred by the Head Office, Singapore Branch and Hongkong Branch of the bank exclusively for the benefit of the Indian Branch. The total amount allocated on this account is ₹.73,93,01,880/-. It was submitted that these are costs allocated based on direct usage, the transaction value represents the arm's length price.

32. The back ground of the assessee company are, it is incorporated in UK and it operates as a branch in India. The branch is taxed in India in the status of Foreign Company. The Foreign Companies are taxed @48% and it is taxed in India on its income attributable to its Indian operations.

33. The value of International transactions as shown in the Form 3CEB is accepted without adjustment in respect of all transactions except the direct cost allocation which is referred to Transfer Pricing Officer vide reference dated 16.01.2004 from the Dy. Director of Income Tax, International Taxation 2(1), Mumbai. Accordingly, notices under section 92CA(2) of the Act was issued vide letter dated 21.01.2004. In response, Authorised Representative of the assessee filed the relevant information as called for.

34. During Transfer Pricing proceedings the assessee was asked to explain the benefits derived out of this cost allocation and show that the benefits are commensurate to the costs allocated to it. In this regard letter dated 20.01.2005 was issued to the assessee calling for specific information for the following details: -

a) Copy of the agreement entered into by the branch for the cost sharing arrangement.

b) Copy of the invoice raised by the overseas entity for the purpose of charging these costs to the Indian Branch.

c) Contemporaneous evidence of the service and the benefits received by the assessee during the previous year under various heads for which individual charge has been made.

d) To confirm that the overseas entities rendering these services have not claimed any deduction on account of these expenses, in the event, no charge is made in the assessee's books in this regard.

35. In reply, assessee submitted vide letter dated 01.12.2004, 10.02.2005 and 16.02.2006 and in summary, assessee has explained which was summarized by the Transfer Pricing Officer at Para No. 6 of his order as under: -

> *"(a) It is stated that there are no agreements entered into with the co-branches for sharing of this costs.*
>
> *(b) It is stated that no invoice is raised on the Indian branch by the co-branches rendering the services. It is stated that the expenses are certified by the annual auditors by issue of a specific certificate in this regard to the assessee branch.*
>
> *(c) Regarding contemporaneous evidence for the services, the assessee has filed some specific documents which are discussed separately in succeeding paragraphs.*
>
> *(d) Regarding debit of these accounts in the assessee's P & L account, it is stated that historically, the assessee branch does not debit the same in its branch accounts.*
>
> *(e) The assessee has filed the certificate from the Hongkong and Singarpore co branches wherein both the branches have confirmed that these expenses have not been claimed by them as deduction for their income tax assessments in their respective jurisdictions. In the case of the services rendered by their London Office, it is explained that as the assessee Bank is incorporated in U.K. and tax resident of the said country, deduction on account of these expenses would ultimately be claimed by Standard Chartered Bank, U.K. under the India column of their income computation which would consist of the entire income and expenditure relating to the India branch."*

36. In the summary, Transfer Pricing Officer observed that the costs allocated to the assessee, Indian branch, are toward technology upgradation, maintenance of systems, advisory and business support,

Hubbing cost and Training cost etc., these costs have been incurred by the Head Office and also by the Singapore Branch and Hongkong Branch. Subsequently these costs were reimbursed by the Indian Branch. In support of the same the assessee has submitted a detailed break up of these costs, vide letter dated 10.02.2005, for the sake of clarity it is reproduced below: -

8. With the above general background, the assessee has furnished a detailed break up of these costs in its letter dated 10.2.2005, which are as follows:-

Particulars	Amount
Reallocation Details	
Spore message centre cost	1397.66
Hubbing costs amotisation – Metro	14816.07
Hubbing costs amortisation – Mumbai	25392.40
Global Technology costs – data processing	43728.29
Systems maintenance for treasury processing system maitenance	8820.64
Training costs	9600.35
Others	-3724.53
Multi Business Processing	79888.49
Total Singapore Costs chargeable to India	179919.35
Essbase cost for accounting support	519.04
Hubbing costs amortisation – Metro	29879.77
Hubbing costs amortisation – Mumbai	42979.24
IS Mandays cost for cash in 3.5 proj	4612.34
IS Mandays cost for Decentralisation Proj	864.81
IS Mandays cost for Fee Billing Services project	321.24
IS Mandays Integration decentralization	995.92
IS recharge Credit Cards	3148.75
IS recharge to Consumer Bank	148972.84
IS recharge to Corporate Bank	134482.95
Others	17285.75
Software maintenance	728.34
Straight Through Services India Implementation	6654.00
System development Support	6565.84
Systems maintenance for treasury processing system maintenance	296.70
Training	20157.68
Total Hongkong Costs chargeable in India	418465.21
Training	5380.55
Information Technology – Cable & Wireless costs	37286.67
Global Technology costs – Comm costs	20253.01
Request for service for systems modification	32727.98
Advisory & Business Support Costs	59491.43
Corporate & Institutional Banking	15948.77
Total UK Costs chargeable to India	171088.41
TOTAL	769472.98

The assessee was requested to provide specific evidence in respect of these items of costs to establish that they relate to Indian branch activity and that the assessee has derived equivalent benefit out of the same.

37. Transfer Pricing Officer asked the assessee to provide specific evidences in respect of the above said cost to establish that they relate to Indian Branch activity and the assessee has derived equivalent benefit out of the same. In response, assessee vide letter dated 16.02.2005 has provided approximately 60% of the cost for demonstrating the benefit for the Indian operations. The cost from the above table were regrouped and explained in the following manner which are reproduced as under: -

S.No.	Nature of costs	USD ('000)	INR ('000)
1	Hubbing Costs (Hkg and Singapore)	2,345	113,067
2	Multi business processing project costs	1,667	79,888
3	System/IS costs (consumer Banking)	3,089	148,973
4	Global Account Managers (Corporate & Institutional Banking)	331	15,949
5	Advisory & Business Support costs	1,234	59,491
6	Training (Hkg & Singapore & UK)	729	35,139
	Total	9,335	452,507

38. It was also explained to the Transfer Pricing Officer that (a) Hubbing cost to the extent of ₹.11.30 crores which was allocated by Hong Kong and Singapore branches to the assessee and the nature of cost were explained and it was also submitted before Transfer Pricing Officer that these costs are charged on actual basis and these costs involved salary, travel and office expenditure incurred till the completion of the projects.

(b) Multi Business processing project costs to the extent of ₹.7.98 cores and were allocated by the Singapore branch. The nature of expenditure was explained and also it was submitted that costs are allocated on the basis of direct cost ratio of each country which utilizes the services of the back-office as a ratio of the overall cost allocated on the basis of utilization, again on the basis of actual costs.

(c) Systems / IS costs of consumer Banking and the nature of cost was explained and necessity of sharing costs.

(d) Global Account Manager – Corporate and Institutional Banking, the nature and earnings of the Indian Branch of ₹.164 Crores out of its multinational clients and as against which the allocation cost of ₹.1.59 Crores for the use of global account managers. It was submitted that the benefits derived are much more than the compensation towards the cost incurred.

(e) Business Advisory and Support Costs, the nature of the expenditure was explained and it was submitted that the separate teams were setup at the group level and it is their costs, which are being allocated to the assessee. It was further submitted that the basis of allocation is the turnover of the respective branches.

(f). Training cost of ₹.3.51 crores and these costs were allocated by Hong Kong, Singapore and UK branches to the assessee, in this regard assessee has submitted a list of various training programmes in which Indian employees were participated during the relevant year. After considering the above training costs, Transfer Pricing Officer observed that the total cost on training were shown to be a sum of ₹.0.23 crores. To the extent of information furnished, the cost allocation made is accepted without any justification. For the balance amount of ₹.3.28 crores (₹. 3.51 cores less ₹.0.23 Crores) as no information has been provided, hence, the cost allocation was not justified. Therefore, he treated the above Arm's Length Price as NIL.

39. After observing the above submissions, Transfer Pricing Officer accepted the various cost allocations to the extent of ₹.41.97 crores out of the total allocation cost of ₹.76.94 crores and for the balance of ₹.34.97 crores, he observed that in absence of contemporaneous evidences establishing the benefits derived by the assessee during the previous year from the cost allocation, the cost allocation cannot be regarded as to be at arm's length. Accordingly, he treated the balance amount of ₹.34.97 crores Arm's Length Price at ₹.NIL.

40. After considering the Transfer Pricing Officer order, the Assessing Officer observed that assessee has claimed expenses of ₹.76,93,01,880/- incurred by the Head office as directly attributable to the business carried in India. In this regard, assessee was asked to produce the following information: -

> *"a Books of account of the HO where such expenses have been incurred*
>
> *b Original vouchers supporting such expenses*
>
> *c Why such expenses have not been debited in the books of account of the branch in India? What are the RBI guidelines in this regard considering the fact that if such amount are to be paid, it would have required RBI approval and by not debiting such amount remittable surplus figure remains higher by such expenses.*
>
> *d The KPMG certificate does not provide any information about the nature of such expense. Kindly give the complete details.*
>
> *e If such expense are on account of royalty or FTS incurred by Head Office on account of the branch, then such payments are liable for taxation in India u/s 9 as well as under the DTAA. Kindly provide whether tax was deducted by the Head Office on such payments or not. If not, why the same should not be disallowed u/s 40(a)(i)...*
>
> *f Also refer to Para 7 of Article 7 which provides that no expenses by way of royalty or fee for technical services (except reimbursement of actuals) to Head Office should be allowed as deduction. Kindly specify as to why the expenses claimed by you should not be disallowed under Article 7.7."*

41. During the course of assessment proceedings, Assessing Officer issued show-cause letter dated 16.03.2005 asking the assessee to justify the total cost allocated to the Indian Branch and for the sake of clarity, the show-cause notice is reproduced below: -

> *"As per para 4 of the said order, it has been explained by the assessee that certain costs have been incurred by the Head Office, Singapore Branch and Hongkong Branch exclusively for the benefit of the Indian Branch. The total amount allocated on this account is Rs.76,94,72,980/-. It has further been stated by the assessee that these costs are primarily in the nature of technology cost. A major part of these costs allocated to India are on account of cost incurred for improving the systems.*
>
> *Further vide letter dated 16/02/2005, the assessee has selected approximately 60% of the costs for demonstrating the benefit for the Indian operations from them.*
>
> *2. After taking into account the various submissions made by you, the Addl.CIT(TP-II), Mumbai has passed the above order stating that out of the total cost allocation to the Indian branch of Rs.76.94 crores, Rs. 41.97 crores is accepted. Further, the arm's length price with respect of the balance amount of Rs. 34.97 crores is treated as NIL. In view of this order, please explain why an amount of Rs.34.97 crores should not be added to your total income.*
>
> *3 It is seen from the order that a majority of the costs incurred for the Indian branch are related to systems i.e. Technology upgradation, maintenance, advisory and business support, hubbing cost, training costs, etc. These costs have been incurred by the Head Office and also by the Singapore and Hongkong Branches. Subsequently, these costs have been reimbursed by the Indian branch. In view of these facts, please state why the reimbursement of Rs. 41.97 crores made by the Indian branch to the HO and other overseas branches should not be treated as fees for technical services(FTS) u/s 9(1)(vii) of the Income-tax Act, 1961. Further, also explain why the amount*

of Rs.41.97 crores debited to the P & L Account of the Indian branch should not be disallowed u/s 40(a)(i) as the assessee has failed to deduct tax on such payments made to the HO/Overseas Branches, which are in the nature of FTS and liable to tax in India."

42. In response to the above letter, assessee filed the detailed submissions objecting to the above said show cause notice which are more or less similar to the submissions made by the assessee in the earlier assessment proceedings. It is fact on record that the addition proposed by the Assessing Officer is not a fresh addition. Similar additions were proposed by the earlier Assessing Officers in the respective assessments. The submissions of the assessee are reproduced in the assessment order at Para No. 5.3 at Page No. 5 to 8 of the assessment order Objecting to the proposal to disallow the allocation of cost which were accepted by the Transfer Pricing Officer in the Transfer Pricing Order dated 10.03.2005.

43. After considering the submissions of the assessee, Assessing Officer dealt with this issue in his order wherein he discussed the issue of acceptance of Arm's Length Price adjustment proposed by the Transfer Pricing Officer to the extent of ₹.34.97 crores wherein the Arm's Length Price adjustment is treated as Nil and at the same time, he has justified

the further disallowance of ₹.41.97 crores with the following observations: -

> *"The assessee was asked to furnish various details vide notice u/s.142(1) including books of account of HO, where such expenses have been incurred, original voucher supporting such expenses etc. However, the assessee has not furnished any such details. It can further been seen from the order u/s.92CA(3) that the assessee himself has accepted that (a) there are no agreements entered into with the co-branches for sharing of the costs. (b) no invoice was raised on the Indian branch. In this context of non-furnishing of the relevant details by the assessee, it would be worthwhile to go through the judgment of Hon'ble ITAT, Mumbai., in the case of Micoperi, Italian Company, (82 ITD 369) wherein it has been held that the disallowance made by the assessing officer on account of non-production of original books of accounts and vouchers maintained in foreign currency abroad. It was observed by the ITAT that the expenses claimed by the assessee in dollars were not audited by the auditors in India and as such expenses cannot be allowed."*

44. In summary, Assessing Officer has disallowed ₹.41.97 crores, which was accepted by the Transfer Pricing Officer as Arm's Length Price and also to the extent of T.P adjustment proposed by the Transfer Pricing Officer to the extent of ₹.34.97 crores. In sum and substance, the Assessing Officer had disallowed the total cost allocation for upgradation of technology and various system related expenditure allocated to the Indian Branch. Further, without prejudice to the above findings, he has proceeded to invoke the provisions of section 40(a)(i) of the Act to further justify the disallowance of entire amount of ₹.76.91 crores.

45. Aggrieved with the above order, assessee preferred appeal before the Ld. CIT(A)-57, Mumbai and filed the detailed submissions before him which is reproduced in the appellate order at Page No. 7 to 17 of the order. After considering the detailed submissions, Ld. CIT(A) has sustained the additions proposed by the Assessing Officer and also he has dealt with the submissions made by the assessee with regard to Article 13 and 7 of the Indo-UK treaty and held that this falls under Royalty/FTS and will not fall under Article 7(7) of the Indo – UK DTAA and accordingly, he dismissed the grounds raised by the assessee.

46. Aggrieved with the above order, assessee is in appeal before us raising the above grounds of appeal.

47. At the time of hearing, Ld.AR of the assessee submitted as under: -

> *"a) Nature of costs primarily Technology costs incurred outside India.*
>
> *b The Appellant has demonstrated the need and benefit for the costs allocated (refer pages 68 to 71 of the factual paperbook including the detailed breakup of the costs before the Ld. TPO (refer page 75 of the factual paperbook).*
>
> *c Representative sample documents evidencing receipt of services submitted before the Ld. TPO (refer pages 72 to 218 of the factual paperbook).*
>
> *d The Ld. TPO has not disputed the benefits derived from the costs incurred.*

e An External Independent Accountant certificate certifies the incurrence and allocation of the costs (refer page 268 of the factual paperbook). The allocation of cost, based on recognized allocation keys is an accepted method. Also, the said allocation key adopted by the Assessee has not been disputed the Ld. TPO.

f No deduction in respect of these amounts has been claimed by the Associated Enterprise in their Income tax computation.

g The Ld. TPO erred in questioning commercial expediency and determining the Arm's Length Price of the part of the Direct costs as NIL, erroneously on an adhoc basis and without following any of the prescribed Method.

h Without prejudice to the above, the transactions between the Appellant and its Head office ('HO') are between the same entity and would not be between Associated Enterprises per the scope of Article 10 of India - UK DTAA. Accordingly, transfer pricing provisions would not be applicable.

i The expenses for which ALP was accepted by the Ld. TPO, the Ld. AO has disallowed the same by alleging that no books of accounts etc. were provided by the Appellant and disregarding the fact that Ld. TPO has accepted the ALP.

j The Ld. AO has erroneously disallowed the entire direct expenditure incurred outside India by treating the same as Royalty on account of non-deduction of tax allegedly deductible at source.

k It was submitted that the expenses under consideration are not in the nature of Royalty / FTS and the Assessee was not required to deduct TDS on the same as:

i) The expense incurred are not in relation to the use of, or the right to use, any copyright;

ii) The expense incurred are not in relation to the use of, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning

industrial, commercial or scientific experience;

iii) The expense incurred does not meet the test of "make available";

iv) For income to be taxable there should be a bilateral transaction between two parties. In the instant case, transaction is between the HO and the Branch.

L) The Hon'ble Tribunal, in the past AYs, has accepted that these costs relate to the business of the India branch. This fact is not in dispute also in the current AY (i.e., AY 2002-03).

v) Disallowance by Hon'ble CIT(A)

vi) Break-up of cost

a) The Hon'ble CIT(A) confirmed the disallowance on the basis that there is no agreement entered with the co-branches to share the cost and no invoice is raised. b) The Hon'ble CIT(A) disallowed the entire expenses by treating the same as Royalty /FTS on which tax has not been deducted which was alleged to be deductible at source.

A. Global Technology Services (GTS) / Group Technology Cost, India RFS, HR CTF, IT Cable & Wireless, Corporate and institutional banking (Global Account manager cost) (INR 13 Cr)

i. The Hon'ble CIT(A) held that these expenses are in nature of FTS as covered by make-available clause, Hence, disallowed the same in absence of TDS. [Page 28 of the CIT(A) order]

ii. In AY 2001-02, the Hon'ble ITAT upheld the decision of the Hon'ble CIT(A) who had held that this cost component represents payment to self and the amounts are held to be not liable to TDS [Page 77 of the ITAT Order - page 295 of the legal paperbook].

B. Advisory and Business Support Services (INR 7 Cr)

i. The Hon'ble CIT(A) held that these expenses are royalty in nature as it imparts scientific, technical or commercial knowledge and hence disallowed in absence of TDS [Page 28 of the CIT(A) order]

ii. In AY2001-02, the Hon'ble CIT(A) held that the said expenses are capital in nature and not allowable as deduction. However, Hon'ble ITAT reversed the order of the Hon'ble CIT(A) and held that the said expenses are revenue in nature and allowable as deduction [Page 19 of the ITAT order - page 237 of the legal paperbook].

C. Singapore IT Hubbing / IT Cable and Wireless - Singapore-India Metros, Honk Kong/Singapore - Information System & Technology (IS & T) Cost (INR 67 Cr)

> *i. The Hon'ble CIT(A) held that these expenses are in nature of FTS as the services are mainly for development of system and therefore, covered by make available clause. Hence, disallowed the same in absence of TDS. [Page 28 of the CIT(A) order), in line with the CIT(A)'s order for AY2001-02.*
>
> *ii. In AY 2001-02, the Hon'ble ITAT set-aside the Hon'ble CIT(A)'s order and held that these expenses are not in nature of FTS and allowable as deduction u/s 37(1) of the Act (Page 19 of the ITAT Order - page 237 of the legal paper book].”*

48. Ld.AR of the assessee finally submitted that the Transfer Pricing Officer has not rejected the cost incurred by the assessee. However, Transfer Pricing Officer has partially accepted that the cost allocated to Indian Branch are within the Arm’s Length Price and balance about 40% Arm’s Length Price as Nil with the observation that assessee has not filed relevant documents even though assessee has filed the complete cost allocation basis and keys for allocation.

49. Further, he submitted that the Assessing Officer has not only disallowed the TP Adjustment proposed by the Transfer Pricing Officer and also gone ahead disallowing the entire cost attributable to the functioning of the branch which are relevant and allocation of cost based on actual as well as with proper allocation key. He prayed that the issue under consideration is already considered by the Coordinate Bench in the

earlier assessment years which are disallowed under section 37(1) and not disallowable for withholding of tax under section 40(a)(i) of the Act. Therefore, he prayed that the findings of the Coordinate Bench may be followed.

50. On the other hand, Ld. DR relied on the findings of the lower authorities.

51. Considered the rival submissions and material placed on record, we observe that the similar issue was raised in earlier assessment years and disallowed under section 37(1) and by invoking section 40(a)(i) of the Act. During the current assessment year, the matter was referred to the Transfer Pricing Officer and Transfer Pricing Officer has considered the various submissions submitted before him and he allowed about 60% of the cost allocated to the Indian Branch based on the detailed submissions made by the assessee justifying the allocation. He has partially made TP Adjustments with the observation that assessee has not filed relevant documents before him. However, the Assessing Officer accepted the disallowance based on the findings of the Transfer Pricing Officer to the extent of TP adjustments and further gone ahead by disallowing the allocation of cost accepted on the basis of various documents and

justification by the Transfer Pricing Officer by observing that he has asked the assessee to furnish various details vide notice issued under section 142(1) of the Act including the books of accounts of Head office where such expenses have been incurred, original vouchers supporting such expenses etc.,. Assessing Officer observed that assessee has not furnished any such details and with reference to the order under section 92CA(3) wherein even the assessee has accepted that there are no agreements entered with the branches for sharing all the costs, no invoices was raised on the Indian branch.

52. Further, he has proceeded to treat the entire allocation of cost as FTS by invoking provisions of section 40(a)(i) of the Act which are similar to the facts brought on record by the earlier Assessing Officers to disallow the expenses under section 37(1) of the Act and there is a failure on the part of the assessee to withholding of tax.

53. After considering the various submissions and facts on record as far as the issue raised by the Assessing Officer on the issue of FTS and failure on the part of the assessee to withholding the tax under section 40(a)(i) of the Act, we observe that even though the Assessing Officer has proceeded to disallow the entire cost allocated to the Indian branch

by observing without prejudice to the order under section 92CA(3) of the Act which is similar to the additions proposed in the earlier assessment orders which are considered by the Coordinate Bench on the exactly similar facts on record, they have decided the issue in favour of assessee, for the sake of clarity, the findings of the earlier order is reproduced below: -

"2.2 Brief facts

- *During the F.Y. under consideration, the Appellant had claimed the deduction of INR 64, 04, 42,048/- on account of expenses incurred outside India, directly related to the Indian operations based on audit certificates.*

- *The broad nature of direct expenses attributable to the Appellant is as under:*

- *GTS, IT cable & wireless and corporate &institutional banking Advisory and business support costs o Singapore IT Hubbing/IT Cable & wireless*

2.3 AO's contention (page 7)

The Ld. AO held that the Appellant failed to produce any details or explanation for the direct expenses, hence, disallowed the entire expenses by relying on the decision of Mumbai ITAT in case of Micoperi, Italian Company (82 ITD 369).

2.4 CIT(A)'s decision (page 19)

- *The Ld. CIT(A) allowed the direct expenses attributable to Appellant's business of INR 21,50,15,149/- which relates to GTS, IT cable and wireless and corporate and institutional banking as it represents payment made to self and the amounts are held to be not liable to TDS [refer para 6.13, page 19 of the CIT(A) order]*

• *The Hon'ble CIT(A) disallowed the direct expenses of INR 42,54,26,899/- attributable to the Appellant's business which relates to advisory and business support costs and Singapore IT Hubbing costs due to the following:*

With respect to advisory and business support costs incurred in connection with the acquisition of Indian branches of ANZ Grindlays Bank, the Ld. CIT (A) held that these advices are not with respect to business activity carried on by the PE but are services rendered to the HO. The amount is not in the nature of revenue expenditure of the PE and hence, cannot be allowed [refer para 6.14, page 19 of the Ld. CIT (A) order]. o With respect to expenses relating to Singapore IT Hubbing costs, the Ld. CIT (A) held that the said expenditure falls within the ambit of FTS on which the Appellant was liable to deduct tax at source. In absence of TDS, the amount is not allowed as deduction [refer para 6.17, page 20 of the Ld. CIT (A) order].

2.5 Appellant's submissions

Advisory and Business support costs:

• *The Appellant submits that this issue is covered in favor of the Appellant, in the case of CIT vs. Bombay Dyeing & Mfg. Co. Ltd [1996] 85 Taxman 396 (SC) [Handed over during the hearing on 5 October 2023- refer page 3], wherein it was held that professional fees incurred for effecting amalgamation of a company was necessary for smooth and efficient conduct of assessee's business and held as allowable under section 37(1) of the Act (relevant part extracted as under):*

"The facts concerning the first question are the following: a company named Nawrosjee Wadia Ginning & Pressing Company was amalgamated with the assessee-company. In that connection an expenditure of Rs. 10,350/- was incurred by the assessee-company towards the professional charge paid to the firm of Solicitors. In the assessment proceedings the said amount was claimed as revenue expenditure. The assessee's case was that Nawrosjee Wadia Ginning &Pressing Company was engaged in the same business as the assessee. In other words, the businesses of both the companies were 'complimentary'. The directors of both the companies thought that it would be advantageous if both the companies are

amalgamated. Accordingly, a scheme of amalgamation was evolved. It was submitted that the legal expenses incurred in connection with the said amalgamation are in the nature of revenue expenditure. The ITO did not agree nor did the AAC. On further appeal, the Tribunal upheld the assessee's contention. It disagreed with the revenue's contention that inasmuch as the said amalgamation resulted in acquisition of the other company by the assessee, which acquisition was in the nature of acquisition of a capital asset, the legal expenses incurred in that behalf partake the nature of capital expenditure. The Tribunal was of the opinion that "as both the companies were carrying on complimentary business and their amalgamation was necessary for the smooth and efficient conduct of the business", it is an expenditure laid out wholly and exclusively for the purpose of the business of the assessee. In view of the, said finding and also in view of the, decision of this Court in Bombay Steam Navigation Co. [1953] (P.) Ltd. v. CIT [1965] 56 ITR 52, we are of the opinion that the Tribunal was right in its conclusion. The decision in Bombay Steam Navigation Co. (1953) (P.) Ltd.'s case (supra) also pertains to amalgamation of two shipping companies. The assessee company took over the assets of the other company and part of the price was treated as a loan secured by a promissory note and hypothecation of all movable properties of the assessee company. The loan was to carry simple interest at 6 per cent. The question that arose in the said case was whether the interest paid upon the said loan was deductible as revenue expenditure. It was held by this Court that it was an expenditure deductible under section 10(2)(xv) of the Indian Income-tax Act, 1922. It was held that transaction of acquisition of the asset was closely related to the commencement and carrying on of the assessee's business and, therefore, interest paid on the unpaid balance of the consideration for the assets acquired had, in the normal course, to be regarded as expenditure for the purpose of the business which was carried on in the accounting periods. In the course of the judgment this Court referred to the earlier decision of this Court in State of Madras v. G.J. Coelho [1964] 53 ITR 186 wherein it was held that the interest on the amount borrowed for acquiring a capital asset is deductible as revenue expenditure. It is true, that in the said decision this Court re-affirmed the well established principle that any expenditure laid out for acquiring an asset of a permanent

character would be capital expenditure, held at the same time that inasmuch as the acquisition of the other company was in the course of carrying on of the assessee's business, the interest paid thereon was deductible under section 10(2)(xv) of the Act. In this case too, the Tribunal has recorded a finding that the acquisition of Nawrosjee Wadia Ginning & Pressing Company was necessary for the smooth and efficient conduct of the assessee's business. Following the ratio of the aforementioned decisions of the Court, we hold that the expenditure incurred towards professional charges of the Solicitors' firm for the services rendered in connection with the said amalgamation was in the course of carrying on of the assessee's business and, therefore, deductible as a revenue expenditure. In this view of the matter, it is not necessary for us to deal with the other decisions cited before us on this question."

Singapore IT Hubbing/ IT Cable & Wireless costs:

At the outset, the Appellant submit that this ground is covered in the Appellant's own case in A.Y. 1999-00, wherein with respect to the similar nature of services, the Hon'ble ITAT held that the said expenditure is allowable under section 37(1) and should not be restricted under section 44C of the Act. However, in the current year (i.e., AY 2001-02), the Ld. CIT(A) has raised an additional contention that Singapore IT Hubbing/ IT Cable & Wireless costs are in nature of "Fees for Technical Services".

With regards to additional contention of Ld. CIT (A), the Appellant submit that the same is not sustainable due to following reasons:

o The Appellant has undertaken a Hubbing project as result of which its operations were networked to hub in Singapore allowing it to have access to centralized transaction processing operations and operation of bank accounts from anywhere in India.

o The expenditure mainly relates to salaries and other related costs, travel, communication for staff working on the project, payment to external vendors such as Cable and Wireless for system maintenance and similar expenditure.

o The examples provided in India US DTAA which is relied by the Ld. CIT (A) (refer para 6.16, page 19) are not applicable in the instant case, as the Appellant has incurred the expenses only for the use of technology solely for the purpose of business in India.

o Further, the services of IT Hubbing costs does not make available any technical design or technical plan to the Appellant. In this regard, the Appellant rely on the following judicial decisions (as enclosed in the

Appellant's legal paper book) wherein it is held that payments towards use of technology do not result in make available. Therefore, the same will not fall with the definition of FTS under Article 13 of India-UK tax treaty:

1. *DIT Vs. Guy Carpenter & Co. Ltd. (20 taxmann.com 807) [2012] (Delhi HC)*
2. *CIT vs. De Beers India Minerals (P.) Ltd. (21 taxmann.com 214) [2012] (Karnataka HC)*
3. *Anand NVH Products Inc. Vs. ACIT (145 taxmann.com 412) [2022] (Delhi ITAT)*
4. *NTT Asia Pacific Holdings Pte Ltd Vs. ACIT (141 taxmann.com 137) [2022] (Mumbai ITAT)*

In view of the above, the Appellant submits before us to allow the deduction towards Advisory services expenses and Singapore IT Hubbing cost of INR 42, 54, 26,899/- under section 37(1) of the Act. We agreed with the logics put forward by the assessee and not in favour of additional contentions raised by the Ld. CIT (A). Moreover, similar issue is covered in the Appellant's own case in A.Y. 1999-00, wherein with respect to the similar nature of services, the Hon'ble ITAT held that the said expenditure is allowable under section 37(1) and should not be restricted under section 44C of the Act. Respectfully following the decision of coordinate bench and judicial pronouncements relied upon by the assessee, we are in agreement with the contentions of assessee and ground raised by the assessee is allowed."

54. Further, the Coordinate Bench in assessee's own case for the A.Y.1999-2000 in ITA No. 803/MUM/2009 dated 27.09.2022 held as under: -

> *"30. With regard to Ground No. 1 and 2 which are in respect of expenses incurred outside India comprising of (a) salaries of Expatriate employees (b) expenses incurred exclusively for operations in India and (c) NRI Desk expenses, Ld. AR brought to our notice that similar ground has been raised before the Coordinate Bench in ITA.No. 7891 and 9229/Mum/2014 for the A.Y. 1997-98 and the Coordinate Bench has considered and adjudicated the issue in favour of the assessee. Copy of the order is placed on record.*
>
> *31. Ld. DR fairly agreed that the issue is covered in favour of the assessee.*
>
> *32. Considered the rival submissions and material placed on record, we observed that similar issue was considered and adjudicated by the Coordinate Bench in assessee's own case for the A.Y. 1997-98 and decided the issue in favour of the assessee. While holding so the Coordinate Bench held as under:-*
>
> > *"16. In ground no.1, the Department has challenged the deletion of disallowance of expenses amounting to ₹.24,85,49,931.*
> >
> > *17. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of expenditure incurred outside India amounted to ₹.24,85,49,931 comprising of salaries of expatriate employees, direct expenditure attributable to Indian branches and NRI expenses. The Assessing Officer after examining the nature of expenses held that the aforesaid expenditure claimed by the assessee being part of Head Office expenses is eligible for deduction under section 44C of the Act, hence, cannot be claimed as deduction separately. Being aggrieved with*

the aforesaid decision of the Assessing Officer, assessee preferred appeal before the first appellate authority.

18. Learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and materials on record found that identical disallowance made by the Assessing Officer in assessee's own case in assessment year 1994–95 to 1996–97 was deleted by his predecessor–in–office by holding that such expenditures are incurred by the assessee exclusively for the purpose of business of the assessee in India and are not in the nature of Head Office expenses covered under section 44C of the Act. Following the decision of his predecessor–in–office, learned Commissioner (Appeals) deleted the disallowance by holding that the expenditure is allowable under section 37(1) of the Act without imposing restrictions contained under section 44C of the Act.

19. We have considered rival submissions and perused material on record. Learned Counsels appearing for the parties have agreed before us that the issue is decided in favour of the assessee by the Tribunal in assessee's own case for the assessment year 1994–95 and 1995–96 while disposing off Revenue's appeal in ITA no.1683/Mum./2003, dated 11th October 2007 and ITA no.1769/Mum./2003, dated 18th November 2011 respectively. Following the consistent view of the Co–ordinate Bench as referred to above, we uphold the decision of learned Commissioner (Appeals) on the issue. Ground is dismissed."

33. Similarly, the Coordinate Bench in assessee's own case for the Assessment Year 1994-95 in ITA.No. 1683/Mum/2003 dated 29.10.2007 held as under: -

"11 Ground no.4 is against deleting the expenses incurred outside India Rs 14,61,83,854/

12. The Assessing Officer disallowed the claim of the assessee by observing that expenses are incurred by assessee outside India which are directly related to the operations of the assessee in India, cannot be allowed in full as they are in nature of head office expenses

deductible in accordance with and subject to limits rule 44C of the Act. It was submitted before CIT (A) that the expenses in question are directly related to the business operation in bank in India and hence fully allowable under the provisions of the Act. It was further submitted that article 7(5) of the DTAA between India and United Kingdom, provides that in the determination of the profits of a permanent establishment the expenses incurred by the assessee shall be allowed as deduction. Accordingly, it was submitted that these expenses are for the business of the assessee therefore, they are allowable. It was further that expenses in question cannot be considered of an administrative and executive in nature falling under the definition of head office expenses as given under section 44C of the Act. It was submitted that section 44C of the Act deals with the allowability of the head office administrative expenses. Accordingly, it was submitted that the expenses incurred by the assessee are out of the scope of provision of section 44C as these expenses are not in the nature of general administrative expenses but are solely and exclusively incurred for the purpose of the operations of the assessee in India and no portion of expenditure is referable to a business outside India. Reliance was also placed on various decisions of Tribunal and High Court

13. After considering the submissions and perusing the material on record the CIT (A) found that these expenses are incurred wholly for the purpose of assessee's business and no portion of these expenses fails under section 44C. Accordingly, the disallowance made by the Assessing Officer was deleted.

14. The learned Departmental Representative placed reliance on the order of the Assessing Officer. On the other hand, counsel for the assessee placed reliance on the order of CIT (A). It was further submitted that in case of British Bank of Middle East in ITA No.2297/M/99 identical issue was involved and Tribunal has decided the issue in favour of assessee. Attention of the Bench was drawn towards copy of the order placed at paper-book at

pages 136 to 144. Further reliance was placed on the decision considered by the CIT (A).

15. After considering the submissions and perusing the material on record we found no infirmity in the finding of the learned CIT (A) who has decided the issue in favour of the assessee following the decision of the Tribunal in the case of ABN Amro Bank NV in ITA no.692/Cal/2000 and in case of American Bureau of Shipping 19 ITD 793 (Bom). The findings of CIT (A) are given at page 9 of his order are as under:

> *"I have carefully considered the arguments of the learned Counsel and the basis of disallowance in the assessment order. As per section 37(1) of the Act, any expenditure, which is not in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". The expenses in question incurred by the Appellant, though outside India, have been incurred for the purposes of business of the Appellant in India. The expenses are not of capital or personal in nature and therefore, allowable u/s.37(1) of the Act. The Bombay ITAT in the case of American Bureau of Shipping (Supra) has held that expenses, which are specifically incurred on account of Indian branch, cannot be held to be in the nature of Head Office expenses u/s.44C. Further expenses on expatriates' salaries are for the services rendered in India and these by no stretch of imagination can be considered and Head Office expenses falling under section 44C. These expenses are not incurred by the Appellant outside India in managing the affairs of any office outside India and therefore, no covered u/s.44C. The allowability of these expenses is also squarely covered by the decision of the Calcutta ITAT in ABN AMRO Bank's case (supra). As far as the absence of debit in the books of accounts for these*

expenses is concerned, the Supreme Court in Kedamath Jute Mfg. Co's case (supra), has held that absence of entry in the books of account is not fatal to the claim otherwise allowable as business deduction under the provisions of IT Act, 1961.

In view of the above, I hold that the expenses incurred by the Appellant on NRI desks and towards salaries of expatriate employees are exclusively for the purposes of business of the Appellant in India and are not in the nature of Head Office expenses covered u/s.44C The claim of the Appellant is, therefore, allowable u/s 37(1) and not to be considered u's 44C. The Assessing Officer is directed to allow the expenses of Rs. 14,61,83,854/- u/s.37(1) of the Act. This ground in appeal is allowed in favour of the Appellant.

16 This finding of CIT (A) neither could be controverted nor any material was brought on record from which it can be established otherwise. We further noted that identical issue was decided by the Tribunal in the case of British Bank of Middle East in ITA No.2297/Mum/1999 and others for assessment year 1992-93 to 1997-98 vide its order dated 28.06.2005. Copy of the same is placed in the paper-book. Following the decision of the Tribunal and on the reasoning given by CIT (A) we confirm his order in this regard also."

34. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 1997-98 and also following rule of consistency, we dismiss the grounds raised by the revenue."

55. From the above ratio, we observe that the issue raised are, whether the allocation of cost by the Head Office are eligible and whether it is covered within the provisions of section 44C of the Act. The

Coordinate Benches have allowed the same in favour of assessee. However, in the current assessment year the Assessing Officer has accepted the TP Adjustments proposed by the Transfer Pricing Officer under section 92CA(3) of the Act wherein the same details were called for by the Transfer Pricing Officer and assessee has submitted all the relevant information before him and after considering the various details he has proposed for TP Adjustments only to the extent of 40% of the cost allocation. He has technically accepted the various submissions and documents submitted before him. Therefore, in our considered view Assessing Officer in one hand accepts the TP Adjustment and on the other hand he has proposed the additions suomoto disregarding the total findings of the Transfer Pricing Officer. For disallowing the whole allocation of costs, he observed that there are no agreements entered into with the branches of sharing of costs. In our considered view, these costs are allocated between the Head office and branches which are nothing but allocation of costs within the cost centers of same assessee, allocated the cost on the basis of allocation key, which are accepted principles without any profit element on it. The arrangements are within the organization and there cannot be any agreement, strictly speaking the agreement on allocation key is itself on an agreed terms between the branches. It is not necessary that it should have a separate agreement

between the branches and also there is no requirement of invoices between the branches it is enough that there are approved internal memo. It is agreed that it is an international transaction there has to be certain documents justifying the allocation with proper allocation key, which has to be documented with mutual agreement for demonstration of acceptance of such allocation key. Once the branches and head office justifies the allocation key for allocation of various expenses, it justifies the purpose of sharing the internal costs. We observe that these costs are not just shared this year, it is a regular practice over the years by the head office or relevant branches which does services by submitting the various costs with proper allocation key. It is brought to our notice that various services are offered by the head office and relevant branches which also demonstrates the increase in the volume of business as well as services to Indian customers, this itself a benefit derived by the Indian branch. Therefore, in sum and substance, we observe that Assessing Officer has intended to disallow the whole cost allocation made by the Head office to toe along with the findings in the earlier assessment years and not inclined to relook at the actual material or facts on record. In our view, he has grossly rejected the documents and justification submitted by the assessee. Therefore, we do not see any reason to differ from the findings of the Coordinate Bench in the earlier assessment years.

Further, the Assessing Officer himself partially accepted the findings of TPO and proceeded to disallow the whole allocation of costs, which demonstrates that he has no inclination to allow the costs incurred by the assessee. Even the TPO partially recognizes the allocation of costs and rejects the cost which according to him not supported by the sufficient documents. It is Transfer Pricing Officer's obligation to call for the whole documents before closing the Transfer Pricing assessments and also he cannot treat any TP adjustment without properly justifying the reasons for such rejection. In this case, we observe that he has merely considered the submissions made by the assessee and he partially accepted the allocation and other part, he has proceeded to treat them as nil with the observation that there is no proper documents submitted before him. We observe that in the case of Jabil Circuit India Private Limited, it is held as under: -

> *"26. Upon careful consideration, we note that the issue in dispute is the allocation of intra group services to be borne by the assessee from its AE in 16 worldwide localities. The assessee's allocation is based upon a global agreement between the AEs in this regard. Various allocation keys, i.e., asset, revenue, number of employee, depending upon the nature has been used. The allocation is supported by a CPA certificate. The Revenue's grouse is that necessary evidence in this regard for the veracity of allocation and incurring of expenditure has not been submitted. That the CPA certificate is not credible in absence of supporting documents on the basis of which the said*

certificate was issued. That there are several errors in the global agreement. That the use of allocation keys is not permissible.

The solution found by the TPO to the above shortcoming is the rejection of the assessee's allocation to be substituted by an absolutely whimsical and bizarre estimation that total 1500 man hours @ 8,500/- would only be permissible and that would be allocated as under:

IT support service - 300 hours

Finance service - 400 hours

Other intra group services for sales, marketing, etc .- 300 hours

27. We find that the ld. Counsel of the assessee has referred to the voluminous paper book and the documents submitted before the authorities below. The summary of the same has also been reproduced in the above part containing the summary of the ld. Counsel of the assessee's submission. We have reviewed the co-relation between the item of expenditure allocated and the supporting document mentioned in the paper book. In our considered opinion, the supporting evidence submitted by the assessee are reasonable and cogent. The adverse inference drawn by the authorities below that the submissions of the assessee has no evidentially value is totally misplaced and it is a result of non examination of evidences by the authorities below. In this regard, we draw support from the decision of the Hon'ble jurisdictional High Court in the case of Maersk Global Service Centre (in ITA No. 692 of 2012 vide order dated 22.08.2014). In this case, the Hon'ble jurisdictional High Court has expounded that in a situation where the details were very much before the TPO, the Hon'ble High Court held that the tribunal therefore, did not and rightly permitted the DR to argue the appeal contrary to the record. That the appeal therefore did not raise any substantive question of law and deserves to be dismissed. The ratio from the above said decision is applicable on the present case also. The necessary evidence has also been brought on record by the assessee. The authorities below have totally disregarded the same and made the allocation on the basis of a total bizarre and whimsical method. The bizarreness and whimsical nature of the allocation done by the TPO which has been supported by the DRP is not lost upon the ld. DR who has

argued for a remand for proper appreciation by the TPO. In view of the aforesaid Hon'ble jurisdictional High Court decisions we are of the considered opinion that such an act of TPO and DRP cannot be set right by remitting the issue on this account.

28. We note that it is the claim of the assessee that the assessee has intra group AEs spread around the length and breadth of the globe. It has been claimed that the intra group services have been allocated on the basis of global agreement among the AEs. Proper allocation keys have been used and that the methodology adopted has the mandate of guiding of the OECD. In this regard, we note that in the OECD guidelines in the Chapter VII relating to special consideration for intra group services has observed that mainly two issues were to be considered, one was whether intra group service have in fact been provided. The other issue is whether the intra group charge for such services for tax purpose should be in accordance with the arms length principle. The OECD guidelines interalia also provide that the allocation of the group cost might be based upon the turnover or staff employed or some other basis. It mentioned that whether the allocation method is appropriate may depend upon the nature and use of the services. A reading of this OECD guidelines makes it abundantly clear that contrary to the Revenue's argument, the using of allocation keys for allocation of intra group services is not alien to international tax jurisprudence. Further, the allocation of concerned group expenses to different accounting units is a duly accepted accounting procedure. Furthermore, the assessee has used a CPA certificate for the allocation of intra group services from the AE. The authorities below have rejected the CPA certificate on the ground that underlying documents on the basis of which the CPA certificate has been issued has not been produced before them. In this regard, we note that the CPA certificate is quite specific and has been duly authenticated. We find that in Rule 10D, containing information and documents to be kept and maintained u/s.92D it has been duly mentioned that the information's required under Rule 10D(2)(A) shall be supported by authentic documents which may include inter alia public accounts and the financial statements relating to the business of the associated enterprises. Hence, the evidence for international transaction can be duly supported by public accounts and financial statements relating to business affairs of the AE. With such mandate of law, in our considered opinion, the action of the authorities below in rejecting the CPA certificate is not sustainable. The various other proposition mentioned by the ld. Counsel of the assessee and case laws in support thereof as noted in para 22 hereinabove are germane and duly support the case of the assessee.

> *29. We further note that as regards the estimation and allocation of IT cost is concerned, the same has been duly accepted for the Dispute Resolution Panel for A.Y. 2013-14 and the Revenue has accepted the same. In the background of the aforesaid discussion and precedent, we set aside the order of the authorities below and decide the issue in favour of the assessee. Hence, the transfer pricing adjustment stands deleted."*

56. It was held that the intra group services should have provided and such services must be at Arm's Length Price. As per OECD, allocation of cost based on approved allocation key and certified by the CPA certificate is relevant. The revenue cannot reject the CPA certificate since the same are specific and authenticated. As per Rule 10D(2)(A), the document must be supported by authentic documents, which includes authentication by the CPA. Therefore, the certification of allocation key and the same was authenticated by the CPA is proper documents as per Reule 10(2)(A) of the I.T. Rules. Respectfully following the above decision, we observe that in the given case also, the assessee has provided informations under Rule 10D(2)(A) and the cost allocation was also certified by the statutory auditors (CPA) of the Head Office and the service branches are submitted before tax authorities. However, this was not taken cognizance by the tax authorities. Therefore, we direct the Assessing Officer to verify the CPA certificate and verify the allocation key and relevant allocation of the cost to the Indian entity. Therefore, we rely on the above decision and findings of the Coordinate Bench in assessee's

own case, we are inclined to allow the Ground No. 2 raised by the assessee with the above direction.

57. With regard to Ground No. 3 which is in respect of disallowance of salaries paid to Expatriates, this ground is similar to Ground No. 1 raised by the revenue in ITA No. 1407/MUM/2019 for the A.Y. 2002-03 and as we have adjudicated the issue in favour of the assessee by following the assessee's own case in earlier assessment years, no further adjudication is required on the same. Accordingly, Ground No. 3 raised by the assessee is allowed.

58. With regard to Ground No. 4 which is in respect of disallowance of expenditure on Refurbishment, this ground is similar to Ground No. 9 raised by the revenue in ITA No. 1407/MUM/2019 for the A.Y. 2002-03 and as we have adjudicated the issue in favour of the assessee by following the assessee's own case in earlier assessment years, no further adjudication is required on the same. Accordingly, Ground No. 4 raised by the assessee is allowed.

59. With regard to Ground No. 5 which is in respect of disallowance under section 14A of the Act, Ld.AR of the assessee submitted that the assessee's own funds and non-interest bearing funds are far in excess of

investment yielding exempt income which demonstrates that the no cost of borrowing is attributable to exempt income. Further, Ld.AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this tribunal in assessee's own case and decided to restrict the disallowance to 1% of exempt income. He prayed that the similar direction may be followed for the year under consideration.

60. On the other hand, Ld. DR relied on the order of the lower authorities.

61. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench in ITA.No. ITA.No. 4867/Mum/2017 dated 13.11.2023 held as under: -

*"**5.1 Ground***

5.1 The learned CIT (A) erred in law and on facts that Rule 8D is to be applied for arriving at the disallowance of expenditure attributable to earning taxable income.

5.2 The learned CIT(A) ought to have considered the Appellant's submission that the expression 'in relation to' under section 14A means dominant and immediate connection which is not

applicable in the case of the Appellant as no expenditure has been incurred by the Appellant in relation to earning the exempt income.

5.3 The learned CIT (A) erred in law and on facts in disallowing the expenditure under section 14A of the Act and accordingly, the disallowance should be deleted.

.....

*The Appellant submits that this issue is covered in favor of the Appellant by a decision of the Co-ordinate bench of the Tribunal in the Appellant's own case for the AY 1999-2000, wherein the Tribunal followed the Appellant's own case Tribunal order of AY 1997-98 and dismissed the ground raised by Revenue (**Copy of AY 1999-00 ITAT order dated 27 September 2022 is enclosed in the Bank's appeal legal paper book -refer page 156, para 10)** which reads as under:*

> *"10. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 1997-98, we allow ground raised by the assessee"*

*Further, the Appellant submits that the Hon'ble Supreme Court in the case of South Indian Bank Ltd [2021] (130 taxmann.com 178) held that disallowance u/s. 14A of the Act is not warranted for investments made in tax-free bonds/ securities which yield tax-free dividend and interest in those situation wherein interest free own funds available to the assessee exceeded their investments **(Copy of decision is enclosed in the Bank's Appeal legal paperbook - refer para 27, page 414)**, which reads as under:*

> *"27. The aforesaid discussion and the cited judgments advise this Court to conclude that the proportionate disallowance of interest is not warranted, under section 14A of Income Tax Act for investments made in tax-free bonds/securities which yield tax-free dividend and interest to Assessee*
>
> *Banks in those situations where, interest free own funds available with the Assessee, exceeded their investments. With this conclusion, we unhesitatingly agree with the view taken by the learned ITAT favoring the assesses"*

In view of the above, the Appellant submits before us to follow its own case vide ITAT order for A.Y. 1999-00, dated 27 September 2022, and delete the disallowance of INR

> *1,26,28,068/- made by the Ld. CIT(A). Without prejudice to the above, if the Hon'ble ITAT do not agree with the above plea of the Appellant, it is submitted that the disallowance be restricted to 1% of the exempt income. We have gone through the entire material and case laws relied upon. Assessee's own case pertains to A.Y. 1997-98 and A.Y. 1999-00, as there is no change in the facts of the case and law laid down by the Hon'ble Apex court in the case of South Indian Bank Ltd [2021] (130 taxmann.com 178) is squarely applicable to the assessee, we agreed with the plea taken by the assessee and to be just and fair in the matter, disallowance is restricted upto 1% of the exempted income.* ***Ground raised by the assessee is partly allowed.****"*

62. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, accordingly, Assessing Officer is directed to restrict the disallowance to 1% of exempt income and ground raised by the assessee is partly allowed.

63. With regard to Ground No. 6 which is in respect of recoveries against securities loss, at the time of hearing, Ld.AR of the assessee submitted that this ground is academic in nature, accordingly, the same requires no specific adjudication. Ground No. 6 raised by the assessee is kept open.

64. With regard to Ground No. 7 which is in respect of premium paid on acquisition of retail asset portfolio, Ld.AR of the assessee submitted that during this assessment year, the Bank acquired retail loan portfolio (i.e,

auto loans, mortgage loans, etc.) from Standard Chartered Grindlays Bank Ltd., at a premium of ₹.20.30 crore. Since this loan portfolio is stock-in-trade/trading asset for the Bank, the said premium was claimed as revenue expense / deduction in this assessment year. Assessing Officer held that the premium paid is capital in nature and disallowed the same and Ld. CIT(A) sustained the same. Ld.AR of the assessee submitted that any income arising from loan portfolio is business income for the Bank and same has been consistently offered and taxed accordingly in the relevant assessment years. Hence, any disallowance of the premium amounts to double taxation for the Bank to that extent. Alternatively, he prayed that where this premium is disallowed in entirety in this assessment year, the said premium shall be allowed as deduction over a period of loan tenure i.e., two to five assessment years on the basis of deferred revenue.

65. In regard to the proposition that Loan portfolio to be treated as trading asset and any loss arising on the same is allowable as business loss, he relied on the following case law: -

i) GE Money Financial Services v. ACIT (ITA No. 4206/Del/2011)

ii) CIT v. Gillanders Arbuthnot & Co. Ltd (Cal HC) (69 Taxman 31)

iii) PCIT v. South Canara District, Central Co-operative Bank Ltd (2022) (139 taxmann.com 303) (Karnataka HC).

66. On the other hand, Ld. DR relied on the orders of the lower authorities.

67. Considered the rival submissions and material placed on record, we observe from the record that the assessee has acquired the retail loan portfolio from Standard Chartered Grindlays Bank Ltd, which is a separate legal entity on the proprietary basis, it is also relevant to note that it has acquired the running retail portfolio business. Therefore, it is only a trading assets acquired by it. In our view, the assessee will get the benefit based on the tenure of this trading assets. It was submitted by the Ld AR that the tenure of this retail loans are for the period 2 to 5 years. Therefore, cost verses benefit has to be recognized in this transaction. The assessee has benefitted and recognized the income in the next 5 years, hence, in our view, it should be treated as deferred revenue expenditure and allocated in 5 equal installments. Therefore, we direct the AO to allow 1/5th of the cost in this assessment year and balance can be carried forward to the subsequent years. Accordingly, the ground raised by the assessee is partly allowed.

68. With regard to Ground No. 9 which is in respect of deduction of Head office expenditure in entirety, Ld.AR of the assessee submitted that the assessee has claimed that deduction of Head Office Expenditure is not subject to limit of 5% as provided in section 44C of the Act considering the India-UK tax treaty provisions. He submitted that the claim made before Ld. CIT(A) was disallowed. Further, Ld.AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this tribunal in assessee's own case and decided the issue in favour of the assesse and against the department.

69. On the other hand, Ld. DR relied on the orders of the lower authorities.

70. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench in ITA.No. 4867/Mum/2017 dated 13.11.2023 held as under: -

"8.1 Ground

8.1 The learned CIT(A) erred in disallowing the claim of the appellant towards Head Office Expenditure of Rs. 77,08,83,765/- in entirety on the ground that no revised return of Income was

filed for such claim and thus, restricted the claim under section 44C of the Act.

8.2 The Ld. CIT (A) failed to appreciate that:

a) The decision of the Supreme Court in the case of Goetz (India) Ltd. v CIT (2006) 284 ITR 323 (SC) can be applied only when the claim for deduction was made first time during the course of assessment. In the present case, the Appellant had already claimed deduction for Head Office Expenditure in the Return of Income, but the same was restricted under section 44C of the Act. Further, the said decision of Supreme Court deals with the power of the Assessing officer and not that of Appellant Authority.

b) The said claim was revised during the course of appeal proceeding in view of the decision of the Mumbai Tribunal in the case of Metchem Canada Inc. v/s. DCIT [284 ITR (A.T.) 196], wherein after referring to Article on non-discrimination, it has been held that provisions of section 44C of the Act will have no application.

8.3 Without prejudice to the above, the learned CIT(A) also erred in holding that Article 26 of the DTAA entered into by India with UK is not applicable to the provisions of section 44C of the Act and the provisions of section 44C of the Act does not create a situation of discrimination vis-a-vis an Indian resident taxpayer.

8.4 The learned CIT (A) ought not to have restricted the claim of head-office expenses to 5% under section 44C of the Act and accordingly, should have allowed the head-office expenses in entirety.

......

The Appellant submits that this issue is covered in favor of the Appellant by the decision of the Co-ordinate bench of the Tribunal in the Appellant's own case for the A.Y. 1999-2000 wherein the Tribunal, following the decision of the Mumbai ITAT in the case of Metchem Canada Inc. v DCIT 284 ITR (AT) 196 (copy of decision enclosed in the Appellant's legal paper book at page 444), has held that in view of Article 26 of the India-UK DTAA, provisions of section 44C of the Act will not be applicable to the Appellant (copy of A.Y. 1999-00 ITAT order is enclosed in the Appellant's legal paper book - refer page 168, para 21), which reads as under:

"21. Considered the rival submissions and material placed on record, we observe that Coordinate Bench in the case of Metchem Canada Inc., v. DCIT (supra) considered the similar issue and adjudicated in favour of the assessee. While deciding the issue, the Coordinate Bench held as under:-

> *"3. We have heard the rival contentions, perused the material on record, and duly considered factual matrix of the case as also the applicable legal position.*
>
> *4. We may, first of all, reproduces the relevant extracts from the provisions of arts. 7 and 24 of the applicable Indo-Canadian DTAA for ready reference:*
>
> *Article 7 - Business profits*
>
> *1. 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 PE situated therein. If the enterprise carries on or has carried on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to:*
>
> *(a) That PE, and*
>
> *(b) Sales of goods and merchandise of the same or similar kind as those sold, or from other business activities of the same or similar kind as those effected, through that PE.*
>
> *2. Subject to the provisions of para 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a PE situated therein, there shall in each Contracting State be attributed to that PE, 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 PE. In any case, where the correct amount of profits attributable to a PE is incapable of determination or the ascertainment thereof presents exceptional difficulties, the profits attributable to the PE may be estimated on a*

reasonable basis provided that the result shall be in accordance with the principles laid down in this Article.

3. In the determination of the profits of a PE, there shall be allowed those deductible expenses which are incurred for the purposes of the business of the PE including executive and general administrative expenses, whether incurred in the State in which the PE is situated or elsewhere as are in accordance with the provisions of and subject to the limitations of the taxation laws of that State. However, no such deduction shall be allowed in respect of amounts, if any paid (otherwise than as a reimbursement of actual expenses) by the PE 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, know-how or other rights, or by way of commission or other charges, 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 PE. Likewise, no account shall be taken in the determination of the profits of a PE, for amounts charged (otherwise than towards reimbursement of actual expenses), by the PE 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, know-how or other rights, or by way of commission or other charges 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.

Article 24 - Non-discrimination

2. The taxation on a PE which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.

5. The core issue, as we have noted earlier as well, is whether or not the limitation on deduction of head office expenditure, as set out in Section 44C of the Indian IT Act, will apply in the case of

non-resident companies governed by the India Canada DTAA, particularly in the light of non-discrimination clause in the said DTAA. As a corollary to this question, we must decide whether restriction on admissibility of deduction on account of head office expenditure, as contemplated by Section 44C of the Act, constitutes "taxation on a PE which an enterprise of a Contracting State has in the other Contracting State" as "less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities". Another aspect which requires to be considered by us is whether the provisions of computation of business profits in Article 7 are to viewed as subject to the application of nondiscrimination clause in Article 24(2), or is it the other way round i.e., nondiscrimination clause to be read as subject to the clause regarding computation of business profits. There are other peripheral or subsidiary issues raised before us, such as, whether the provisions of Section 44C of the Act can be viewed as a restriction on admissibility of deduction of head office expenditure at, and, whether the provisions of Section 44C of the Act, only provide for a fair method of estimation of deductible head office expenses and are enabling provisions in nature.

6. Article 24(2) of the Indo-Canadian DTAA is worded on the lines of Article 24(3) of the OECD Model Convention. In fact, it is verbatim extract from the Model Convention. While elaborating upon the scope of the said clause the OECD Model Convention Commentary, inter alia, states as follows:

24. Effect of tax bases With regard to the basis of assessment of tax, the principle of equal treatment normally has the following implications:

(a) PE must be accorded the same right as resident enterprises to deduct the trading expenses that are, in general, authorized by the taxation law to be deducted from taxable profits in addition to the right to attribute to the PE a proportion of overheads of the head office of the enterprise. Such deductions should be allowed

without any restriction other than those imposed on the resident enterprise.

(b)...

It is thus clear that according to the scope of this clause as explained by the OECD Commentary, includes the deduction on account of head office expenditure. In addition to the deduction of normal business expenditure of a PE as permissible under the domestic taxation laws, the deduction is also required to be allowed for a proportion of overheads of the head office and such a deduction is to be allowed without any restriction other than those imposed on the resident enterprise. This makes two things clear-(a) that the restriction on admissibility of expenditure in accordance with the domestic law is, according to the OECD Commentary, is in respect of the normal business expenditure incurred by the PE; and (b) that the deduction on account of overheads of the head office is to be allowed without placing any restriction on such deduction save and except such restrictions as may also be placed on the resident enterprises. As the provisions of Article 24(2) of Indo-Canadian DTAA and of the provisions of Article 24(3) of the OECD Model Convention are in pari materia, the OECD Model Convention Commentary has a key role in determining the scope and connotations of art 24(2) of the Indo-Canadian DTAA. Hon'ble Andhra Pradesh High Court in the case of CIT v. Vishakhapatnam Port Trust (1983) 144 ITR 146 (AP), referred to the OECD Commentary on the technical expressions and the clauses in the model conventions, and referred to, with approval, Lord Redcliff's observation in Ostime v. Australian Mutual Provident Society (1960) 39 ITR 210, 219 (HL) which have described the language employed in those documents as the 'international tax language'. These documents are thus in the nature of contemporanea expositioin as much as the meaning indicated in these documents to the clauses and expressions in the tax treaties can be inferred as the meaning normally understood in, to use the words of Lord Redcliff, 'international tax language' developed by the organizations like OECD. This is so held in the case of Graphite India Ltd. v. Dy. CIT (2003) 78 TTJ (Cal) 418 : (2003) 86 ITD 384 (Cal).

When an expression or a clause is picked up from the OECD Model Convention, the normal presumption is that the persons using the said clause or expression are also aware about the meanings assigned to the said clause or expression by the OECD and have used it in

the same sense and for the same purpose. Unless a contrary intention is specifically expressed, say by a protocol attached to the DTAA, it is only axiomatic that the clause or the expression will have the same meaning as normally assigned in the tax literature by the OECD. Therefore, when an expression or a clause from the OECD Model Convention is used even in a bilateral tax treaty involving a non OECD country, one has to proceed on the basis that it is used in the same meaning and with the same connotations as assigned to it by the OECD Model Convention Commentary. As per the OECD Commentary, placing a restriction on the deduction, on account of overheads of the head office, except when the same restriction is also placed on the resident enterprises, does constitute discrimination under Article 24. The taxation on a PE of a Canadian company, by the reason of placing a restriction on deduction of head office expenditure which is not applicable in the case of resident companies, does, therefore, constitute less favorable tax treatment in India than the taxation levied on Indian enterprise carrying on the same activities in India. Viewed in this perspective, it is clear that the limitation on deduction of head office expenditure, as stipulated by Section 44C of the Act, will be hit by the nondiscrimination clause in the Indo-Canadian DTAA. In any event, on a plain reading of the provisions of the Article 24(2), we are of the considered view that a restriction on admissibility of head office overheads of PE of a Canadian company constitutes discrimination against such a PE vis-a-vis a domestic Indian entity because no such restriction is applicable for deduction of head office or controlling office overheads of an Indian entity. It puts PE of a Canadian company to an unfair disadvantage inasmuch as even legitimate business expenses attributable to the PE and deductible under Section 37(1) of the Act cannot be allowed as a deduction in the light of restriction placed under Section 44C of the Act, whereas all the legitimate business expenses of the Indian entity operating in India will be allowed as a deduction. The scope of deduction under Section 37(1) of the Act thus stands curtailed for PE of a Canadian company.

7. In the Indo-Canadian DTAA, arts. 24 to 28 are clubbed together under Chapter VI titled "specific provisions", whereas the provisions of arts. 6 to 21 are contained in Chapter III titled "taxation of income". It is thus clear that the provisions of Article 24 are specific provisions whereas the provisions of Article 7 are in the

nature of general provisions. While taxation of business profits under Article 7 refers to the general principles on the basis of which the business profits are to be computed, Article 24(2) refers to the specific provision that the PE of the residents on one State shall not be subjected to any taxation which is less favorable vis-a-vis the taxation levied on enterprises of that other State carrying on the same activities. On the issue whether the general provisions will prevail over the special provision or vice versa, the law is fairly well settled. As aptly conveyed by the legal maxim generalia specialibus non derogant', i.e., special things derogate from general things. As observed by a co-ordinate Bench, in the case of ITO v. Titagarh Steels Ltd. (2001) 73 TTJ (Cal) 297 : (2001) 79 ITD 532 (Cal) and relying upon Hon'ble Supreme Court judgment in the case of South India Corporation (P) Ltd. v. Secretary, Board of Revenue AIR 1964 SC 207, 'a special provision normally excludes the operations of general provision'. The provisions of Article 7 being general in nature are therefore, required to be read as subject to the provisions of Article 24. Revenue's argument that since the business profits are to be computed "in accordance with the provisions of and subject to the limitations of the taxation laws of that State" under Article 7(3) and, therefore, limitation placed under Section 44C of the Indian IT Act cannot be ignored, cannot, therefore, be accepted. What Article 24(2) seeks to remove is the discrimination to the permanent residents of Indian and Canadian residents in the other States visa-vis the domestic business entities of that other State. When domestic tax laws permit such discrimination, such legal provisions have to be treated as overridden by the provisions of the Indo-Canadian DTAA. There is no dispute about the fact that when the provisions of the IT Act and the DTAA are in conflict, the provisions of the Act will be applicable only to the extent the same are more beneficial to the assessee. In other words,

the provisions of the treaty prevail over the provisions of the Act. Therefore, the restriction placed on the allowability of the head office expenditure by Section 44C of the Act is to be ignored in the light of the provision of Article 24(2) of the Indo-Canadian DTAA.

8. The next contention of the Revenue is that the provisions of Section 44C of the Act are not in the nature of restriction but provide only a fair method of allocation of head office overheads. It is also contended that in the absence of the provision of Section 44C of the Act, the head office expenses cannot be allowed at all for want of verification of expenses. We see no substance in this plea either. In the case of CIT v. Deutsche Bank AG (IT Ref. No. 139 of 1997, judgment dt. 24th July, 2003), upholding the action of this Tribunal, Hon'ble Bombay High Court held that in a case where Section 44C of the Act is held to be not applicable, the head office expenditure was allowable under Section 37(1) of the Act and that Section 44C of the Act puts a ceiling on the deduction of head office expenditure. Whatever be the object of the said section, it is clear that it is in the nature of a disabling provision which puts a ceiling on the admissibility of a deduction. It does constitute a restriction-and a restriction which is not similarly placed for a domestic enterprise. The head office expenses, to the extent the same can be fairly allocated to the PE, are admissible as deduction under Section 37(1) of the Act and this is so held by the Hon'ble jurisdictional High Court in Deutsche Bank's case (supra).

9. We have noted that the Ld. CIT (A) has, in the asst. yrs. 1994-95 and 1996-97 restored the matter to the file of the AO for examining the claim of expenditure as attributable to the PE in India, and the assessee is not in appeal against these directions. Therefore, beyond dispute, only such expenses are to be allowed as a deduction on

account of head office expenses as can be fairly allocated to the PE. The only impact of the applicability of non-discrimination clause will be that the scope of deduction under Section 37(1) of the Act will not stand curtailed by the restriction placed under Section 44C of the Act. In our considered view, this direction of the Ld. CIT (A) is justified and calls for no interference.

10. As far as asst. yr. 1993-94 is concerned, the CIT(A) has held that the provisions of Section 44C of the Act will apply but then, for the reasons set out above, we are of the considered view that Section 44C has no application in the matter and that the assessee is to be allowed deduction of such head office expenses as can be fairly allocated to the PE. Accordingly, as for the asst. yr. 1993-94, the matter is to be restored to the file of the AO for adjudication de novo in the light of the above observations."

22. Respectfully following the above said decision, we allow the ground raised by the assessee."

In view of the above, the Appellant submits before Hon'ble ITAT to follow the own case above ITAT order for AY 1999-00 and allow the head office expenditure in entirety under the provisions of Article 26 of the tax treaty without applying the restriction under section 44C of the Act.

- *Further, the Appellant submits that Article 26 of the India-UK Treaty is parimateria to Article 24 of India-Canada Treaty. Relevant extracts from 'Nondiscrimination' Article from India-UK and India-Canada Tax treaty are produced below for easy reference:*

Provision	**India – UK Treaty**	**India – Canada Treaty**
Non-discrimination	***Article 26(2)*** *"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 State than*	***Article 24(2)*** *"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*

Provision	India – UK Treaty	India – Canada Treaty
	the taxation levied on enterprises of that other State carrying on the same activities in the same circumstances or under the same conditions."	*State than the taxation levied on enterprises of that other State carrying on the same activities."*

In view of the above, we observe that the above additional ground involves question of law liable to be admitted. Further, on the basis of the above submissions by assessee, we agree that as decided by the coordinate bench, in the case of assessee that the Head office expenditure is allowed in entirety under the provisions of Article 26 of the tax treaty without the applicability of restriction under section 44C of the Act, ***and as the submissions by assessee not controverted by the Revenue, In view of this, ground of appeal of the assessee is allowed following the precedent discussed (supra)."***

71. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, accordingly, ground raised by the assessee is allowed.

72. In the result, appeal filed by the assessee is partly allowed.

ITA NO. 2839/MUM/2019 (A.Y. 2003-04)

73. Coming to the appeal relating to A.Y. 2003-04, since facts and grounds in this case are mutatis mutandis, therefore the decision taken in assessee's case for the A.Y. 2002-03 are applicable to this assessment year also. With regard to Ground No. 7 relating to premium paid to acquire the retail loan portfolio, we have decided the issue on the basis

of deferred revenue expenditure, the same is directed to be allowed to the assessee at 1/5th of the premium paid on acquisition of portfolio. Therefore, this ground is partly allowed. All other grounds raised are similar to the grounds raised in A.Y. 2002-03, the same are disposed off mutatis mutandis to other grounds in A.Y. 2002-03. Accordingly, the appeal filed by the assessee is partly allowed.

74. In the result, appeal filed by the assessee is partly allowed.

75. To sum-up, appeals filed by the revenue are dismissed and appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 15th March, 2024.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 15/03/2024
Giridhar, Sr.PS

<u>Copy of the Order forwarded to</u>:
1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum