

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

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER

AND

SHRI RAJ KUMAR CHAUHAN, HON'BLE JUDICIAL MEMBER

**ITA NOs. 4766 & 4767/MUM/2016
(A.Ys .2006-07 & 2007-08)**

The Hongkong & Shanghai Banking Corporation Ltd., Senior Vice President Tax The Hongkong and Shanghai Banking Corporation Ltd., India Area Management, 5 th Floor, Hongkong Bank Building 52/60, MG Road, Fort, Mumbai – 400001 PAN: AACT2786P	v.	The Additional Director of Income-tax (International Taxation)-Range – 3 1 st Floor, Scindia House N.M. Marg, Ballard Estate Mumbai - 400038
(Appellant)		(Respondent)

ITA NO. 7010/MUM/2016 (A.Y. 2008-09)

The Hongkong & Shanghai Banking Corporation Ltd., Senior Vice President Tax The Hongkong and Shanghai Banking Corporation Ltd., India Area Management, 5 th Floor, Hongkong Bank Building 52/60, MG Road, Fort, Mumbai – 400001 PAN: AACT2786P	v.	The Additional Director of Income-tax (International Taxation)-Range – 3 Air India Building Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA NOs. 4787 & 4788/MUM/2016
(A.Ys . 2006-07 & 2007-08)**

DCIT (International Taxation)-2(2)(2) Room No. 136, 1 st Floor, Scindia House N.M. Marg, Ballard Estate Mumbai - 400038	v.	The Hongkong & Shanghai Banking Corporation Ltd., Hongkong Bank Building, India Area Management, 5 th Floor 52/60, MG Road, Fort, Mumbai – 400001 PAN: AACT2786P
(Appellant)		(Respondent)

ITA NO.7309/MUM/2016 (A.Y. 2008-09)

DCIT (International Taxation)-2(2)(2) Room No. 1722, 17 th Floor Air India Building Nariman Point, Mumbai - 400021	V.	The Hongkong & Shanghai Banking Corporation Ltd., Hongkong Bank Building India Area Management, 5 th Floor 52/60, MG Road, Fort, Mumbai – 400001 PAN: AA ACT2786P
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Porus Kaka & Shri Divesh Chawla
Department Represented by	:	Ms. Dhivya Ruth J.
Date of conclusion of Hearing	:	24.06.2024
Date of Pronouncement	:	28.06.2024

ORDER

PER NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER:

1. ITA No. 4766/MUM/2016 & ITA No. 4787/MUM/2016 are cross appeals by the assessee and the revenue preferred against order of the Learned Commissioner of Income-Tax (Appeals)-56, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 31.03.2016 pertaining to A.Y. 2006-07. ITA No. 4767/MUM/2016 & ITA No. 4788/MUM/2016 are cross appeals for the A.Y.2007-08 and ITA No. 7010/MUM/2016 & ITA No.7309/MUM/2016 are cross appeals for the A.Y. 2008-09.

2. The captioned appeals were heard together and are disposed off by this common order, for the sake of convenience and brevity.

3. At the very outset, the counsel for the assessee stated that the grounds raised by the assessee and the revenue in their respective appeals have been considered and decided by this Tribunal in earlier assessment years. The counsel supplied the copies of the decisions of the Coordinate Bench in earlier years. Though the Ld. DR strongly supported the findings of the Assessing Officer but fairly conceded that the impugned issues are coming from earlier years and have been decided by this Tribunal.

4. We have carefully considered the orders of the authorities below and have also perused the detailed chart furnished by the assessee showing how the issues are covered. We find force in the contention of the counsel. The grounds of appeal taken by the assessee and the revenue were also there in earlier assessment years and have been decided by the Coordinate Benches.

5. The assessee is one of the largest banking and financial organizations in the world which is incorporated and registered in

Hongkong. HSBC carries out the business of banking in India through its branch in accordance with the Banking Regulation Act, 1956 and the RBI guidelines. The bank's business in India includes personal financial services, financial planning services, credit cards, corporate and institutional banking, Custody, trade services and treasury.

6. We will first address to the cross appeals for the A.Y. 2006-07.

7. The first grievance relates to the transfer pricing adjustment on account of Correspondent Banking Activities of the assessee to the extent of ₹.2,72,81,846/-. As mentioned earlier, in earlier years also a similar dispute arose and the Ld. CIT(A) while deciding the appeal of the assessee at Para No. 27.22 of his order has observed that *"I find that the same issue arose in the earlier years 2002-2003, 2003-2004 and 2004-2005 and that the arguments are similar and my predecessors after examining the issue at length, had decided that 75% of the costs (direct cost, indirect cost and Head Office Expense allocation) has to be taken for corresponding banking activity. I agree with the views of my predecessors"*. We find the Coordinate Bench in A.Y. 2002-2003 and 2003-2004 in ITA No. 3857/MUM/2006 & ITA No. 4565/MUM/2009 has

considered this issue and vide Para No. 14.1 of its order at Page No. 26

and held as under: -

"14.12. We have heard the rival submissions and perused the materials available on record including the various judicial pronouncements that were relied upon by the parties at the time of hearing before us. The preliminary facts stated hereinabove are not reiterated herein for the sake of brevity. From the facts narrated above, we find that INM IB majorly manages relationships of Indian FIs to provide services and products. INM IB offers vis-à-vis the Indian FIs including marketing of loans, payments and cash management facilities, guarantee and other products offered by the assessee. These products when sold by the assessee, result in earning of revenue like float income, guarantee commission, fee income as a result of payment and cash management facilities etc., The details of the said revenue earned from sale of products to the Indian FIs are as under:-

Sr. No.	Sector	Amount (Rs. In Crores) AY 2002-03
I.	Securities Houses	2.7759
2.	NBFCs	0.9244
3.	Fund Managers	0.624
4.	Insurance	0.7229
TOTAL		4.4856

14.12.1. We find that the assessee had duly offered the aforesaid amount of Rs.4.4856 Crores as its income in the return of income. We find considerable force in the arguments advanced by the Id. AR that the Indian banks have to establish relations with the overseas banks as the Indian banks themselves do not have network of branches outside India. INM IB markets the Nostro accounts and trade finance services offered by overseas branches of HSBC to such Indian banks. The INM IB division does not use any additional facility, and the employees providing this support do not have any special marketing skills or knowledge of the products provided by the overseas HSBC branches. It is important to emphasize that the global network of the assessee is a direct asset and mainly benefit the assessee to have global reach and the ability to offer services under its network. This directly encourages FI's to approach the assessee for the services as compared to others who may not have such global reach. It may also be noted that the overseas HSBC branches also

provide services that benefit the assessee, i.e., in selling INR Vostro accounts of HSBC India to banks domiciled outside India, The assessee does not pay any amount to overseas HSBC branches for such marketing services. It is also pertinent to note that as a result of various services of overseas HSBC branches, as above, assessee had earned float income of Rs.1.97 Crores on the interest free balances maintained by the Indian banks which have maintained Vostro account with the assessee. This fact is not disputed by the revenue before us. Hence, it could be safely concluded that the assessee and the overseas HSBC offices being a part of the HSBC group derived reciprocal benefits and thus the non-charging of costs for providing the incidental marketing support services to overseas HSBC entities would not cause any prejudice to the interest of the assessee as well as the revenue.

14.12.2. Further, the total cost of INM IB division is only Rs 1.55 Crores, whereas the income earned from the activity performed by INM IB division is Rs 4.48 Crores (including income from Indian FI and Rs 1.97 Crores- float income from Vostro account). Even if only the float income from Vostro Account is considered, still the assessee has earned a profit of Rs. 42 Lakhs (1.97-1.55 cr) resulting in profit margin of 27%, which has been already offered to tax. The profit margin arrived is much higher than the margin of 22 percent arrived at by the TPO. If both the income (income from Indian FI and Float income) are considered, the profit margin stands at 189 percent. This shows that the assessee is adequately compensated for the activities carried out by INM IB division. Hence the allegation of the revenue that the assessee has not been adequately compensated has no merits.

14.12.3. We find lot of force in the case law relied upon by the Id. AR before us that when services are rendered free of charge to the AE by the assessee and similarly AE also provided reciprocal services free of charge to the assessee, there cannot be any reason for doubting the said transaction or make any transfer pricing adjustment thereon as both the assessee as well as the AEs are part of global conglomerate. The decision relied upon by the Id. AR in this regard is in the case of Aramex India Pvt. Ltd. vs. DCIT reported in 51 Taxman.com 573 (Mumbai Tribunal).

14.13. In view of the aforesaid observations in the peculiar facts and circumstances of the case herein and respectfully following the aforesaid decision of this Tribunal, we hold that the assessee had considerably benefitted out of earning income from Indian FIs and float income pursuant to correspondent banking activities and the said benefit directly flows to the assessee.

14.14. It would be crucial to note that assessee had reflected more than 100 international transactions in form No.3CEB filed along with the return of income and the same were accepted to be at arm's length by the Id. TPO. Admittedly these transactions include items which are marketed by INM IB division such as custodian charges, guarantee commission charges etc as is evident from Annexure 'C to form 3CEB. Hence, it could be seen that the main transactions were found to be at arm's length and the incidental benefit arising out of such transaction has been considered as a separate transaction. We find in the instant case that the main business transactions have been accepted to be at arm's length and hence, the Id. TPO cannot separately treat the incidental benefit as a separate transaction unless it is shown that they are separate from the main business activities. In this regard, we find that the Id. AR placed reliance on the decision of Co-ordinate bench decision of this Tribunal in the case of *Det Norske Veritos A/S. v. Additional Director of Income Tax* reported in 67 taxmann.com 16 (Mumbai Tribunal) wherein it was held that if the main international transactions have been benchmarked, then incidental transaction cannot be considered as a standalone transaction and an adjustment to that effect cannot be made independently.

14.15. We find that with regard to allocation of cost and mark up thereon, the Id. AR argued that the Id. TPO and the Id. CIT(A) erred in considering the head office expenses for arriving at the cost base. It was submitted that only indirect costs are attributable to the activities should have been considered as concerned employees perform the work in the Indian business of the assessee and they do not use any significant additional facility to provide marketing support in respect of correspondent banking activities. Further, there is no reason for allocating head office expenses to the costs incurred for rendering services as the head office expenditure allocated to India is for the purpose of main line of banking business undertaken by the assessee and the inputs provided by the head office are not directly related to the incidental marketing support activity rendered by the assessee. Though we find lot of force in the aforesaid argument of the Id. AR, in any case, the nature of services are such that they are reciprocal in nature and hence, there cannot be any attribution of mark up on the same. Hence, we hold that no mark up should be loaded on the attribution of costs towards incidental marketing activities undertaken by the assessee in connection with the correspondent banking activities.

14.16. In view of the aforesaid observations, we are not inclined to adjudicate the other arguments advanced by the Id. AR that no search process has been identified by the Id. TPO and no AE has

been identified in respect of the subject mentioned marketing support services etc and the comparables chosen thereon by the Id. TPO etc as the adjudication of the same would become academic in nature.

14.17. In view of elaborate observations given hereinabove, we hold that no transfer pricing adjustment on account of correspondent banking activity is warranted in the instant case. Accordingly, ground Nos.10.1 to 10.4 raised by the assessee are allowed."

8. On finding parity of facts and also finding that the lower authorities have followed the orders of earlier assessment years, respectfully following the decision of the Coordinate Bench (supra), this ground is allowed.

9. The second grievance relates to the adjustment on account of Marketing and Support Services relating to External Commercial Borrowings. The Ld. CIT(A) has considered this grievance of the assessee on adjustment of ₹.3,49,53,287/- in respect of alleged services in relation to External Commercial Borrowings [ECB] at Para No. 29 of its order vide Ground No. 26 and at Para No. 29.2 and he has followed the orders of his predecessor for the A.Y.2002-2003, 2003-2004 & 2004-2005 and after observing that there is no change in the facts of the case, following the decision of his predecessor has deleted the adjustment. The Coordinate Bench in ITA No. 3857/MUM/2006 and others, has considered the issue at Para No. 17 of its order and at Para No. 17.12 held as under: -

"17.12. We have heard rival submissions. At the preliminary facts stated hereinabove remained undisputed and hence, the same are not reiterated herein for the sake of brevity. It is not in dispute that assessee had received Debt Syndication Fees of Rs.67,68,620/- together with 50,000 USD as its fee / commission income for enabling the Indian customers to avail ECBs from its overseas branches. The said receipt of fee / commission income has been accepted to be at arm's length. Hence, there is no question of further fee that is required for the assessee in respect of continuing ECBs. We find that the Id. CIT(A) had categorically observed that HSBC India does not assume any risk in respect of continuing ECBs compared to the nature of service rendered by them. This categorical finding has not been controverted by the revenue before us. Hence, we hold that no transfer pricing adjustment in respect of the services rendered by HSBC India in respect of continuing ECBs more so when the entire commission income / Debt Syndication Fee income received by the assessee have already been accepted to be at arm's length. Accordingly, ground No.6 raised by the revenue is dismissed."

10. Respectfully following the decision of the Coordinate Bench (supra), we decline to interfere with the findings of the Ld. CIT(A). This grievance of the revenue is dismissed.

11. The next grievance relates to the adjustment on account of marketing of derivatives. The Ld. CIT(A) has considered the grievance in respect of adjustment of ₹.7,11,74,284/- in respect of marketing of derivatives at Para No. 28 vide Ground No. 25 of the appeal before him and at Para No. 28.3 he observed that there is no change in the facts of the case and accordingly agreed with the decision of his predecessor and

followed the decision given in A.Y. 2004-05. The Coordinate Bench in A.Y.2004-05 in ITA No. 7336/MUM/2010 has considered a similar grievance at Para No. 80 of its order and held as under: -

"85. Before us Id. Counsel has submitted the following difference in the application of the two methods:-

As per 30 per cent of the Net New Business Value (NNBV) method

Notional: USD 11,000,000

Tenor of the deal: 3.5 years

Value on the deal per annum: 10 basis points per annum (say)

Credit Risk: 3.5 basis points per annum (say)

*Net New Business Value (NNBV) on the deal: PV of (USD11 mio * 6.5bps * 3.5years) equals USD 22599 (i.e., Present Value of USD 25025)*

30% of this is USD 6,780 /-

As per 60 per cent of the INPV method

Notional: USD 11,000,000

Tenor of the deal: 3.5 years

Value on the deal per annum: 10 basis points per annum (say)

Credit risk on the deal: 3.5 basis points per annum (say)

Other event risk/uncertainty, etc.: 4 basis points per annum (say)

*INPV on the deal: PV of (USD11 mio * 2.5bps * 3.5 years) equals*

USD 8692 (i.e., Present Value of USD 9625)

60% of the above: USD 5215/-

86. From the working of the difference in the application of two methods as given by the Id. Counsel, we do not find any justification given by the Id.TPO to adopt 60% of NNBV allocation so as to take a contrary stand from the facts of the case presented by the assessee and the transaction of marketing of derivative services. Specially

looking to the fact that derivative contract is solely between derivative contract is solely between the Indian customer and the overseas AE; and all risks associated with the derivative contract, including credit risk, market risk, liquidity risk, and country risk, are borne entirely by the overseas AE and the Assessee does not assume any risks in these transactions. For the activities performed, the Assessee has already earned a marketing fee from the AE, amounting to 30% NNBV and the AE is earning the remaining 70% to manage the transaction over its life and assumes all the risk associated with the transaction. Nowhere, Id. TPO has done any analysis of the comparable data as to why it should be adopted at 60%. Thus, we agree with the observation and finding of the Id. CIT(A) and adjustment made by the Id. TPO is deleted.

85. We have perused the relevant finding given in the order passed by Ld. TPO as well as Ld. CIT(A) Further, Ld. Counsel submitted that the actions of the Ld. TPO are contrary to the provisions of the Act and the provisions of transfer pricing. The Ld. TPO has not followed any method and disregarded his own show cause notice and relied upon undisclosed secret comparables in respect of controlled transactions. Thus he submitted that the Ld. CIT (A) findings ought to be upheld, especially since the pricing policy of the Assessee of 30% of the NNBV is a globally accepted practice, followed by the HSBC group. Further, the Ld. TPO has accepted the same in AY 2002- 03 and AY 2003-04. Hence, the CIT (A) order should be upheld and the adjustment deleted."

12. Respectfully following the decision of the Coordinate Bench (supra), we decline to interfere, this Ground is dismissed.

13. The next two grievances relate to the interest received from HSBC Bank USA and HSBC Hongkong, Singapore and Japan offices. The Ld.CIT(A) has considered this issue at Para No. 30 vide Ground No. 27 of the appeal before him and at Para No. 30.2 followed the decision of his predecessor and directed the Assessing Officer to delete the entire

addition. The Coordinate Bench in ITA No. 4786/MUM/2016 in revenue's appeal considered the identical issue vide Ground No. 18 of the appeal before it and held as under: -

"148. We have heard both the parties and perused the relevant finding given in the impugned orders. The assessee maintains account with HSBC USA denominated in USD, which is used for settling dollar clearance. The interest earned by the assessee from HSBC USA, department of the assessee has already been incorporated above. The assessee has benchmarked the transaction using CUP method thereby various Indian banks have applied similar services from HSBC USA which have also been incorporated above. Assessee stated that "Best Efforts" are based on similar marketing conditions and the best effort rate has been lower than the generally committed rates. Thus, assessee is not at disadvantage compared to transaction between HSBC USA and unrelated banks, therefore, we agree with the Id. Counsel that the transaction between the Assessee and HSBC USA is at an arm's length price. The Id. AO has applied ALP at LIBOR + 15 basis points based on the borrowing rate of the assessee on a USD loan taken from HSBC London. Such approach is not correct because LIBOR rate cannot be applied on the US loan taken from HSBC USA. The Id. TPO ought to have considered the Fed Fund which is a target interest rate that is fixed by the Federal Open Market Committee ('FOMC') for implementing the USA's monetary policies, plus the relevant geographic market funds is the USA, for which the Fed Fund rate used should be the most appropriate for the purposes of benchmarking rather than taking LIBOR rates. Accordingly, we agree with the contention of the Id. Counsel. Accordingly, we hold the order of the Id. CIT(A) and accordingly, the ground raised by the Revenue is dismissed."

14. Respectfully following the decision of the Coordinate Bench (supra), we decline to interfere. For the reasons given hereinabove, the issues relating to interest received from HSBC Hongkong, Singapore and Japan offices is also decided in favour of assessee and against the revenue.

15. The last dispute in transfer pricing issues relate to the Transition Support Services. The underlying facts in the issue are that the assessee had provided certain transition support services to its AE in relation to credit card and debit card transactions undertaken by the customers. The assessee was remunerated at cost plus 10% mark-up by the AE. The assessee took arithmetic mean of three years weighted average NCP margin earned by comparable Companies at 12.51%. The Transfer Pricing Officer was of the firm belief that only single year updated NCP margins of comparable companies need to be considered and accordingly determined Arm's Length mark-up at 20.47% and made the impugned adjustment which was confirmed by the Ld. CIT(A).

16. We are of the considered view that the Transfer Pricing Officer has rightly taken the single year data. Merely because the data for financial year 2006-07 was not available, for 13 comparable out of 22 comparable would not allow the assessee to consider multiple year data. We do not find any error or infirmity in the application of single year data used by the Transfer Pricing Officer. We accordingly, decline to interfere with the findings of the Ld. CIT(A), this ground is dismissed.

17. With the above the transfer pricing disputes relating to A.Y.2006-07 are decided and since facts for the A.Y. 2007-08 and A.Y. 2008-09 are identical to the facts of A.Y. 2006-07 the Transfer pricing dispute for the assessment year in A.Y.2007-08 and 2008-09 are also decided accordingly.

18. Having decided the Transfer Pricing dispute, we will now address to the domestic issues.

19. The only issue in the appeal of the assessee for the A.Y. 2006-07 to A.Y. 2008-09 in ITA No. 4766, 4767 & 7010/MUM/2016 relates to the expenditure incurred on separation/termination of employees. In A.Y.2006-07 the Assessing Officer has considered this issue at Page No. 36 of his order. During the course of the scrutiny assessment proceedings and on perusal of computation of income filed along with return of income, the Assessing Officer noted the observations made by way of Note No. 12 that as part of rationalization of operations and workforce, some employees of the bank were separated from the services of the bank during financial year ended 31.03.2006 and the bank paid an amount of ₹.15,52,94,665/- to such separating employees and claimed that such

expenses are fully deductible under section 37 of the Act. After considering the detailed submissions of the assessee, the Assessing Officer was of the opinion that the impugned expenditure is in the nature of capital expenditure and the assessee has not submitted any documents to show the mode of determination of compensation. Moreover, the payments made to the employees are intended to compensate them for their remaining years of service left and thus cannot under any circumstances be allowed to be claimed in a single year. Allowing the expenditure allowable under section 35DDA of the Act, the Assessing Officer disallowed the excess deduction claimed. While deciding, the Assessing Officer followed the orders of his predecessor for the A.Y.2004-2005 and A.Y. 2005-2006. When the matter was agitated before Ld. CIT(A), the Ld. CIT(A) also followed the order of his predecessor for the A.Y. 2004-2005 and decided the issue against the assessee. The Coordinate Bench in ITA No. 7336/MUM/2010 for the A.Y.2004-2005 has considered a similar issue vide Ground No. 5 of the appeal before it and held as under: -

"24. It has been stated that, the Assessee operated a separate VRS scheme from July 7, 2003, to July 31, 2003, which was considered for section 35DDA of the Act. The said VRS scheme is included on page 17 of the factual paper book filed by the assessee before us. The said scheme applied to the clerical and subordinate staff of

Assessee that had attained 40 years of age or completed 10 years of service with the Assessee. The specific scope and eligibility enunciated in the said VRS scheme was in accordance with Rule 2BA of the Rules. The payments made to the redundant / separating employees did not conform to the VRS scheme of the Assessee / guidelines laid down under Rule 2BA of the Rules. Since the said payment is not pursuant to a VRS scheme, section 35DDA of the Act should not apply.

25. *The Assessee has submitted the statement showing details of severance cost paid to the employees. It has submitted the method of computation of expenses in code on separation and termination of employees. Additionally, as directed during the course of the hearing, assessee has attached sample copies of letters of termination/separation of employees. It has been further submitted that the method of computation for payments to redundant employees per the sample letters of separation / termination of employees is different than the manner contained in the VRS scheme.*

27. *The said proposition has also been upheld by the Mumbai ITAT in the case of Warner Lambert (India)(P.) Ltd (143 TTJ 571), which has identical facts to the Assessee's. The relevant extracts of the said order are reproduced below (emphasis supplied):*

"17. We have considered the submissions of both the parties. Sec. 35DDA (1) of the Act reads as under :

"35DDA. (1) Where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee at the time of his voluntary retirement, in accordance with any scheme or schemes of voluntary retirement, 1/5th of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal instalments for each of the four immediately succeeding previous years."

18. *A bare perusal of this section would reveal that the applicability of this section is attracted only when the payment has been made to an employee in connection with his voluntary retirement, in accordance with any scheme or schemes of voluntary retirement. Since the payment reduces the burden on the assessee relatable to subsequent years, the legislature inserted this section in order to allow only 1/5th of the total sum paid by the assessee to its employees. This*

amount in the hands of the employee has been exempted under s. 10(10C) of the Act to the extent of Rs. 5 lacs. The relevant part of s. 10(10C) reads as under :... ”

19. The submission of the learned Departmental Representative is that the provisions of s. 35DDA are applicable because the payment has been made in pursuance to scheme of voluntary retirement and it is not necessary that the said scheme should comply with guidelines as per s. 10(10C). We are not inclined to accept the plea of the learned Departmental Representative. In the present circumstances, in order to resolve the dispute, we are of the opinion that principles of harmonious construction of statute have to be applied. As per these principles a statute must be received as a whole and one provision of the Act should be conformed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. The provisions relating to voluntary retirement scheme are contained in s. 10(10C) and all the conditions laid down therein have to be fulfilled before exemption can be availed under the said section. The income and expenditure go together and it is difficult to appreciate that while considering the expenditure part any kind of claim could be taken into consideration whereas while allowing exemption only those claims are to be taken into consideration which conform to the guidelines under r. 2BA. The language in s. 35DDA and s. 10(10C), as noted above, clearly refers to scheme or schemes of voluntary retirement. It is true that s. 35DDA does not specifically refer to s. 10(10C) but principles of harmonious construction have to be applied here and it is to be held that the requirements as laid down under r. 2BA have to be met before deduction under s. 35DDA could be allowed. There is no dispute that the scheme adopted by the assessee did not conform to the guidelines laid down under r. 2BA. Therefore, it cannot be held that provisions of s. 35DDA are applicable in the present case. We are in agreement with the pleading of the learned Departmental Representative that deduction of tax under s. 192 out of sum of Rs. 17 lacs without allowing any exemption is not of much relevance, because that does not determine the correct tax liability of the assessee. However, it is an important factor to be taken into consideration in deciding the issue since the assessee has deducted the tax from the entire sum of Rs. 17 lacs. Therefore, the plea of the assessee that the claim of the assessee is not in conformity with r. 2BA, cannot be disputed. It has not been brought on record by the Department that in

the assessment order Ms. Chitra Dhoke was allowed exemption as contemplated under s. 10(10C). In view of the above we confirm the order of the learned CIT(A). In the result, this ground is dismissed."

28. Thus, following the aforesaid decision, we hold that expenditure of Rs 19,19,64,640/- is fully deductible under section 37 of the Act, since the expenditure is incurred wholly and exclusively for its business and the rationalization was not a part of voluntary separation scheme and, as such, was not covered by the provisions of Section 35DDA of the Act. Accordingly, this ground is allowed."

20. Respectfully following the decision of the Coordinate Bench (supra), the Assessing Officer is directed to delete the impugned addition. This ground in A.Y. 2006-2007, 2007-2008 and 2008-2009 is allowed.

21. The second grievance in the impugned assessment years related to the claim of depreciation on amount paid to Gillanders Arbuthnot and Company Ltd. Since the deduction has been allowed by the Coordinate Bench as revenue expenditure this ground becomes infructuous.

22. In the result, the captioned appeal relating to the domestic issues raised by the assessee are partly allowed.

23. Now coming to the domestic issues raised by the revenue in its appeals for the captioned assessment years in ITA Nos. 4787, 4788 & 7309/MUM/2016 are decided as under.

24. The first grievance relates to the expenses incurred for mobilization of deposits from Non-resident Indian. The Ld. CIT(A) has considered the grievance of the assessee at Para No. 5.1 of his order and at Para No. 5.5 he observed that this issue is covered in favour of assessee by the decisions of the Tribunal for the A.Y.1992-93, 1994-95, 1996-97, 1997-98 upto A.Y. 2001-02 and since there is no change of facts following the orders of the earlier assessment years, the Ld. CIT(A) has deleted the impugned addition. The Coordinate Bench in ITA No. 2680/MUM/2004 & ITA No. 4670/MUM/2005 in A.Y. 2000-2001 & 2001-2002 has considered a similar issue and has decided in favour of assessee. Respectfully following the decision of the Coordinate Bench, we decline to interfere with the findings of the Ld. CIT(A), this ground is dismissed.

25. The second ground relates to the addition on account of overfunding of Employees Gratuity Fund. The Ld. CIT(A) has considered this issue at Para No. 16 of his order vide Ground No. 13 before him and at Para No.16.4 directed the Assessing Officer not to allow reversal of excess fund to the extent of ₹.10.70 lakhs and directed to delete the disallowance over and above this.

26. Having heard the rival submissions, we have carefully perused the orders of the authorities below. The working of the reduction in overfunding of ₹.5,08,60,000/- on account of Employees Gratuity Fund is as under: -

Particulars	Amount (in ₹.)
Surplus as on 31 March 2006 (as per actuarial valuation report) (refer Page 23 to 41 of factual paper book 2)	3,53,90,000/-
Surplus as on 31 March 2005 (as per actuarial valuation report) (refer page 1 to 22 of factual paper book 2)	8,62,50,000/-
(reduction in overfunding)	(5,08,60,000)

27. We find for every year the reduction of expenses claimed is based on valuation determined as per actuarial valuation. Therefore, the ratio laid down by the Hon'ble Supreme Court in the case of Bharat Earth Movers v. CIT [245 ITR 428] squarely apply on the facts of the case in Hand. There is no dispute that the excess payment made in the prior years to Employees Gratuity Fund is now been adjusted against the allowability of ₹.5,08,60,000/- arising for the financial year 2005-06. The contention of the Ld. DR is that the assessee itself had added the amount, is not accepted as the same has been done by the assessee out of the abundant caution and has explained vide letters dated 08.10.2008 and 203.02.2010 and filed note dated 24.02.2010. Moreover, in the draft assessment order the Assessing Officer himself has allowed the claim of

₹.5.08 Crores. Considering the facts in totality, we do not find any error or infirmity in the findings of the Ld. CIT(A), this Ground is dismissed.

28. The next ground relates to the addition on account of overfunding of Employees Defined Benefit Pension Fund. For the reasons given hereinabove this ground is also dismissed.

29. The next ground relates to the addition of ₹.6,36,80,000/- in respect of provision made for unfunded pension liability in respect of Ex-employees. A perusal of the findings of the Ld. CIT(A) show that this issue has been decided against assessee and in favour of revenue. Therefore, we do not find any logic in revenue taking this ground in its appeal, the same is dismissed.

30. The next ground relates to the addition on account of interchange income received by the offshore (non-India) branches of the assessee. The First Appellate Authority has followed the decision of the Coordinate Bench given in favour of assessee in A.Y.2000-2001, 2001-2002, 2003-2004 & 2005-2006 in ITA Nos. 3688/MUM/2009, 3689/MUM/2009, 2358/MUM/2011 & 4786/MUM/2016 respectively. We find that the Coordinate Bench in ITA No. 4786/MUM/2016 has considered a similar

grievance at Para No. 118 of its order wherein it has followed the decision given in A.Y. 2000-2001, 2001-2002 & 2003-2004, the findings read as under: -

"118. This issue is covered in Assessee's own case for AY 2000- 01, 2001-02 and 2003-04 (3688/Mum/09, 3689/Mum/09, 2358/Mum/14) – the relevant para of the decision is reproduced as under:

"We have heard the rival submissions and perused the material before us. We find that in the matter of Standard Chartered Grindlays Bank Ltd.(supra), the issue of taxability of commission with regard to Credit Cards was deliberated upon and decided by the Tribunal. We would like to reproduce the relevant portion of the order that deals with the facts as well as the reasoning, given by the FAA and the Tribunal, for deciding the issue against the AO. It reads as under:

"43. Next ground of appeal is against deletion of addition of Rs. 10 crores being made on alleged commission earned by foreign branches of ANZ Grindlays Bank on their credit card business overseas where transactions have taken place in India.

44. During the course of assessment the AO required the assessee to give details of total commission received by the foreign branches of the assessee bank on international credit cards issued by them where the transactions were completed in India by the card holders and the cards were honoured by the branches of the assessee bank or branches of any other bank in India. The AO was of the view that whatever income arose in or from India to any foreign branch of the assessee is also taxable in India. The assessee could not furnish any details; at the same time it did not deny that no income arose from the transaction in India on credit cards issued by its foreign branches. The AO, therefore, estimated the income. The AO stated that commission income from cards issued by Indian branches was Rs. 9.90 crores. It would be reasonable to estimate income of Rs. 10 crores earned by foreign

branches from transactions entered into India. The learned CIT(A) held that the income earned either by way of issuing bank of credit card or acquiring bank of credit card, transaction is accounted for. He also held that under s. 9 of the IT Act all incomes accruing or arising directly or indirectly through or from any business connection in India or through or from any source of income in India can be taxed. As per s. 9(1)(v)(c), income can be deemed to have accrued in India only if payment is made for the debt that has been incurred in India by a non-resident which will not be the case here since the issuing bank which provides debt is outside India being a foreign branch. As per art. 7 of Indo-UK DTAA, income that can be brought to tax in India must be directly or indirectly attributable to the PE in India. Since the transactions were with appellant's foreign branches where the issuing bank and the acquiring bank in India was some bank other than the Indian branch of the assessee, it cannot be said that Indian branch was in any way connected with the transaction or that income earned could in any way be said to have been directly or indirectly through PE in India. He accordingly held that the income arising in India from transaction in India by using credit cards of foreign branches should be taxed in India. This income can only be the income received by the Indian branch and such commission income being already included as an acquiring bank. The income to the foreign branch from the credit given to its card holders outside India cannot be taxed in the hands of the Indian branch since it is not arising in India and also it cannot be attributed to the assets and activities of the Indian branch as is required under art. 7 of DTAA. Therefore, there is no need to further estimate any income. He accordingly deleted the addition.

XXXXXXXXXX

48. We have considered the rival submissions. We are in agreement with the finding of the learned CIT(A). Where the foreign branch has issued credit card and even if the transaction takes place in India, the credit is given to the customer outside India and the debt has also arisen outside India. The merchant shipments in India may receive the payment but the merchant shipments do not incur any debt. They merely receive

charges for the goods sold or services rendered. However, the charges are received by the foreign branch for providing credit to their card holders outside India. The amount payable by the card holders who have acquired the credit card from branches outside India incurs the debt outside India. Therefore, the fees in respect of such transaction are not taxable in India. We, therefore, uphold the deletion of addition of Rs. 10 crores." As the issue is squarely covered by the decision of the above referred order of the Tribunal, so we hold that the order of the FAA does not suffer from any legal or factual infirmity as far as issue of taxability of ICMED is considered. Confirming his order, we decide the effective ground of appeal against the AO.

118. Thus, following the aforesaid decision of the Tribunal in assessee's own case by various earlier years, the addition of Rs. 41,33,021/- is deleted."

31. Respectfully following the decision of the Coordinate Bench (supra), we decline to interfere. These grounds are dismissed.

32. The next grievance relates to the deletion of the addition on account of Employee Share Scheme under section 40A(9) of the Act and addition of provision for employee share scheme as contingent liability.

33. The underlying facts in the issue are that cost of shares of ultimate holding company acquired by the assessee to be granted to employees as bonus or incentive have been disallowed by the Assessing Officer. Identical issue was considered by the Coordinate Bench in the case of HSBC Data Processing Electronic (India) Private Limited in ITA No.

2388/HYD/2018 wherein the Coordinate Bench held that "*Having regard to the rival contentions and the material on record, we find this issue is covered in favour of assessee and therefore, we direct the AO to grant relief to the assessee by following the direction of the Special Bench in the case of Biocon Limited [35 taxman.com 335]*". The appeal against which has been dismissed by the Hon'ble Karnataka High Court vide order dated 11.11.2022 in ITA No. 653 of 2013.

34. Respectfully following the decision of the Coordinate Bench (supra), the impugned grounds are dismissed.

35. Next ground relates to the deletion of the addition on account of tax free income. This issue is raised by the revenue in its appeal for the A.Y.2008-09. While deleting the addition the Ld. CIT(A) followed the decisions given in A.Y. 1992-1993 to A.Y. 2001-2002 and also for the A.Y.2005-06 to 2007-08. We have carefully considered the underlying facts, the investment in tax free bonds brought to our notice as on 31.03.2007 was ₹.241 crores which came down to ₹.141 crores as on 31.03.2008 and the investment in shares which was ₹.4.02 crores as on 31.03.2007 became ₹.35.09 crores as on 31.03.2008. The own capital as

on 31.03.2007 was ₹.56,84,85,32,000/- which was ₹.78,01,32,46,000/- as on 31.03.2008, this clearly show that the assessee was having sufficient interest free own funds to make the impugned investments in shares. Therefore, there is no question of utilization of any interest bearing funds. Therefore, there is no question of any disallowance of interest on earning exempt income. However, expenditure on account of administrative expenses cannot be ruled out, therefore in our considered opinion the disallowance to the extent of 1% of the exempt income should meet the ends of justice. Therefore, we direct the Assessing Officer to restrict the disallowance to the extent of 1% of the total exempt income, this ground is partly allowed.

36. The next grievance in A.Y. 2008-09 relates to the deletion of the disallowance on payments towards canteen subsidy, holiday home subsidy, contribution to staff cultural committee and payment to recreation club. We find that the First Appellate Authority has followed the orders of the Tribunal for the A.Y. 1984-1985 to A.Y. 2001-2002 and also for the A.Y. 2004-05 to A.Y. 2007-08. Since the First Appellate Authority has followed the decision of the Coordinate Bench, we do not

find any reason to interfere with the findings of the Ld. CIT(A), this Ground is also dismissed.

37. The next ground relates to the deletion of addition of ₹.3,81,88,000/- on account of overfunding of Employee defined benefit pension fund. While deleting the addition, the Ld. CIT(A) has followed the order of his predecessor for the A.Y. 2005-06 and A.Y. 2006-07 wherein the Assessing Officer has been directed not to tax the reduction in the liability on account of unfunded pension. Following the same the Ld. CIT(A) deleted the impugned addition. This Tribunal in ITA No. 4786/MUM/2016 for the A.Y. 2005-06 has confirmed the findings of the Ld. CIT(A). Therefore, respectfully following the decision of the Coordinate Bench, we decline to interfere, this ground is dismissed.

38. The last ground relates to the deletion of addition of ₹.1,43,49,098/- on account of Nostro Account Maintenance Charges under section 40(a)(ia) of the Act. An identical issue has been considered by this Tribunal in ITA No. 2191/MUM/2022 & ITA No. 2190/MUM/2022 for the A.Y. 2013-14 and 2014-15. The relevant findings read as under: -

"11. We have considered the rival submission and perused the material on record.

11.1. The CIT(A) has deleted the demand raised upon the Assessee under Section 201(1)/(1A) of the Act by holding as under:

"4. Decision: I have considered the submission of the Appellant as well as the order under appeal. Various grounds of appeals raised are adjudicated below.

4.1 Grounds no. 1 & 2: These grounds pertain to AO's action of holding Appellant as assessee in default in respect of Nostro Account Maintenance charges paid / payable to foreign banks and subsequent raising of TDS demand, by holding that the charges are liable to tax in India and consequently, liable for tax deduction u/s 195 of the Act.

In the submission, Appellant has submitted that it has not borrowed money/ debt incurred from overseas banks. As such, payment of Nostro Account Maintenance charges would not be classified as interest u/s 2(28A) of the Act. It is also claimed that these charges do not accrue or arise in India. Reference is also made to CBDT Instruction dated 27.09.1988 whereby it is clarified that no tax is required to be withheld on SWIFT charges since the amount is directly debited overseas. It is accordingly submitted that the charges are not liable to tax in India and as such there is no question of TDS u/s 195. The Appellant has placed reliance on decision of the Hon'ble Mumbai Tribunal in the case of Oman International Bank SAOG vs DDIT(IT) [ITA No. 6800/Mum/2010] as well as various orders of the CIT(A) deleting the disallowance made u/s 40(a)(i) for AY 2006-07 to 2015-16.

4.1.1 I have considered the submission. I find that the Appellant has raised ground disputing disallowance of the nostro account maintenance charges of Rs. 2,78,35,306/- under section 40(a)(i) of the Act on the ground that tax has not been deducted thereon under section 195 of the Act in its appeal against assessment order u/s 143(3) r.w.s. 144C for AY 2013-14. In appeal order dated 22.03.2019, the said disallowance has been deleted by my predecessor. In view of

the above and considering the submission of the Appellant, I hold that the action of the ITO(IT) Wd 2(2)(2), Mumbai in holding the Appellant as assessee in default for not making TDS on Nostro Account maintenance charges, is not sustainable. Ground Nos 1 & 2 are accordingly allowed.” (Exphasis Supplied)’

11.2. We note that the decision of the CIT(A) is in line with the decision of the Mumbai Bench of the Tribunal in the case of *Oman International Bank SAOG Vs. Deputy Director of Income Tax (International Taxation)* [ITA No. 6800/Mum/2010, dated 27/12/2013], wherein it has been held as under:

“15. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that a similar issue was involved in assessee’s own case for the earlier years and the same has been decided by the Tribunal consistently in favour of the assessee in the said years including the immediately preceding year i.e. A.Y. 2004-05 which was decided vide order dated 13th September, 2013 passed in ITA No. 1609/Mum/2008. As noted by the Tribunal in its orders, the transaction charges paid on Nostro Account were in the nature of bank charges for maintaining the accounts with banks outside India. These charges were recovered directly by way of debits to the concerned accounts of the assessee with these banks and the same represented business income of those banks which accrued/arisen outside India. As held by the Tribunal, no tax therefore was required to be deducted at source from the transaction charges paid on Nostro account and the disallowance made by the A.O. u/s 40(a)(i) of the Act was not sustainable. Respectfully following the orders of the Tribunal on the similar issue involved in earlier years, we uphold the impugned order of the Id. CIT(A) deleting the disallowance made by the A.O. on account of transaction charges u/s 40(a)(i) of the Act and dismiss ground No. 3 of Revenue’s appeal.”(Emphasis Supplied)

11.3. Thus, the Tribunal has, in identical facts and circumstances, decided the issue in favour of the Assessee while holding that Nostro Account Maintenance Charges are in the nature of bank charges

levied on transaction and the same are not subject to tax deduction at source under Section 195 of the Act. Therefore, the provisions of Section 40(a)(i) of the Act cannot be attracted in case of the deemed remittance of Nostro Account Maintenance Charges without deduction of tax at source. In the case before us also the CIT(A) has concluded that the Assessee was not under obligation to withhold tax from Nostro Account Maintenance Charges in terms of Section 195 of the Act and therefore, could not be treated as an 'assessee in default'. Accordingly, demand raised by the Assessing Officer on the Assessee under Section 201(1) and 201(1A) of the Act was deleted by the CIT(A). In our view, the order passed by the CIT(A) does not suffer from any infirmity to this extent.

11.4. Further, we do not find merit in the contention advanced by Ld. Departmental Representative that Nostro Account Maintenance Charges are in the nature of 'interest' as defined under Section 2(28A) of the Act. On perusal of the aforesaid definition we find that term 'interest' is defined as under:

' interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.'

11.5. The service fee and other charges included in the above definition of 'interest' are those charged in respect of (i) moneys borrowed, or (ii) debt incurred or (iii) in respect of any credit facility (which has not been utilized). In the case before us, the Assessing Officer has not brought on record any material to establish that the Assessee has borrowed money or incurred debt or availed any credit facility, and the Nostro Account Maintenance Charges have been charged in respect of the same.

12. In view of the above, we are not inclined to interfere with the order passed by the CIT(A) deleting demand of INR 1,72,50,730/- and INR 1,96,33,817/- raised by the Assessing Officer under Section 201(1) and 201(1A) of the Act, respectively. Ground No. 1 & 2 raised by the Revenue are, therefore, dismissed."

39. Respectfully following the decision of the Coordinate Bench (supra), we decline to interfere.

40. In the result, the captioned appeals by the assessee are partly allowed and that of the revenue are partly allowed.

41. Before parting by way of additional ground the assessee has challenged the validity of the assessment claiming that the same is barred by limitation. Since this ground was not contested by the counsel, the same is dismissed as not pressed.

Order is pronounced in the open court on 28th June, 2024

Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Mumbai / Dated 28.06.2024
Giridhar, Sr.PS

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum