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

BEFORE SMT BEENA PILLAI, JM &
MS PADMAVATHY S, AM

I.T. (TP) A. No. 1479/Mum/2015
(Assessment Year: 2010-11)

Credit Agricole Corporate and Investment Bank (Formerly known as 'Calyon Bank') 11th Floor, Hoechst House, Nariman Point, Mumbai-400021. **PAN: AACCC3872B**	Vs.	**DCIT (International Taxation)-2(1)(1),** 1st Floor, Room No. 136, Scindia House, N.M. Marg, Ballard Pier, Mumbai-400038.
Appellant)	:	**Respondent)**

I.T.A. No. 1839/Mum/2015
(Assessment Year: 2010-11)

ADIT (International Taxation)-1(2), Room No. 119, 1st Floor, Scindia House, N.M. Marg, Ballard Pier, Mumbai-400038.	Vs.	**Credit Agricole Corporate and Investment Bank,** 11th Floor, Hoechst House, Nariman Point, Mumbai-400021. **PAN: AACCC3872B**
Appellant)	:	**Respondent)**

I.T.A. No. 1273/Mum/2016
(Assessment Year: 2011-12)

Credit Agricole Corporate and Investment Bank (Formerly known as 'Calyon Bank') 11th Floor, Hoechst House, Nariman Point, Mumbai-400021. **PAN: AACCC3872B**	Vs.	**DCIT (International Taxation)-2(1)(1),** 1st Floor, Room No. 136, Scindia House, N.M. Marg, Ballard Pier, Mumbai-400038.
Appellant)	:	**Respondent)**

I.T.A. No. 1165/Mum/2016
(Assessment Year: 2011-12)

DCIT (International Taxation)-1(1)(1), Room No. 114, 1st Floor, Scindia House, N.M. Marg, Ballard Estate, Mumbai-400038.	Vs.	**Credit Agricole Corporate and Investment Bank,** 11th & 12th and 14th Floor, Hoechst House, Nariman Point, Mumbai-400021. **PAN: AACCC3872B**
Appellant)	:	**Respondent**)

I.T.A. No. 2313/Mum/2017
(Assessment Year: 2012-13)

I.T.A. No. 4652/Mum/2017
(Assessment Year: 2013-14)

I.T.A. No. 458/Mum/2019
(Assessment Year: 2014-15)

I.T.A. No. 7881/Mum/2019
(Assessment Year: 2015-16)

I.T.A. No. 1027/Mum/2021
(Assessment Year: 2016-17)

I.T.A. No. 749/Mum/2022
(Assessment Year: 2017-18)

I.T.A. No. 1234/Mum/2022
(Assessment Year: 2018-19)

I.T.A. No. 897/Mum/2023
(Assessment Year: 2019-20)

Credit Agricole Corporate and Investment Bank, 11th Floor, Hoechst House, Nariman Point, Mumbai-400021.	Vs.	**DCIT (International Taxation)-2(1)(1),** 17th Floor, Room No. 1713, Air India Building, Nariman Point,

PAN: AACCC3872B		Mumbai-400021.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Shri Madhur Agarwal / Saurin Safi, AR
Revenue / Respondent by	:	Shri Vivek Perampurna, CIT-DR
Date of Hearing	:	13.03.2025
Date of Pronouncement	:	10.03.2025

O R D E R

Per Bench:

These appeals by the assessee and the revenue for Assessment Years (AYs) 2010-11 to 2019-20 have common issues and therefore, these appeals are heard together and disposed of by this common order. The appeals are decided in seriatim of AYs.

ITA No. 1479/Mum/2015 – Assessee's appeal - AY 2010-11

2. This appeal by the assessee is against the final order of assessment passed by the Deputy Commissioner of Income Tax (International Tax)-2(1)(1), Mumbai [for short 'the AO'] under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (the Act) dated 30.01.2015 for the AY 2010-11.

3. The assessee is a multinational Bank based in France with branch offices in India. The assessee is a non-resident having Permanent Establishment (PE) in India. For AY 2010-11 the assessee filed the return of income on 11.10.2010 declaring a total income of Rs. 3,49,14,26,218/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. A reference was made

to the Transfer Pricing Officer (TPO) who determined the Arm's Length Price (ALP) of certain international transactions of Indian Branch such as back to back guarantee, marketing of ECB loans & derivative transactions to make a Transfer Pricing (TP) adjustment of Rs.51,00,76,850. The AO vide draft order dated 28.03.2014 assessed the income of the assessee at Rs. 470,95,27,240/- (including the TP adjustment) and also assessed the income of the HO, Hongkong Branch and Singapore Branch to the tune of Rs. 131,62,22,653/- in the hands of the assessee. Aggrieved the assessee raised the objections before the Dispute Resolution Panel (DRP). Pursuant to the directions of the DRP, the total income was computed at Rs.404,21,58,617/- and the income of the Branches assessed in the hands of the assessee at Rs.132,78,88,740/- by the AO in the final order of assessment dated 30.01.2015. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO.

4. The ld. AR at the outset submitted that the majority of the grounds raised by the assessee for the year under consideration have already been considered by the Co-ordinate Bench in assessee's own case in the preceding AYs. The ld. AR in this regard placed reliance on the various orders of the Tribunal from AYs 1997-98 to 2009-10 submitted in the case law Paper Book. The ld. AR also brought to our attention that some of the issues which are recurring in nature have travelled to the Hon'ble Bombay High Court and that the Hon'ble High Court has upheld the findings of the Tribunal in favour of the assessee.

5. The ld. DR while supporting the order of the AO fairly conceded that the most of the issues contended in this appeal have already been considered by the Co-ordinate Bench in the preceding AYs in assessee's own case.

6. The assessee during the year under consideration raised 23 grounds and also the two additional grounds contending the legal issues pertaining to the order of the TPO and the final assessment of the AO. The assessee through one of the additional grounds contended the validity of final assessment order passed under section 143(3) r.w.s.144C by relying on the decision of the Hon'ble Madras High Court in the case of Roca Bathroom Products Private Limited (WA No.1517 and 1519 of 2021 dated 9th June 2022). The assessee vide letter dated 11.02.2025 submitted that the said additional ground is not pressed for admission. Accordingly, the additional ground raised by the assessee with regard to the final assessment order being barred by limitation is not admitted for adjudication.

7. The assessee vide letter dated 24.05.2023 raised an additional ground stating that the order passed by the Transfer Pricing Officer (TPO) under section 92CA(3) of the Act dated 30.01.2014 is not passed within the time limit prescribed as per the Act. After hearing both the parties in our considered view, the additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC)*, we admit the additional grounds.

8. For the purpose of adjudication, we will first consider the additional ground raised by the assessee. The ld. AR submitted that the order passed by the TPO under section 92CA(3) of the Act is barred by limitation and therefore liable to be quashed. The ld. AR submitted the table with the dates which are relevant for considering the issue of the TPO's order being barred by limitation. The ld. AR in this regard relied on the decision of the Hon'ble Madras High Court in the case of Pfizer Healthcare India Pvt. Ltd. vs. JCIT [2021] 124 taxmann.com 536 (Madras).

9. We heard the ld. DR and perused the material on record. The relevant extract of the table submitted by the ld. AR with regard to the impugned issue is extracted below:

Sr. No.	Particulars	Relevant Dates Pfizer Healthcare India Pvt. Ltd. (Madras High Court)	Appellant
A	Assessment Year	2016-17	2010-11
B	Period of limitation for making an order of assessment as per Section 153 of the Act	21 months from the end of Assessment Year	24 months from the end of Assessment Year
C	Extension of period of limitation in case reference is made under section 92CA of the Act	12 months	12 months
D	Proceeding for assessment should be completed on / before this date	31.12.2019	31.03.2014
E	A date prior to the date on which period of limitation expires	30.12.2019	30.03.2014
F	Sixty day period expires on	01.11.2019	30.01.2014
G	Transfer Pricing Officer's order to be passed any time on / before this date	31.10.2019	29.01.2014
H	Date on which Transfer Pricing Officer's order is passed	01.11.2019	30.01.2014

10. We notice in this regard that the similar issue have been considered by the Hon'ble Madras High Court in the case of Pfizer (supra) where it has been held that

> *"29. The provisions of section 144C prescribe mandatory time limits both pre and post the stage of passing of a transfer pricing order. Assessments involving transfer pricing issues are different and distinct from regular assessments and the intention of Legislature is to fast track such assessments. Bearing in mind the specialized nature of such assessments, a separate set of Officers attend to the framing of assessments and the DRP has been constituted for redressal of disputes involving TP issues, in a timely fashion. In this scheme of things, I am unable to accept the submission that the period of 60 days stipulated for passing of an order of transfer pricing is only directory or a rough and ready guideline. This argument is rejected.*
>
> *30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be*

computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 a m of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 a m on 1-1-2020, whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31-12-2019. The period of 21 months therefore, expires on 31-12-2019 that must stand excluded since section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to section 153 expires'. Excluding 31-12-2019, the period of 60 days would expire on 1-11-2019 and the transfer pricing orders thus ought to have been passed on 31-10-2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31-10-2019. The impugned orders are thus, held to be barred by limitation."

11. From the perusal of the above table given in assessee's case, we notice that the TPO ought to have passed the transfer pricing order under section 92CA(3) by 29.01.2014 whereas the order is passed on 30.01.2014. Therefore, applying the ratio laid down by the Hon'ble Madras High Court in the above case, we hold that the order passed by the TPO making the TP Adjustment is barred by limitation and accordingly liable to be quashed. Hence, the TP Adjustment made for AY 2010-11 is hereby deleted. The additional ground raised by the assessee in this regard is allowed. In view of our decision with regard to the TP Adjustment, Ground No. 19 to 21 raised contending the TP Adjustment made by the TPO have become infructuous.

12. Now we will proceed to consider the grounds raised by the assessee with regard to various additional made towards corporate tax

Ground No.1 – Disallowance of Bank charges paid to Head Office(HO) / Overseas Branches (OB) by invoking provisions of section 40(a)(i) of the Act.

13. During the year under consideration the assessee has paid a sum of Rs.6,34,998 towards bank charges to the HO/OB. The AO held that these payments are taxable in India in the hands of HO/OB and therefore tax should have been deducted on the same. The AO further held that since the assessee has not deducted the tax at source, the payment is to be disallowed under section 40(a)(i) of the Act. The contention of the assessee before the lower authorities is that while computing profit attributable to Indian Branches, the bank charges paid to HO/OB is deductible as per Article 7(2) and 7(3) of the DTAA between India and France. The assessee also contended that the said payment is not taxable in the hands of the HO/OB in India since the payment is to self.

14. We heard the parties and perused the material on record. The ld. AR before us submitted that this is a recurring issue and that the same is covered by the decision of the Special Bench of Tribunal in the case of Sumitomo Mitsui Banking Corporation Ltd. vs. DCTI 136 ITR 66 (Mum-Trib-SB) and that the Co-ordinate Bench in assessee's case has been consistently holding the issue in favour of the assessee. We notice that in the latest decision in assessee's own case for AY 2006-07 to 2009-10 dated 11.09.2023 the Co-ordinate Bench has considered the similar issue where it has been held that

> *"8. We find that the issue is recurring in nature. The taxability of interest /commission paid to HO/Overseas branches has been considered by the Co-ordinate Bench in assessee's own case in Assessment Year 2004-05. The Co-ordinate Bench in turn placing reliance on the earlier decision of the Tribunal in ITA NO.4471/Mum/2009 for Assessment Year 2002-03 dated 21/03/2014 has decided the issue in favour of assessee. We find that the Tribunal has held that the ratio laid down in the case of Sumitomo Mitsui Banking Corporation vs. DCIT(supra) squarely applies to the issue in hand and thus, allowed the payment of interest and bank charges paid to HO/Overseas branches. No*

contrary material has been placed on record by the Revenue. Respectfully following the decision of Co-ordinate Bench in assessee's own case in the preceding Assessment Years ground No.2 and 3 of the appeal are allowed."

15. The issue for the year under consideration being identical respectfully following the above decision of the Co-ordinate Bench, we hold that the AO is not correct in making disallowance of Bank Charges paid to HO/Overseas Branch. Ground No.1 is allowed.

Ground No.2 & 3 - Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch.

16. During the year under consideration the Indian Branches have paid the following amounts to HO/OB towards reimbursement of expenses incurred by the HO/OB on behalf of the Indian Branch –

(i) Credit risk assistance	Rs. 7,90,55,825/-
(ii) EDP assistance expenses	Rs. 1,26,98,108/-.
(iii) Head Office System Implementation charges and information system Asia Pacific charges	Rs. 4,03,53,485/-

17. The AO disallowed these expenses on two counts. First the AO held that these expenses are covered under the provisions of section 44C of the Act. The AO did not accept the submissions of the assessee that these expenses are direct expenses pertaining to the Indian Branches and are not HO expenses allocated to the assessee. The second ground for disallowance as held by the AO is that these payments are taxable in the hands of HO in India and accordingly the same is to be disallowed under section 40(a)(i) since the Indian Branch has not deducted tax at source on the impugned payments. The AO in this regard rejected the contention of the assessee that these are cost to cost reimbursements with no income element and therefore not taxable in India. The AO did not consider the contention that the

these expenses are to be allowed under section 37(1) of the Act since these are business expenditure pertaining to the Indian Branches.

18. We heard the parties. We notice that the similar issue has been considered by the Co-ordinate Bench in assessee's own case for AY 2006-07 to 2009-10 (supra) where it has been held that

> *"10.1 We find that the issue raised in ground No.4 and 5 of the appeal was considered by the Co-ordinate Bench in assessee's own case in the preceding Assessment Years. While deciding the appeal of assessee for Assessment Year 2004-05 the Co-ordinate Bench placed reliance on the decision of Tribunal in assessee's own case for Assessment Year 2002-03 allowing direct expenditure incurred by HO u/s. 37(1) of the Act. In Assessment Year 2005-06 the Co-ordinate Bench restored the issue back to the file of Assessing Officer as the Revenue Authorities failed to verify the documents furnished by the assessee. In remand proceedings the Assessing Officer allowed the expenditure. We find that this issue is recurring and the Tribunal has been consistently allowing this issue in favour of assessee. No material has been placed on record before us to show any distinction in the impugned assessment year. Therefore, we find no reason to take a contrary view. Ergo, ground No.4 and 5 of appeal are allowed for the reasons stated in Tribunal order for Assessment Year 2004-05.*

19. For the year under consideration also the revenue did not bring anything on record for us to take a contrary view and therefore respectfully following the above decision, we hold that the AO is not correct in making the disallowance of these expenses in the hands of Indian Branches. Ground No. 2 & 3 raised by the assessee are allowed.

Ground No.4 – Disallowance of provision towards country risk.

20. The assessee during the year under consideration has made provision towards country risk to the tune of Rs. 1,33,81,000/- and has claimed the same as a separate deduction besides the Provision for Bad and doubtful debts. The assessee submitted that the provision towards country risk is made as per the RBI

regulations and hence should be allowed as a deduction. The AO held that the provision made is not allowable as a deduction under section 37 for the reason that they are contingent in nature. The AO while arriving at the assessed income included the provision made towards country risk for the purpose of determining the deduction allowable under section 36(1)(viia)(b) i.e. an amount not exceeding 5% of the total income. The DRP confirmed the decision of the AO on both counts that the provision for country risk cannot be allowed as a separate deduction under section 37 and that the same to be considered with other provisions made towards bad and doubtful debts for the purpose of deduction under section 36(1)(viia)(b). The ground raised by the assessee is with regard to AO not allowing the claim separately as a deduction under section 37. The department is also contending the issue of AO considering the impugned provision for the purpose of section 36(1)(viia)(b).

21. The ld. AR fairly conceded that the issue of allowability of provision towards country risk under section 37 has been held against the assessee and in this regard drew our attention to the decision of the Co-ordinate Bench in assessee's own case for Ay 2003-04, 2004-05, 2005-06 and 2008-09.

22. We heard the parties and perused the material on record. We notice that The Special Bench of the Delhi Tribunal in the case of New India Industries Ltd (supra) has held that claim of a provision for bad and doubtful debts by an NBFC as an allowable deduction only on the basis of provisioning requirement contained in the directions issued by the RBI in exercise of powers conferred under Section 45JA of the RBI Act cannot be entertained. We further notice that the ratio laid down in decision of the Special Bench has been considered while deciding the

issue of allowability of provision for country risk under section 37 in assessee's own case for AY 2003-04 dated 21.03.2014 where it has been held that

> *"44. Ground No. 4 regarding disallowance of provision toward country risk. The assessee made a provision of Rs.41,00,000 towards country risk management as per RBI guidelines vide its Circular No.DBOD.BP.71/21.04.103/2002-03 dated 19th February 2003. The AO disallowed the claim of deduction as this was not an actual return of bed debts, but only a provision was made as per the guidelines of the RBI therefore, in view of the first proviso to section 36(1) (viia) (a) of the Act no deduction is allowable to a foreign banking company. The CIT(A) has confirmed disallowance made by the AO, when the assessee itself has fairly conceded that this issue is now covered against the assessee by the decision of special bench of this Tribunal in case of New India Industries Ltd. V. ACIT (18 SOT 51) as well as the decision coordinate Bench in case of Ahmadabad and Gujarat Gas Financial Services Ltd. V. ACIT (307 ITR 370).*
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> *45. Before us, the learned AR has fairly conceded that this issue is covered against the assessee by the decision of the Special Bench of this Tribunal. Accordingly, we decide this issue against the assessee and in favour of the revenue."*

23. The facts for the year under consideration being identical, respectfully following the decision of the Special Bench in the case of New India Industries Ltd (supra) and the decision of the coordinate bench we hold that the provision towards country risk cannot be claimed as deduction merely on the ground that the same is made as per RBI regulation. Accordingly the ground raised by the assessee is dismissed.

Ground No.5 – Disallowance of depreciation on light motor vehicle

24. During the year under consideration the assessee has claimed depreciation of Rs. 2,89,886/- @ 40% on motor vehicles. The AO held that as per the provisions of Income Tax Rules depreciation on motor vehicle shall be allowable at 15% only. Accordingly, the AO disallowed the difference.

25. The ld AR submitted that the motor vehicles would fall within the definition of Commercial Vehicle and accordingly eligible for higher depreciation. The ld AR since there is no addition to the block of assets during the year under consideration the impugned issue is covered by the decision of the Co-ordinate Bench in assessee's own case for AY 2006-07 where it has been held that –

> *"17.2 We have heard the submissions made by rival sides. We find that the DRP in its directions has given a finding of fact that the vehicles were used for transportation of employees and other banking business requirements. This itself shows that the vehicles were "put to use". Since, vehicles were used for the business purpose of the assessee, i.e. transportation of employees, etc. they are eligible for higher rate of depreciation. In view of facts of the case, ground No.9 of appeal is allowed."*

26. We heard the parties and perused the material on record. We notice that there is no addition is made to Motor Vehicle by the assessee during the year under consideration and the depreciation is claimed on the written down value. Therefore there is merit in the submission of the ld AR that the issue stands covered by the above decision of the coordinate bench. In any case, with regard to the contention that the motor vehicles are to be considered as commercial vehicles that are eligible for higher depreciation, we notice that the coordinate bench in the case of M/s.Blue Steel Engineers P Ltd., vs DCIT (ITA No.6411/Mum/2010 dated 11.05.2012) has considered a similar issued and held that –

> *"8. We have carefully considered the rival contentions of the parties and also perused the orders of the learned CIT(A) as well as the Assessing Officer. The assessee company had purchased three Hyundai Accent cars on 11-2-2002 which was prior to 1-4-2002. Admittedly, these cars have been purchased in the name of the assessee company and have been used for the purpose of assessee's business. The short controversy involved whether the depreciation on these cars should be allowed @ 20% or @ 50%. Clause 2 of Part III of Appendix I provides "Motor Cars" acquired or put to use on or after 1st day of April, 1990, the rate of depreciation from the Assessment year 2003-2004 to 2005-2006 was allowable @ 20%. Sub-clause (vi) and (via) of clause 3 of Part III of Appendix I provides that*

new commercial vehicle, which is acquired on or after 1st day of April, 2001 but before 1st day of April, 2002 or put to use on or after 1st day of April, 2002 for the purpose of business, the rate of depreciation is 50%. The definition of commercial vehicle has been given in Note 6 of the Appendix I, which defines "Commercial Vehicle" as under :-

> *"6. "Commercial vehicle" means heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", and "medium passenger motor vehicle" but does not include "maxi-cab", motor-cab, "tractor" and "road-roller". The expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road-roller" shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988)."*

8.1 The assessee's cars being light motor vehicles and the definition of light motor vehicle has been given in Section 2 of the "Motor Vehicles Act, 1988", which defines as under :-

> *"2(21)- "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of motor car or tractor or road roller, unladen weight of any of which, does not exceed [7500] kgs.*

Thus, the definition of "commercial vehicle" had itself been given in the rules which also includes light motor vehicle having unladen weight of less than 7,500Kgs. Nowhere it has been defined that the "commercial vehicle" should be used only for the purpose of hire. On the contrary sub-clause 6 of Clause 3 of Part III of Appendix-I, provides that commercial vehicle should be used for the purpose of business or profession. Once a definition has been provided in the Appendix to the Income Tax Rules itself, there is no need for looking other definition of "commercial vehicle" as given in various dictionaries. The report of newspapers as have been referred by the Assessing Officer has no relevance here or gives any separate meaning with regard to definition of "commercial vehicle". In this case, the gross weight of the vehicle as per the registration certificate is 820 kg, which is much less than 7500 kgs and, therefore, it comes within the purview of light motor vehicle.

8.2 Similar issue has been considered by the ITAT Mumbai Bench in the case of Shah Rukh Khan (supra), wherein the same analysis has been considered by the ITAT and came to the following conclusion :-

"4.3 We have perused the records and considered the rival contentions carefully. Dispute is regarding the rate of depreciation on the BMW car purchased by the assessee. The clause (1A) of part III of Appendix-I prescribes depreciation @20% in case of motor cars other than those used in a business of running them at hire. In case of motor buses, motor lorries and motor taxies used in a business of running them on hire, the depreciation has been provided at a higher rate of 40% as per clause 2(ii) of part III. However, clause 2(iid) was inserted w.e.f. 1.4.2002 as per which a new commercial vehicle which is acquired on or after 1.4.2001 but before 1.4.2002 and is used before first day of April, 2002 for the purposes of business or profession would be entitled for depreciation @ 50%.The note (3A) defines the commercial vehicle which includes light motor vehicles as defined in Section 2 of the Motor Vehicles Act, 1988. The light motor vehicle under the Motor Vehicle Act has been defined to mean different transport vehicles including the motor car the weight of which does not exceed 7500Kg. In case of the assessee, it is not in dispute that the motor car had been acquired between 1.4.2001 to 1.4.2002. The weight of the car as per the RC Book placed on record is 2170KG and therefore, it is a light motor vehicle as per the definition under the Motor Vehicle Act. There is also no dispute that the vehicle had been used in the profession of the assessee. The commercial vehicle has been specifically defined in the Appendix and the said definition does not require that the vehicle should be registered as a commercial vehicle under the Motor Vehicle Act. The BMW car purchased by the assessee is covered by the definition of commercial vehicle and had been purchased between 1.4.2001 to 1.4.2002 and used before 1.4.2002 in the profession of the assessee. It thus satisfies all the conditions for allowance of depreciation @ 50%. In our view it would be entitled to depreciation @ 50%. The order of CIT(A) denying the claim of the assessee for higher rate of depreciation cannot be sustained and the same is set aside and the claim of the assessee is allowed."

Thus, respectfully following the aforesaid judgment, we direct the Assessing Officer to allow the depreciation @ 50%. Accordingly, the ground of appeal No.1 as raised by the assessee is allowed."

27. We also notice that a similar view is held by Hon'ble Bombay High Court in the case of CIT vs Birla Global Asset Finance Co Ltd (ITA No.828 of 2010 dated 08.08.2012). In view of these discussions and respectfully following the above

judicial precedence we hold that no disallowance towards depreciation can be made for the year under consideration.

Ground No.6- Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO

28. During the year under consideration the assessee has made payment of Rs.9,17,63,933 towards Technical Services towards credit risk assistance and EDP assistance etc., and a sum of Rs.4,03,53,486 towards software services. The AO treated these payments as FTS in the hands of HO and accordingly brought the same to tax.

29. We heard the parties and perused the material on record. We notice that in assessee's case for earlier years, the Co-ordinate Bench has been holding the issue in favour of the assessee on the ground that the "make available" test to qualify as FTS under Article 12 of the DTAA between India and France fails in assessee's case. We further notice that Article 13 of the India France DTAA does not have the "make available" test, but the same is imported from the other treaties India has with other countries basis the Most Favoured Nation (MFN) clause mentioned in the Protocol of the tax treaty. However the ld. AR during the course of hearing fairly submitted that this view of the coordinate bench will no longer hold good in view of the decision of the Hon'ble Supreme Court in the case of AO (IT) vs. Nestle SA (2023) 155 taxmann.com 384 (SC). We notice in this regard that the Hon'ble Apex Court has ruled that a notification by the competent authorities of both the contracting state to the DTAA is a mandatory condition to give effect to any changes in terms including application of the MFN clause in tax treaties. Accordingly the relief allowed in favour of the assessee in earlier years by the coordinate bench on the ground that the "make available" test fails is not

applicable for the year under consideration. In view of this, the claim of the assessee that the income cannot be treated as FTS is not valid and cannot be the ground for seeking relief for the year under consideration.

30. With regard to the impugned payments the ld. AR, raised an alternate plea that out of the total disallowance made by the AO a sum of Rs. 9,17,63,933/- is claimed by the Indian Branch on the basis of allocation done by the HO and has not been actually paid by the Indian Branch to the HO. Therefore the ld AR argued that the amount is not taxable as per Article-13 of DTAA between India and France the fees for technical services which should be taxed only on actual payment. The ld. AR in this regard placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT (IT) vs. M/s Pramerica ASPF II Cyprus Holding Ltd. (ITA No. 1824 of 2016 dated 12.03.2019). The ld. AR submitted that it is an undisputed fact that the amount has been claimed by the assessee based on provision and not on payment and this fact has been recorded by the AO in the final assessment order (para 6.4.4. in page 16) . Accordingly, the ld. AR made the alternate plea that the sum of Rs. 9,17,63,933/- cannot be treated as income of the assessee.

31. We heard the parties and perused the material on record. The alternate contention of the ld AR is that credit risk assistance cost and cost of EDP assistance are not actually paid by the Indian Branch to HO and therefore not taxable in the hands of the HO as per Article 13(1) of the DTAA between India and France. In this regard we notice that a similar issue has been considered by the Hon'ble Bombay High Court in the case of DIT(IT) vs. M/s Siemens Aktiengesellschaft (ITA No. 124 of 2010 dated 22.10.2012) where it has been held that –

"2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para-1 to 3 under Article IIX-A of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per Notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26th August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis cannot be faulted."

32. We further notice that a similar view has been expressed by the Hon'ble Bombay High Court in the case of M/s Pramerica ASPF II Cyprus Holding Ltd. (supra). In this regard, it is relevant to note that Article-13(1) of the DTAA between India and France reads that "Royalties, fees for technical services and payments for the use of equipment arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State". Further in assessee's case on perusal of AO's order we notice that the AO has recorded the fact that the expenses have been claimed by the Indian Branch on the basis of allocation by the HO and that the payment for these expenses have not been made (refer para 6.4.4 in pg. 16 of AO's order). Therefore, respectfully following the above decisions of the Hon'ble Bombay High Court we hold that the amount of Rs. 9,17,63,933/- which is not been actually paid by the Indian Branch to HO cannot be treated as FTS income in the hands of HO for the year under consideration under Article-13 of DTAA between India and France and therefore cannot be taxed in the hands of the assessee.

Ground No.7 –Taxability of interest paid by Indian Branch to HO/OB

33. The Indian Branches during the year under consideration the paid a sum of Rs. 19,92,60,902/- to HO/OB in India which the AO held as taxable as per the

provisions of Article-12 of DTAA between India and France. The ld. AR in this regard submitted that the Co-ordinate Bench in assessee's own case for AY 2005-06 has held that no income accrues to the HO/OB on the principles of mutuality. The ld. AR further submitted that the Hon'ble Bombay High Court has dismissed the revenue's appeal on the principle of mutuality for AY 1997-98 to 2000-01.

34. The ld. DR in this regard submitted that the issue needs to be examined in the light of the amendment made to section 9(1)(v) by way of explanation.

35. We heard the parties and perused the material on record. We notice that the issue of interest paid by Indian Branch to HO has been considered by the Co-ordinate Bench in assessee's own case for AY 2006-07 where it has been held that

> *"18. The Id. Counsel for the assessee submitted that the assessee has paid interest to the tune of Rs.7.20 crores to Head Office and overseas branches. The Assessing Officer has taxed said interest in the hands of Head Office/Overseas Branch under Article-12 of India France DTAA. The short contention of the assessee is that this issue is squarely covered by the decision of Special Bench in the case of Sumitomo Mitsui Banking Corporation vs. DDIT. 136 ITD 66 (Mum-SB). This is a recurring issue in assessee's case. In Assessment Year 2005-06 similar issue had come up, the Tribunal placing reliance on the decision of Hon'ble High Court in the case of Steria India Ltd., 386 ITR 390 dismissed the ground raised in appeal by the Revenue.*
>
> *18.1 Both sides heard. We find that identical issue has been decided by the Co-ordinate Bench in an appeal by the Revenue in ITA No.6682/Mum/2012 for Assessment Year 2005-06 vide order dated 05/01/2018. The assessee has placed reliance on the decision in the case of Sumitomo Mitsui Banking Corporation vs. DDIT (supra) and Steria India Ltd. (supra). The Co-ordinate Bench dismissed the ground raised in appeal of Revenue. No contrary material has been bought to the notice of Bench to distinguish the decision taken by Co-ordinate Bench in assessee's own case in the preceding Assessment Year. Consequently, ground No.10 of the appeal is allowed for parity of reasons."*

36. From the perusal of the decision of the Co-ordinate Bench, we notice that the issue is allowed in favour of the assessee in the earlier year by placing reliance on the decision of Special Bench in the case of Sumitomo where it is held that the on the principle of mutuality the interest received by the HO from the Indian Branch as not taxable. Accordingly, respectfully following the above decision of the Co-ordinate Bench, we hold that the interest paid by the Indian Branch to HO is not taxable. In the grounds of appeal, the assessee has highlighted the error in the amount considered as taxable in the computation statement by the AO. In view of our decision on the impugned issue this contention has become infructuous.

37. **Ground No.8 to 15** raised by the assessee with regard to interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers as taxable in India are not pressed by the assessee. The ld. AR submitted that these grounds are not pressed by the assessee since the ECB contracts are tax protected and the tax liability on the interest income is discharged on gross basis by the borrowers. Accordingly, these grounds are dismissed as not pressed.

38. **Ground No. 16** pertains to the AO making addition of 100% of the interest income arising to OB in respect of ECB extended to Indian borrowers. Considering that the assessee is not pressing Ground No.1 to 15 which we have dismissed as not pressed, this ground has become infructuous.

Ground No. 17 & 18- Taxability in India at 50% of commission earned by Hong Kong Branch on ECB to Indian borrowers.

39. The AO noticed that the Hong Kong Branch of the assessee has earned a commission income of Rs.3,66,77,228/- on the ECB extended to Indian borrowers. The AO held that the since there is no DTAA between India and Hong Kong the

commission income has to be examined under the Act. The AO further held that commission income is out of source in India and hence deemed to accrue or arise in India as per section 5(2) of the Act. The AO also held that the commission income is taxable under section 9(1)(i) of the Act since the Hong Kong Branch is having a business connection in India, as the business income and since the assessee is having a PE in India arising in India. Accordingly the AO attributed 50% of the commission of Hong Kong Branch as taxable in India. This addition is made besides the TP adjustment where 25% of the commission income earned by OB is attributed to the Indian Branch and taxed in India accordingly. The ld. AR submitted that the impugned issued is already considered by the Co-ordinate Bench in assessee's own case for AY 2005-06 where it has been held that the same would amount to taxing the income twice for the reason that the TPO has already considered 25% of the commission as ALP. The ld. AR further brought to our attention that assessee in the TP study has already considered 15% of the commission income as taxable in India and that the Co-ordinate Bench while considering the TP Adjustment has enhanced percentage of commission to 20%. The ld. AR accordingly submitted that the issue stands covered by the decision of the Co-ordinate Bench in assessee's own case for earlier AYs. With regard to AO invoking provisions of section 115A, the ld AR argued that the said provisions are not applicable since the Indian Branches are the PE in India. The ld AR also argued that the since the presence in Hong Kong is a Branch of the assessee which is French entity, the impugned income should be examined as per the DTAA between India and France and not as per section 9(1)(i) of the Act.

40. We in this regard notice that the similar issue has been considered by the Co-ordinate Bench in assessee's own case for AY 2005-06 and that facts for the current year are identical. We further notice that the Hon'ble Bombay High Court

has decide the issue in favour of the assessee in the group concern (ITA No. 1781 of 2024 titled DIT vs. Caylon Bank vide order dated 23.03.2017). We have extracted below the relevant findings of the Co-ordinate Bench in assessee's case for AY 2005-06 –

> *"12.1.Aggrieved by the order of the AO the assessee preferred an appeal. The FAA after considering the available material, held that ALP of the international transactions of the PE in India was determined by the TPO, that the AO had made addition of the adjustments arrived at by the TPO, that after such adjustment it would be the position that the Indian PE of the assessee bank had been remunerated at the ALP and that the profit attributable to India PE is based on the functions undertaken, asssets employed and risks assumed. He further observed that remuneration at ALP would extinguish any further attribution of profit to the PE, that 50% of commitment fee(Rs. 5,41,43,714/-) and commission(Rs. 62,11,440/-) received by assessee's Hong Kong branch was not chargeable to tax as income of the assessee by virtue of section 9(1)(i) r.ws 115 A of the Act.*
>
> *12.2.The DR argued that the disputed amount was not interest, that it consisted of commission and commitment charges, that same was taxable as per the provisions of Article 7 of the DTAA, that it was not a case of double deduction. The AR stated that the commitment fees/commission etc. were clearly effectively connected to the Indian PE, that 20% income was attributed as the ALP for the services performed by the India branch, that the said position was confirmed by the Bombay HC in the assessee's own case in earlier AY.s. that nothing further could be taxed in the hands of the Hong Kong branch, that it would lead to the same amounts being assessed to tax twice.*
>
> *12.3.We have heard the rival submissions We find that identical issue was dealt by the Hon'ble Bombay HC and was adjudicated in favour of the assessee while deciding the appeals for the earlier years(Income tax Appeal no.1781 of 2014 dtd.23.03.2017 and IT Appeal no.1748 of 2014 dtd 23.03.2017) Respectfully following the judgment of the Bombay HC, we dismiss last ground of appeal, raised by the AO."*

41. In the above decision addition made @ 50% of commission earned by Hong Kong branch was deleted for the reason that the TP adjustment is confirmed at 20% of the commission income by the Hon'ble High Court and that making

addition towards the same commission would amount to double taxation. For the year under consideration, the TP adjustment is deleted on the legal ground that the order of the TPO is time barred. Therefore only for AY 2010-11 we are confirming the addition made by the AO towards commission earned by Hong Kong branch to the extend of 20% as taxable in India by respectfully following the ratio laid down in the decision of the Hon'ble Bombay High Court and the decision of the Co-ordinate Bench. The AO is directed not to make any the addition if the amount already offered by the assessee is more that the commission income computed @ 20% as directed in this order. The grounds raised by the assessee are partly allowed.

42. Ground No. 22 & 23 is with regard to levy of interest under section 234B and penalty which are consequential not warranting any separate adjudication.

ITA No. 1839/Mum/2015 – Revenue's Appeal

43. The ground raised by the Revenue pertains to DRP upholding the decision of the AO in considering the provision made towards country risk amounting to Rs. 133,81,000/- for the purpose of deduction under section 36(1)(viia)(b). We have while adjudicating the Ground No.4 have already held the issue against the assessee stating the provision cannot be claimed as deduction merely for the reason that the same made as per RBI regulations. However we see no infirmity in the decision of the DRP in allowing the provision to be considered for the purpose of deduction under section 36(1)(viia)(b) of the Act. Accordingly, the ground raised by the Revenue is dismissed.

ITA No. 1273/Mum/2016-Assessee's appeal- AY 2011-12

44. The issues contended by the assessee and the revenue in the appeal for AY 2011-12 which are identical to the issues contended in AY 2010-11 are tabulated below –

Issue	AY 2011-12	AY 2010-11
Disallowance of Bank charges paid to Head Office(HO) / Overseas Branches (OB) by invoking provisions of section 40(a)(i) of the Act	Ground No.1	Ground No.1
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.2 & 3	Ground No.2 & 3
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.4	Ground No.6
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.5 to 12	Ground No.8 to 15
Double Taxation of ECB Interest as income arising to Overseas branches on ECB to Indian borrowers and by way of Transfer Pricing adjustment income of Indian Branches	Ground No.13	Ground No.16
Taxability in India at 50% of commission earned by Hong Kong Branch on ECB to Indian borrowers	Ground No.14 & 15	Ground No.17 & 18
Levy of interest under section 234B	Ground No.19	Ground No.22
Levy of penalty under section 271(1)(c)	Ground No.20	Ground No.23

45. From the above table it is clear that the grounds of the assessee and the revenue raised for AY 2011-12 are identical to AY 2010-11. Accordingly in our considered view our decision on above tabulated issues in AY 2010-11 are mutatis mutandis applicable to AY 2011-12 **except for Grounds No.14 & 15** which will be decided along with the TP Grounds as listed below.

46. We while adjudicating the appeal of AY 2010-11, deleted the TP adjustments on the legal contention raised through additional ground that the order passed by the TPO under section 92CA for AY 2010-11 is barred by limitation. Therefore we did not adjudicate the issue of TP adjustment on merits for AY 2010-11. Accordingly we will adjudicate the following TP grounds raised by the assessee in AY 2011-12 on merits in the ensuing paragraphs.

TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.16
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.17
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.18

Ground No.16 - TP adjustment towards commission on Back to Back Guarantee

47. The TPO noticed that during the year under consideration, the OBs executed inter-bank indemnities against which the Indian Branch issued a back to back guarantee on behalf of the clients of overseas branches and vice-versa. The Indian branche has received a commission towards the said guarantee provided to Indian customers on behalf of OBs as per the agreement entered into in this regard. The compensation is determined based on risk return setting consistently followed by the assessee group. The assessee submitted before the TPO that the Indian branches bear no risk of the bank guarantee given to customers on behalf of the OBs since the same is secured by a back to back indemnity issued by the OBs. The assessee further submitted that it receives a minimum fee of Euros 200 flat on an annual basis and the fee of Euro 75 for amendments and Euro 50 for settlement of

claims. The assessee also submitted that the India Branch is further remunerated at the rate of 10 basis points of guarantee amount as per the agreement.

48. The TPO directed the assessee to bench mark the transaction using CUP method and to show-cause why consequent adjustment could not be made. The assessee submitted before the AO that the assessee renders only support administrative services towards the bank guarantee for which a fixed fees is charged. The assessee further submitted that the CUP method may not be the most appropriate method since the guarantee given by the Indian Branch in this case is supported by a back to back indemnity and therefore cannot be compared with guarantee given by the Indian branch in the normal course of business. TPO did not accept the submissions of the assessee for the reason that –

> *"(i) The contention is not acceptable because the functions performed, assets used and risk undertaken by the assessee for both transactions i.e. for inter-bank indemnity transaction with its AEs and for the guarantee issued to third party customers without any back-to-back guarantee is the same.*
>
> *(ii) Even for the similar third-party transactions the bank always secures itself fully with collateral security to cover against the risk. Therefore, the contention of the assessee that it is merely providing administrative support in issuing the guarantee on behalf of the clients of the AE cannot be accepted.*
>
> *(iii) Further, there is no documentary evidence on record to show that the assessee is issuing bank guarantees on behalf of its own clients in the domestic market without taking any collateral. Hence the transaction of issuing guarantee entered into by the assessee with third parties in India is akin to the transaction entered into by the assessee on behalf of the AE's clients in India.*
>
> *(iv) The contention of the Assessee that the transactions entered into with clients in domestic market are different from the transaction entered into on behalf of the AEs clients as they are in an international market, also cannot be accepted. The reason being, both these transactions are entered into in the Indian market itself. For the clients of the AE, the guarantees are issued by the assessee in favour of parties in India only. Thus the contention of the assessee on this point is rejected.*

(v) Coming to the benchmarking done by the assessee, the assessee has not carried out any benchmarking of this international transaction. It is merely stated that the money has been charged to the AE and the AE has recovered these amounts from the 3rd party clients and paid thern to the assessee. This contention of the assessee is not supported by the documentary evidence. The fact remains that the assessee has not benchmarked this transaction by considering itself as a tested party.

(vi) Assessee has merely considered itself as an administrative service provider. The entire discussion above shows that the transactions of the assessee relate to issuing guarantees on behalf of third as well as the AEs clients. The guarantees are issued in favour of parties in India in both the cases. In the case of third parties, the guarantees are backed up by collaterals whereas in the case of clients of the AE, the guarantees are backed up by the AE's guarantee. The attendant risk remains the same in both the cases. It is further the contention of the assessee that in the latter case, the entire capital of the assessee is that of its AE and the hence the entire risk is borne by the AE. This contention again cannot be accepted in transfer pricing scenario as for the purposes of transfer pricing, assessee and its AE are treated as two distinct entities. Thus the contention of the assessee on this point stands rejected.

(vii) The last contention taken by the Assessee is that, as a reciprocal measure, such services are also provided by its AE at the similar rates. Hence the rates paid by the AE to the assessee should also be accepted. This contention cannot be accepted in principle as the transfer pricing regulations in India will consider and examine only one end of the transaction. Without prejudice to the above, it is to be noted that there are no details whatsoever regarding the transaction with the AE. Hence, this contention cannot form the basis for accepting substantial transactions executed by the assessee for the AE."

49. The TPO obtained information under section 133(6) from SBI and Union Bank of India with regard to rates charged for a counter guarantee given by the said banks. Based on the said information the TPO proposed the guarantee commission rate to be @ 1% for guarantee above USD 1 million and for others the TPO bench marked the commission rate at 1.8%. Accordingly the TPO made an adjustment of Rs.20,79,12,808/-

50. The ld. AR submitted that with respect to the Back to Back Guarantee given by the Indian Branch, there is no risk and that the branch is rendering on the administrative support. The ld. AR further submitted that the Guarantee is issued by the HO/OB and the guarantee when invoked by the Indian borrower, the branch gets fully reimbursed by the HO/OB. The ld AR also fairly conceded that the assessee has not done any bench marking towards the impugned transactions in its TP study. Before us the ld AR submitted a certificate from an independent Chartered Accountant, certifying the workings of the cost incurred towards the back to back guarantee transactions are accurate and the fees received are reasonable (page 213 to 219 of paper book)

51. The ld DR on the other hand vehemently argued that the contention that assessee is merely rendering administrative services cannot be accepted since the assessee by giving the guarantee takes the risk and the assets of the assessee are also employed in the process. The ld DR further submitted that the comparables chosen by the TPO of SBI and Union Bank are having identical transactions with its AE and therefore the bench marking done by the TPO is correct.

52. We heard the parties and perused the material on record. The OBs of the assessee in foreign countries cannot give guarantees to the Indian customers due to regulatory restrictions. Therefore these OBs ask the Indian Branch to give the guarantee and agree to indemnify the Indian Branch by give counter / back to back guarantee. The Indian Branch is receiving fixed fees and also a nominal percentage as commission. The assessee has not done any bench marking of the impugned transaction in the TP study. The TPO was of the view that the compensation received is not at arm's length and accordingly made TP adjustment based on information received under section 133(6) from SBI and Union Bank who provide

similar services to its OBs. The argument of the ld AR with regard to TPO's bench marking is that the transaction entered into by SBI and Union Bank are not uncontrolled transactions since the same are entered into with their AEs only. Though we see merit in the said submission of the ld AR that the comparison should be done with an uncontrolled transaction, we are unable to agree with the contention that the price charged by the assessee is at arm's length without proper bench marking. Further the certificate of the Chartered Accountant also needs to be factually examined. We notice that an identical issue has been considered by the coordinate bench in the case of Mizuho Bank Ltd., vs DDIT(IT) [2023] 149 taxmann.com 46 (Mum-Trib) where it has been held that –

> *"17. We have considered the rival submissions and perused the material available on record. In the present case, certain overseas branches of Mizuho Corporate Bank Ltd and Mizuho Bank Ltd have clients who require guarantees to be issued in India. Given that these clients are located in India, the overseas branches of Mizuho Corporate Bank Ltd and Mizuho Bank Ltd request the Indian branch to provide such guarantees to the beneficiary and provide a back-to-back counter bank guarantee to the Indian branch. It is the plea of the assessee that such back-to-back counter bank guarantee is to cover any financial liability that Indian branch would incur on behalf of these overseas branches in connection with the guarantees issued to Indian clients on their behalf. It is further submitted that where the client of the overseas branch defaults and the guarantee would be invoked then under the back-to-back guarantee issued to Indian branch, the overseas branch would make the payment to Indian branch, which would then onward make the payment to the beneficiary in India, In this regard, it is also the submission that Indian branch provide support services towards processing of these guarantees such as receiving swift instructions, issuing the guarantee on stamp paper and couriering the same to the party in India, maintenance of log of original documents, sending reports on project basis, reconciliation of transactions received versus those processed etc. Thus, as per the assessee the entire risk of discharging the bank guarantee is borne by the overseas branches issuing the counter bank guarantee. As per the assessee, Indian branch only faces element of foreign exchange risk as it would receive processing for from its associated enterprise in foreign currency and there could be difference in USD, Yen and Indian nipee conversion rates as on the date of receipt of remittance and the booking date. As*

per Form No. 3CEB, forming part of the paper book, the assessee claimed to have applied CUP method for determining the arm's length price of the international transaction of issuing bank guarantee against counter guarantee issued by the associated enterprise. The TPO rejected the contention of the assessee and noted that functions performed, assets used and risk undertaken by the assessee for both transactions de for inter-bank indemnity transaction with its associated enterprises and for the guarantee issued to the third-party customers without any back-to-back guarantee is same. The TPO also noted that even for the similar third party transactions the bank always secures itself fully with collateral security to cover against the risk. Ultimately, the TPO, by applying the rate charged by the Bank of Baroda for issuance of guarantee against 100% counter guarantee by reputed international banks, made the adjustment in the present case. During the course of hearing, learned AR placed reliance upon the decision of coordinate bench of the Tribunal in Australia and New Zealand Banking Group Ltd. (supra). We find that the basic facts of the aforesaid case are as under:

> *"3.5 At the outset, we find that overseas branches of ANZ have clients who require guarantees to be issued to the beneficiaries in India. Since the beneficiaries are situated in India, the overseas branches of ANZ are situated in India. The overseas branches of ANZ request the assessee to provide such guarantees to the beneficiaries and inturn provide a back to back inter-bank guarantee/indemnity to assessee to cover any financial liability that assessee may incur in connection with guarantees issued to Indian beneficiaries on behalf of overseas ANZ branches. This is the prime function/activity carried out by the assessee with regard to the impugned international transaction. In case where the client of the overseas branch defaults and the guarantee would be invoked then, under the back to back guarantee issued to assessee, the overseas branch would make payments to assessee which would onward then make the payment to the beneficiary in India."*

18. The coordinate bench of the Tribunal, in the aforesaid decision, noted that the taxpayer does not bear any risk in its books as it is fully protected by overseas counter guarantee/indemnity and there is also no foreign exchange risk as whenever the taxpayer is called upon to discharge the guarantee on behalf of the overseas branches, the taxpayer would first receive the money from overseas branches because of the existing counter guarantee, and then it would discharge the same. The coordinate bench further noted in the aforesaid decision that the assessee received the processing fee from the associated enterprise in foreign currency and the said fees is received immediately after the invoices are raised for the same, thereby the risk of exchange fluctuation would be very negligible due to

reduce time span involved therein. We find that the coordinate bench of the Tribunal in para 3.7 of the aforesaid decision also considered the details of fee charged by the taxpayer for each type of services rendered by it. Further, in the aforesaid decision, as noted by the coordinate bench in para 3.7, the taxpayer also filed details of guarantees issued by it based on the counter guarantee received from the overseas branches of the taxpayer. It is also noted that the taxpayer furnished the sample documents enclosing the copy of swift message received from the overseas branch advising the taxpayer to issue guarantee to Indian beneficiaries, and providing counter guarantee. The taxpayer, in the aforesaid decision as noted by the coordinate bench, also furnished the details of fresh guarantees issued during the year. Thus, it is evident that the coordinate bench of the Tribunal after detailed perusal of facts available on record deleted the transfer pricing adjustment made in respect of guarantee fee.

19. However, in the present case, apart from the claim of the assessee that guarantees have been issued to the clients of the overseas branches, in respect of which counter/inter-bank indemnity was executed by the overseas branches, the assessee in the factual paper book has filed the details of commission earned from the bank guarantee issued on behalf of the overseas branches. We find that there is no detail/document with regard to the counter guarantee/indemnity executed by the overseas branch, Also there is nothing available on record in support of assessee's claim that money has been charged to the overseas branch and overseas branch recover these amounts from the third-party clients and paid them to the assessee. There are also no details regarding whether the aforesaid process of charging and payment by the overseas branch is prior to or post the discharge of bank guarantee in favour of the beneficiary in India, in case of default. Thus, no details have been furnished to support the claim that no risk was borne by the Indian branch. Further, though in Form No. 3 CEB assessee has claimed to determine the arm's length price of international transaction of issuing bank guarantee against the counter guarantee issued by the associated enterprise by applying CUP method, however, there are no details available on record as to how such benchmarking has been carried out by the assessee. On the other hand, we find that the TPO, by considering the rate charged by Bank of Baroda for issuance of guarantee against 100% counter guarantee by reputed international banks, has made the transfer pricing adjustment by considering it to be an appropriate CUP. However, there is no further analysis as to how the said transaction is an appropriate CUP to the transaction undertaken by the assessee's Indian branch considering the FAR in both the transactions and whether any adjustment for differences as per Rule 10B(1) (a) of the Income-tax Rules is possible. We find that the learned CIT(A) vide impugned order on an ad hoc basis directed computation of commission for

guarantee by making addition of 10% increase in the rate of commission charged by the assessee to arrive at the arm's length rate. Thus, in view of the above, we deem it appropriate to remand this issue to the file of TPO for de novo benchmarking of impugned international transaction of issuing bank guarantee against counter guarantee issued by the associated enterprise. The assessee is directed to produce all the documents before the TPO in support of its claim. Further, the TPO shall be at liberty to call for any details or documents for proper benchmarking of the impugned international transaction. In the remand proceedings, the assessee shall have the liberty to file any alternative benchmarking in respect of the aforesaid impugned transaction. As a result, grounds no. 5 to 9 raised in Revenue's appeal are allowed for statistical purpose."

53. In assessee's case also it is an admitted position that the assessee has not done any bench marking in the TP study with regard to the impugned transactions. Therefore respectfully following the above decision of the coordinate bench we remit the issue back to the TPO for a *de Novo* bench marking of the international transaction of back to back guarantee given by the OBs to the assessee. The TPO is directed consider the certificate of the Chartered Accountant while determining the ALP of the impugned transaction. The assessee is directed to submit the relevant details as may be called for by the TPO in this regard and cooperate with TP proceedings. It is ordered accordingly. The ground of the assessee is allowed for statistical purposes.

Ground No.17 - TP adjustment towards Foreign Currency Loans (ECB)

54. The Indian branch of the assessee provides marketing and supporting services in respect of External Commercial Borrowings (ECB) made by the HO of the Bank to third party Indian borrower and receives 15% of the net interest/commission as compensation towards the services rendered. The TPO by relying on the orders of the earlier assessment year held that the amount is not at

arm's length and accordinging made an adjustment by applying 25% of the net interest / commission.

55. We heard the parties and perused the material on record. We notice that the Co-ordinate Bench in assessee's own case for AY 2002-03 has considered the issue of ALP adjustment made towards ECB to Indian borrowers where it has been held that

> *"24. We have heard learned AR as well as learned DR and considered the relevant material on record. The TPO made an adjustment of 25% of interest and commission received by overseas branches in respect of ECB advance to Indian borrowers. The CIT(A) granted relief of 5% and restricted the adjustment to 20% of interest and commission. At the outset, we note that an identical issue has been considered by the Tribunal in case of M/s. Credit Lyonnais (through their successors Calyong Bank) in vide order dated 31" September 2013 in para 8.7 to 8.8 as under:*
>
> > *"8.7 We have considered the rival submissions as well as relevant material on record The assessee being Indian branch has helped the foreign currency loan syndication in respect of two loans to Reliance Petroleum Limited and Reliance industries Limited to the tune of US$50 million and USDS II million, respectively. There is no dispute that for these two loans, Credit Agricole Indosuez (Asia), Syngapore worked as an agent and Credit Lyonnais worked as lead arrangers/cc- arrangers The ANZ Investment Bank, BA Asia Ltd, as well as ABN Amro Bank were also worked as co-arrangers. The role of the assessee in these transactions of foreign currency loan under ECB was to provide financial analysis of the borrowers, general market conditions and regulatory environment. The learned AR has vehemently argued that as per para 4 of Protocol, profit cannot be attributed to the PE an account of facilitation of conclusion of loan agreement or mere singing thereof, We do not agree with the contention of the learned AR of the assessee because of the fact that the role of the assessee is not merely facilitation of conclusion of loan agreement or signing thereof but the services provided by the assessee are the core-basis for taking the decision of granting the loan by the syndicate. The assessee provided the services regarding clients creditability analysis, its capacity so as to consider the capacity to repay the loan and risk involved in the loan transaction. Therefore, the role of the assessee in providing such a crucial service is inevitable for taking the decision of providing loan and as such cannot be said to be a mere*

facilitation of conclusion of the loan agreement or signing thereof. At this slage, para 4 of the Protocol between the India and France is quoted for ready reference as under :-

"4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

The plain reading of para 4, mentioned above, makes it clear that if the role of the PE is only to facilitate the conclusion of foreign trade or loan agreement or mere signing thereof, then na profit shall be attributed to PE in terms of Article 7(2) of the Indo France DTAA. As we have discussed above that the assessee's role in providing the services is the core-basis of taking the decision of granting loon, therefore, the nature of services provided by the assessee do not fall under the terms facilitation of conclusion of loan agreement or signing thereof as stipulated under para 4 of the Protocol.

8.8 Having held that para 4 of the Protocol does not apply to the case of the assessee, now, the question arises as to whether the adjustment made by the authorities below is justified. For making the adjustment, the authorities below have taken into consideration, the income towards interest as well as the fee charged by the foreign branch from the clients. It is pertinent to note that when the loan is provided by the syndicate and the assessee has not contributed to the loan amount then as regards the income of interest, the same cannot be attributed to the assessee for providing the services of the financial analysis of the borrowers, market condition and regulatory Environment in India. Since the assessee has provided certain services for that arms length charges can be determined as per the provisions of transfer pricing regulation. The TPO as well as C)T(A) has not brought out any comparable for determination of the arms length price but took the total income comprising interest as well as other fees charged by the foreign branches for allocation/attribution to the assessee. In this case, the ALP has not been determined by taking into consideration for making adjustment under transfer pricing provisions. Accordingly, we direct the AO/IPO to make adjustment in respect of the services performed by the assessee for foreign currency loan arranged for its existing clients by taking into account only the fee and other charges received by the foreign branches from the borrowers in question. Since none of the parties have come out with the suitable comparables, therefore, we find that the estimation made by the CIT(A) at the rate of 20% is just and proper, however, the some would be only in respect of the

fee and charges other than interest received by the foreign branches. Thus, these grounds of the assessee are partly allowed."

25. As it is clear from the earlier order of this tribunal that the benefit of para 4 of the protocol between India and France does not apply as assessee has rendered the key services for taking decision of granting loan by the syndicate of Banks to the Indian borrowers, however as it was found that the TPO made the adjustment without considering any comparable. By following earlier orders of this Tribunal, ***we direct the AO/TPO to make adjustment in respect of the services performed by the assessee for foreign currency loan arranged for its existing clients by taking into account only the fee and other charges excluding interest received by the foreign branches from the borrowers in question by applying the rate of 20% as accepted in the earlier order****. Accordingly, this ground is partly allowed."*

(emphasis supplied)

56. Respectfully following the above decision, we direct the TPO to modify the TP adjustment by applying rate of 20% only on the fee and other charges. We also direct the TPO not to make any TP adjustments if the amount already offered by the assessee in this regard is more than amount arrived at by the TPO as per the directions given in this order.

Ground 18 – TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products

57. The TPO noticed that the Indian Branch has received commission towards marketing of derivatives. The assessee submitted that the Indian branch is merely acting as a selling agent such as identifying the customers, markets and sells derivatives to the customers and performs liaisons and negotiations between trades settled by the AEs and the Indian customers. The assessee further submitted that the commission is received for rendering of these services at the fee equal to 50% of the commercial mark up of each transaction or reimbursement of costs plus 10% whichever is higher. The TPO held that considering the nature of services rendered by the assessee 100% of the commercial mark up should be considered for the

purpose determining the ALP of the transaction by placing reliance on the OECD report on Attribution of Profits to Permanent Establishments dated 27 July 2010. The TPO made the TP adjustment accordingly.

58. We heard the parties and perused the material on record. We notice that the coordinate bench in assessee's own case while considering the issue of TPO making a similar adjustment has relied on the decision of the coordinate bench in the case of Barclays Bank PLC vs ADIT (90 taxmann.com 378 (Mum-Trib)) where it has been held that

> *" 5.3.We have heard the rival submissions and perused the material before us. We find that one of the divisions of the assessee i.e. Barclays Capital would handle the global derivative operations, that same included foreign exchange, interest rate, equity, commodity and credit derivatives, that the activities of the assessee were limited to marketing activities, that the AE.s were concluding the sale-transaction, that for the year under consideration the assessee was compensated at the rate of 24%(approximately)of the estimated day-1profit/loss from the said deals in accordance with the GTPP of the group, that the TPO had rejected the TNMM applied by the assessee and had used PSM for benchmarking the transaction of marketing of derivative products, that he concluded that risk relating to the derivative business remained partly in India and partly outside India and that the key assets in derivative were its people, that one of the foreign bank branch was being compensated at the rate of 60% for the same derivative business, that he made an addition of Rs.51.12 crores, that the FAA granted relief to the assessee.We find that the TPO had accepted, in principle, that the functional role of the assessee was limited to rendering the marketing services to overseas branches,that rest of the activities were handled by the AE.s. The derivative transaction does not end with marketing. It is a complex process.So,the AE would compensate the assessee for the services rendered to it.There would always be a relation between the compensation paid and availed services.The assessee had adopted the GTPP to determine ALP of the IT.s.In our opinion, there was no defect in its approach.On the other hand,method applied by the TPO and the details of controlled transactions,relied upon by him,were not available in the public domain. The assessee did not have any opportunity to examine the comparability of FAR of the transactions selected by the TPO. In our opinion,use of untested comparables to determine the ALP is against the basic spirit of the TP provisions and the Rule 10 of the Rules The TPO had also violated the principles of natural Justice by not confronting the assessee with the*

comparables used against it. He proposed an addition of Rs. 51.12 crores to the income of the assessee without affording an opportunity to it,so that it could become aware of the basis for the adjustment.Only on this count the adjustment could be validly deleted.

5.4.But,we would like decide the issue on merits also. It is found that the assessee had followed GTPP for TP purposes, that as per the global policy the Indian branches rendering the services and arranging for the sales of the derivative products for its customers from its foreign branches were to get at 24.40 percent of the INPV. The Appellant had carried out a TP study and had applied TNMM for determining the ALP. We find that the average cost plus margin of the uncontrolled comparables was 19% and in the assessee's case, cost plus margin was 424%. If we look at these figures, it becomes clear that compensation received by the assessee from its AE for derivative deal was at arm's length. INPV of a derivative transaction is calibrated based on projection of expected cash flow on a derivative transaction and applying appropriate discounting factor.INPV calculation can be different for different banks because of their functioning. So, in our opinion it would be inappropriate to apply for a uniform multiplier effect on the value of sales credit/INPV of derivative transactions. In other words, the INPV fixed by Indian branch of another foreign bank in India should not have been compared with the assessee case, because the above said branch of the foreign bank itself was dealing with its another AE. In short, we hold that the methodology adopted by the TPO,for determining the ALP of INPV of the derivative transactions,was incorrect from the very beginning and was fundamentally wrong.We would like to refer to the case of Technimont ICB(P.)Ltd.(supra) and it reads as under:

> *"14. What is an 'uncontrolled transaction' has been clearly defined under Rule 10A(a) to mean 'a transaction between enterprises other than associated enterprises whether resident or nonresident'. A plain reading of the meaning given to the expression 'uncontrolled transaction1 leaves no room for any doubt that it is a transaction between two non-associated enterprises. If the transaction is between two associated enterprises, it goes out of the ambit of' uncontrolled transaction' under Rule 10A.When section 92C is read along with Rules 10B(e), and 10A, it becomes abundantly clear that in computing ALP under the transactional net margin method, a comparison of the assessee's net profit margin from international transactions with its AEs has necessarily to be made with that of the net pro fit margin realized by the same enterprise or an unrelated enterprise from a comparable but definitely uncontrolled transaction i.e., a transaction between non-associated enterprises. There is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. When it has been clearly mandated in all the relevant methods*

for determining ALP that the comparison has to be made by the enterprise's international transaction with comparable uncontrolled transaction, by no sheer logic a comparable controlled transaction can be employed for the purposes of making comparison. There is no warrant for diluting the prescription given by the statute or rules when such prescription itself serves the ends of justice properly and is infallible. If the view of the Revenue that a controlled transaction should not be shunted out for the purposes of benchmarking is accepted, then all the relevant provisions contained in Chapter X in this regard, will become otiose. If such a contention of making comparison with a comparable controlled transaction is taken to its logical conclusion, then there will never arise any need to take up any case for transfer pricing scrutiny. The reason is obvious. ALP is determined for application in respect of transactions between two AEs so that the profit likely to arise from such transactions is not under-reported vis-a-vis from similar transactions with third parties. If the comparison is made again with net profit margin realized from transactions between two AEs, instead of third parties, it may demonstrate the same cooked results in both the situations, thereby leaving no scope for any adjustment. In this eventuality, the very object of such provisions will be frustrated. Thus it follows that the ALP can be determined only by making comparison with a comparable uncontrolled transaction and not a comparable controlled transaction."

We are of the opinion that the FAA had rightly held that the TPO was not justified in considering JP Morgan Chase Bank and Bank of America, NA having similar arrangements with their AEs as appropriate comparables for the aforesaid transaction.

5.5.We also find that the method applied by the TPO is not PSM as defined under the Rules. Rule 10B of the Rules stipulates that the for the purpose of applying PSM the Net Profit derived by the AE from the international transactions is to be considered. However, the TPO has made the adjustment by taking 60% of Day 1 INPV, which is a hypothetical value representing the gross surplus cash. In the matter of Johnson & Johnson Ltd. (247 Taxman 136) the Hon'ble Bombay High Court has held that the TPO is obliged under the law to determine the ALP by following any one of the prescribed methods of determining the ALP as detailed in Section 92C(1) of the Act, that the determination of the ALP has to be done only by following one of the method prescribed under the Act. We are also agreeable to the argument submitted by the assessee that the PSM can never be applied for benchmarking marketing support service functions. As per Rule 10B(d),PSM is applicable "mainly in IT.s involving transfer of unique intangibles or in multiple IT.s which are so inter-related that they

cannot be evaluated separately for the purpose of determining the ALP of any one transaction."

[Emphasized by us]"

59. From the perusal of the above findings it is clear that the coordinate bench has deleted the TP adjustment for the reason that the comparables chosen by the TPO are not uncontrolled transactions and that the TPO has not followed one of the methods prescribed under Rule 10B. We also notice that the coordinate bench while following the above decision in the case of Barclays Bank Plc (supra) in assessee's own case for AY 2006-07 to 2009-10 has held that the attribution of more than 50% of the commercial mark up is not justified. In assessee's case we notice that the TPO has relied on the OECD report dated 27.07.2010 on Attribution of profits to PE to conclude that 100% of commercial mark up is to be attributed to the Indian Branch. The ld AR submitted that the OECD commentary provides for sharing of the initial markup with the marketing entity and does not provide for 100% attribution of the initial mark-up. From the perusal of the OECD report (paragraphs 130 and 131 of Part III) relied on by the TPO we notice that the same states that marketing entity is not entitled to the trading markup if the marketing entity is not taking the trading risk of the derivative transaction. In assessee's case it is an admitted fact that the assessee is not taking any trading risk and this fact is substantiated by the observations of TPO that the bad debt of Rs.1,89,38,15,512 with respect to the two transactions are borne by the HO/OB (refer para 8.7(iv) of TPO's order). Therefore we see merit in the submission that the TPO is not right in attributing 100% of commercial mark up and that the reliance placed in this regard on OECD report is not appropriate. It is also relevant note that the TPO for making the adjustment has not followed any specific method as per Rule 10B. In view of these discussions and respectfully following decisions

of the coordinate bench we hold that the TP adjustment made by the TPO is not sustainable. The ground raised by the assessee in this regard is allowed.

Ground No.14 & 15 - Taxability in India at 50% of commission earned by Hong Kong Branch on ECB to Indian borrowers

60. We heard the parties and perused the material on record. We notice that the coordinate bench in assessee's own case for AY 2005-06 while considering the identical issue held that since the TP adjustment is confirmed at 20% of the commission income by the Hon'ble High Court that making addition towards the same commission would amount to double taxation. The relevant observations of the coordinate bench are extracted in the earlier part of this order. Accordingly we hold that the addition made by the AO by attributing 50% of the commission earned by the Hong Kong Branch towards ECB extended to Indian Borrowers is not sustainable and liable to be deleted.

61. In result the appeal of the assessee for 2011-12 is partly allowed

ITA No. 1165/Mum/2016-Revenue's appeal- AY 2011-12

62. The revenue's appeal pertain to interest income payable by the Indian Branch to HO/OB being held to be not taxable as income of the HO/OB in India. We have while deciding the identical issue in assessee's appeal for AY 2010-11 (Ground No.7 of assessee's appeal in AY 2010-11) have held that the interest paid by the Indian Branch to HO/OB is not taxable in India by placing reliance on the decision of Special Bench in the case of Sumitomo where it is held that the on the principle of mutuality the interest paid by Indian Branch is not taxable in the hands of the HO. The issue contended by the revenue in the current year being identical, in our view our decision on the said issue for AY 2010-11 in assessee's appeal is

mutatis mutandis applicable to revenue's appeal for the year under consideration. Accordingly we dismiss the ground raised by the revenue in this regard.

63. In result the appeal of the revenue is dismissed.

ITA No. 2313/Mum/2017-Assessee's appeal- AY 2012-13

64. The issues contended by the assessee in the appeal for AY 2012-13 which are identical to the issues contended in AY 2011-12 are tabulated below –

Issue	AY 2012-13	AY 2011-12
Disallowance of Bank charges paid to Head Office(HO) / Overseas Branches (OB) by invoking provisions of section 40(a)(i) of the Act	Ground No.1	Ground No.1
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.2 & 3	Ground No.2 & 3
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.5	Ground No.4
Taxability of interest paid by Indian Branch to HO/OB	Ground No.4 & 4.1	Departmental appeal Ground No.1
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.12 to 22	Ground No.5 to 12
Double Taxation of ECB Interest as income arising to Overseas branches on ECB to Indian borrowers and by way of Transfer Pricing adjustment income of Indian Branches	Ground No.23	Ground No.13
TP Adjustment towards taxability in India at 50% of commission earned by Hong Kong Branch on ECB to Indian borrowers	Ground No.24 & 25	Ground No.14 & 15
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.8	Ground No.16

TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.9	Ground No.17
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.10	Ground No.18
Levy of interest under section 234B	Ground No.26	Ground No.19
Levy of penalty under section 271(1)(c)	Ground No.27	Ground No.20
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, on behalf of Indian Branch to be taxed u/s.25(iv) if the expenditure is allowed u/s.37(1)	Ground No.6	-
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, on behalf of Indian Branch claimed in AY 2011-12 to be taxed as deemed income u/s.41(1) in AY 2012-13	Ground No.7	-
TP adjustment with regard to interest on call borrowings	Ground No.11	-

65. From the perusal of the above table, it is clear that all the issues pertaining AY 2012-13 except issues contended through Ground No.6,7 and 11 are common to AY 2011-12. Therefore in our considered view, our decision with respect to these issues in AY 2011-12 are mutatis mutandis applicable to AY 2012-13 also. It is ordered accordingly.

66. At the outset the Ld.AR submitted that assessee does not wish to press **Ground No.11** considering the fact that the smallness of the amount involved. Accordingly ground number 11 is dismissed as not pressed.

67. With regard to **Ground No.7** the Ld.AR submitted that, the issue raised therein need not be considered pursuant to the following observations of the AO in the final order of assessment) that reads as under:

"4.4.5. During the proceedings the assessee was asked specifically as to why the amount of Rs. 7,70,16,329 in A.Y 2011-12 not debited to the P & L A/c in 2010-11 or even subsequently, and allowed in an earlier year should not be considered under the provisions of Sec 41(1). Assessee vide letter dated 22/02/2016 has reproduced the section and submitted:

For any expenditure to fall under section 41(1) of the Act,

- *A deduction should have been claimed in any previous year and*
- *The assessee should have obtained any amount in respect of such expenditure and*
- *Such amount could either be in cash or in any other manner Thus, obtaining the amount in subsequent year, in respect of the expenditure claimed in the earlier year is a sine qua non for applicability of sec 41(1) of the Act. Similarly, for expenditure claimed in the earlier year the India Branch should have obtained the amount in respect of the said expenditure in the current assessment year.*

  Without prejudice the assesse e submits that the said amount has been disallowed in the previous assessment year and hence the situation of taxing the same u/s 41(1) would not arise.

4.4.6. Assessec's submission has been considered. Without going into the merits, as the facts are not applicable, no addition u/s 41(1) is considered for this year"

68. Therefore the ground raised by the assessee has become infructuous and dismissed accordingly.

69. **Ground No.6** pertains to the alternate contention of the AO that if Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges on behalf of Indian branch is allowed as a deduction under section 37 then the same needs to be treated as income under section28(iv) of the Act. We have while deciding the allowability of credit risk assistance, EDP assistance HO-System Implementation Charges (Ground No.2 & 3) have held that the same is allowable under section 37 by following the decision of the coordinate bench in earlier years in assessee's own case. Therefore, for the year under

consideration, the alternate ground on which the AO is proposing the addition under section 28(iv) needs to be adjudicated.

70. The ld AR submitted that the impugned expenditure incurred by the HO on behalf of the branch does not result in any benefit to the assessee as the actual services are rendered by the third parties to enable the Indian branch to carry on the business. The ld AR further submitted that for charging income in the hands of the Indian Branch the income should fall within the purview of the deeming fiction created under Article 7(2) of the DTAA between India and France where the PE and HO are to be treated as distinct and independent entities only for the purpose of calculation of **profits attributable** to the PE i.e. the PE would have actually earned by virtue of conducting business activities in the country where PE is created. The ld AR also submitted that the provisions of Article 7(2) of the DTAA are distinct from the provisions of section 28(iv) of the Act as the DTAA only attributes actual profits to the PE which has been actually earned by undertaking business activities as against the provisions of section 28(iv) of the Act which notional income in the hands of the assessee. The ld AR also placed reliance on the decision of coordinate bench in the case of Shihan Bank vs DCIT reported in (2022) 144 taxmann.com 182 to submit that the provisions of section 28(iv) cannot be applied in assessee's case.

71. The ld DR on the other hand relied on the order of the AO and the directions of the DRP.

72. We heard the parties and perused the material on record. The AO for the year under consideration disallowed the expenditure incurred by the HO on behalf of the Indian Branch towards credit risk assistance, EDP assistance HO-System Implementation Charges by invoking the provisions of section 44C of the Act. The

AO also held that alternatively if the expenditure is allowed as a deduction under section 37, then the same should be treated as income under section 28(iv) in the hands of the Indian Branch. It is an admitted fact that the expenditure is incurred towards services rendered by third party service providers and since these are direct expenses pertaining to the Indian Branch, the same is claimed as a deduction under section 37 which we have already held that is allowable. Now the issue is whether any benefit is arising to the Indian Branch due to the fact that HO incurred the expenditure on behalf the Indian Branch within the purview of section 28(iv) in the light of the fact that Indian Branches have not actually made payments towards these expenditures. For the purpose of taxing the income in the hands of Indian Branch (which is the PE of the assessee) it is relevant to look at Article 7(2) of the DTAA between India and France, which provides for how the income of the PE in India should be computed. The relevant extract of Article 7(2) is reproduced below –

> *"2. Subject to the provisions of paragraph 3, where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be* ***attributed 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. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on the basis of an apportionment of the total profits of the enterprise to its various parts, provided, however, that the result shall be in accordance with the principles contained in this Article."*
>
> *(emphasis supplied)*

73. From the above it is clear that the PE is to be treated as an independent enterprise and the net income i.e. income earned by virtue of activities carried on in India as reduced by the expenses incurred for earning such income. The

impugned expenses towards credit risk and EDP assistance HO-System Implementation Charges are allowed in the hands of the Indian Branch since the same is incurred for the purpose of earning income in India and as per Article 7(2) it is the net income that is taxable. The fact that the expenditure are not paid by the Indian branch to HO in our view, would not change the entire nature of the payment itself. Therefore we see merit in the contention of the ld AR that a transaction cannot be treated as both income and expenditure in the hands of the assessee. Further impugned expenditure in order to be treated as income should be a profit attributable to the Indian Branch. Since the amount is in the nature of expenditure, it cannot be treated as profit attributable as per Article 7(2) of the DTAA between India and France. Section 28(iv) is a deeming provision which deems income towards the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. Therefore fitting the said deeming provision into the provisions of Article 7(2) as profit attributable is not a logical view and accordingly we hold that the contentions of the AO that such income should be taxable under section 28(iv) of the Act is incorrect. We in this regard notice that the coordinate bench in the case of Shihan Bank (supra) has held a similar view while considering the issue of whether expenditure by HO on behalf of Indian Branches towards employee cost would attract addition under section 28(iv).

74. In view of the above discussion and respectfully following the above decision of the coordinate bench we hold that there cannot be any addition made under section 28(iv) be made in assessee's case towards credit risk assistance, EDP assistance HO-System Implementation Charges paid by HO on behalf of Indian Branch.

ITA.No.4652/Mum/2017 – AY 2013-14

75. The issues contended by the assessee and the revenue in the appeal for AY 2013-14 which are identical to the issues contended in AY 2012-13 are tabulated below –

Issue	AY 2013-14	AY 2012-13
Disallowance of Bank charges paid to Head Office(HO) / Overseas Branches (OB) by invoking provisions of section 40(a)(i) of the Act	Ground No.1	Ground No.1
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.2 & 3	Ground No.2 & 3
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.5	Ground No.5
Taxability of interest paid by Indian Branch to HO/OB	Ground No.4 & 4.1	Ground No.4 & 4.1
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.12	Ground No.12 to 22
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.8	Ground No.8
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.9	Ground No.9
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.10	Ground No.10
Levy of interest under section 234B	Ground No.13	Ground No.26
Levy of penalty under section 271(1)(c)	Ground No.14	Ground No.27
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, on behalf of Indian Branch to be taxed u/s.25(iv) if the expenditure is allowed u/s.37(1)	Ground No.6	Ground No.6
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System	Ground No.7	Ground No.7

Implementation Charges, on behalf of Indian Branch claimed in AY 2011-12 to be taxed as deemed income u/s.41(1) in AY 2012-13		
TP adjustment with regard to interest on call borrowings	Ground No.11	Ground No.11

76. From the perusal of the above table, it is clear that all the issues pertaining AY 2013-14 are common to AY 2012-13. Therefore in our considered view, our decision with respect to these issues in AY 2012-13 are mutatis mutandis applicable to AY 2013-14 also. It is ordered accordingly.

ITA.No.458/Mum/2019 – AY 2014-15

77. The issues contended by the assessee in the appeal for AY 2014-15 which are identical to the issues contended in AY 2013-14 are tabulated below –

Issue	AY 2014-15	AY 2013-14
Disallowance of Bank charges paid to Head Office(HO) / Overseas Branches (OB) by invoking provisions of section 40(a)(i) of the Act	Ground No.1	Ground No.1
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.2,3 & 4	Ground No.2 & 3
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.6	Ground No.5
Taxability of interest paid by Indian Branch to HO/OB	Ground No.5	Ground No.4 & 4.1
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.13	Ground No.12
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.9	Ground No.8
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.10	Ground No.9
TP Adjustment made in respect of commission	Ground No.11	Ground No.10

earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)		
Levy of interest under section 234B	Ground No.17	Ground No.13
Levy of penalty under section 271(1)(c)	Ground No.19	Ground No.14
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, on behalf of Indian Branch to be taxed u/s.25(iv) if the expenditure is allowed u/s.37(1)	Ground No.7	Ground No.6
Cost incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, on behalf of Indian Branch claimed in AY 2011-12 to be taxed as deemed income u/s.41(1) in AY 2012-13	Ground No.8	Ground No.7
TP adjustment with regard to interest on call borrowings	Ground No.12	Ground No.11
Computation of higher rate of tax	Ground No.14	-
Lower credit for TDS	Ground No.15	-
Levy of interest under section 234A when the return is filed within the due date	Ground No.16	-
Interest under section 234C	Ground No.18	-

78. From the perusal of the above table, it is clear that all the issues pertaining AY 2014-15 are common to AY 2013-14 except issues contended in Ground No.14 to 16 & 18. Therefore in our considered view, our decision with respect to these issues in AY 2013-14 are mutatis mutandis applicable to AY 2014-15 also. It is ordered accordingly.

79. Ground No.14 pertaining to computing higher rate of tax and Ground No.18 pertaining levy of interest under section 234C are consequential not warranting any separate adjudication. With regard to Ground No.15 on AO allowing short credit of TDS we direct the AO examine the issue based on evidences and allow the credit in accordance with law. On the issue of levy of interest under section 234A contended through Ground No.16, it is submitted that the assessee has filed the return of income within the due dates as prescribed under the Act and therefore no interest is warranted. We in this regard direct the AO to examine the claim of the

assessee based on evidences and give relief to the assessee as per law. It is ordered accordingly.

ITA.No. 7881/Mum/2019 – AY 2015-16

80. The issues contended by the assessee in the appeal for AY 2015-16 which are identical to the issues contended in AY 2014-15 are tabulated below –

Issue	AY 2015-16	AY 2014-15
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.1 & 2	Ground No.2,3 & 4
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.4	Ground No.6
Taxability of interest paid by Indian Branch to HO/OB	Ground No.3	Ground No.5
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.9	Ground No.13
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.5	Ground No.9
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.6	Ground No.10
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.7	Ground No.11
Levy of interest under section 234B	Ground No.12	Ground No.17
Levy of penalty under section 271(1)(c)	Ground No.13	Ground No.19
xTP adjustment with regard to interest on call borrowings	Ground No.8	Ground No.12
Computation of higher rate of tax	Ground No.10	Ground No.14
Lower credit for TDS	Ground No.11	Ground No.15

81. From the perusal of the above table, it is clear that all the issues pertaining AY 2015-16 are common to AY 2014-15 except issue contended in Ground No.6. Therefore in our considered view, our decision with respect to these issues in AY 2014-15 are mutatis mutandis applicable to AY 2015-16 also. It is ordered accordingly.

Ground No.17 - TP adjustment towards Foreign Currency Loans (ECB)

82. The ld AR at the outset submitted that the facts pertaining to the issue under consideration is identical to earlier years and that the issue is covered by the orders of the coordinate bench and the Hon'ble High Court. However, the ld submitted that the amount considered for arriving at TP adjustment by the TPO is not correct. In this regard the ld AR elaborated the facts pertaining to the year under consideration to submit that the policy pertaining to remuneration received by the assessee for services rendered towards ECB, has under gone change with effect from AY 2015-16. As per the old policy the assessee was remunerated at 15% of the net interest/commission as compensation towards the services rendered and the assessee continue to receive remuneration towards the loans under this policy till AY 2019-20. The ld AR further submitted that from AY 2015-16 the policy has undergone change where by assessee is remunerated at 25% of fees and this is applicable for the fresh ECBs extended from AY 2015-16. The ld AR brought to our attention that the TPO while making the TP adjustment by applying 25% of fees / commission has considered the entire ECB i.e. both under the old and the new policy without taking note of the fact that the assessee is already remunerated for ECBs under new policy at 25%. The ld AR accordingly prayed for appropriate direction to the TPO in this regard.

83. We heard the parties. We have while adjudicating the identical issue for AY 2011-12 directed the TPO to modify the TP adjustment by applying rate of 20% only on the fee and other charges by respectfully following the decision of Hon'ble High Court in assessee's own case. For the year under consideration from the perusal of the TPO's order we notice that the TPO has made the TP adjustments towards the total ECBs at 25% of the fees/commission. However it is noticed that the assessee itself is remunerated at 25% from AY 2015-16 for the ECBs under the new policy and therefore no further adjustment should have been made by the TPO. The ld AR during the course of hearing presented the following table containing the details of remuneration received towards ECBs under old and new policy –

AY	Renumeration under the old policy - 15% of net profit	Renumeration under the new policy - 25% of upfront fees	Total
2010-11	28,49,75,921	-	28,49,75,921
2011-12	38,18,52,938	-	38,18,52,938
2012-13	27,63,82,776	-	27,63,82,776
2013-14	22,23,19,524	-	22,23,19,524
2014-15	35,27,13,060	-	35,27,13,060
2015-16	21,21,77,565	1,93,87,430	23,15,64,995
2016-17	11,27,47,583	7,85,55,433	19,13,03,016
2017-18	2,40,75,397	1,07,07,626	3,47,83,023
2018-19	84,46,998	1,04,27,151	1,88,74,149
2019-20	19,62,381	1,10,93,992	1,30,56,373
Total	**1,87,76,54,143**	**13,01,71,632**	**2,00,78,25,775**

84. The TPO is accordingly directed to consider the overall remuneration already received by the assessee and not to make any TP adjustments if the amount already offered by the assessee is more than amount arrived at by the TPO as per the directions given in this order.

ITA.No. 1027/Mum/2021 – AY 2016-17

85. The issues contended by the assessee in the appeal for AY 2016-17 which are identical to the issues contended in AY 2015-16 are tabulated below –

Issue	AY 2016-17	AY 2015-16
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.1 & 2	Ground No.1 & 2
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.4	Ground No.4
Taxability of interest paid by Indian Branch to HO/OB	Ground No.3	Ground No.3
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.9	Ground No.9
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.7	Ground No.5
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.6	Ground No.6
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.5	Ground No.7
Levy of interest under section 234B	Ground No.12	Ground No.12
Levy of penalty under section 271(1)(c)	Ground No.13	Ground No.13
xTP adjustment with regard to interest on call borrowings	Ground No.8	Ground No.8
Lower credit for TDS	Ground No.10	Ground No.11

86. From the perusal of the above table, it is clear that all the issues pertaining AY 2016-17 are common to AY 2015-16. However the issue contended through

Ground No.3 have to be examined afresh considering the amendment brought in the Act in section 9(1)(v). Therefore the said ground is adjudicated separately for the year under consideration in the ensuing paragraphs. Having said so, with respect to other grounds the facts being identical we are of the considered view that our decision with respect to these issues in AY 2015-16 are mutatis mutandis applicable to AY 2016-17 also. It is ordered accordingly.

87. Ground No.3 is with regard to taxability of interest paid by the Indian Branch to HO in India. We while adjudicating the issue up to AY 2015-16, have held that the interest is not taxable in the hands of the HO for the reason that the principle mutuality is applicable to the said receipt by placing reliance on the decision of the Special Bench in the case of Sumitomo Mitsui Banking Corporation Ltd.(supra). However the issue needs to be examined in the light of the amendment brought in section 9(1)(v) by which the following explanation is inserted in the said section with effect from 01.04.2016 –

> *Explanation.—For the purposes of this clause,—*
>
> *(a) it is hereby declared that in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly;*

88. The ld AR in this regard submitted that though the interest income paid by the Indian Branch to the HO would become taxable under the Act interms of the explanation inserted to section 9(1)(v), the taxability under DTAA also needs to be considered. The ld AR further submitted that the taxability of interest normally

covered under the provisions of Article 12 of the DTAA between India and France but since the HO has a PE i.e. Indian Branch then the interest earned would be governed under Article 7 as has been stated in Article 12(5). In this regard the ld AR drew our attention to the relevant Articles of the DTAA between India and France which read as under –

> *"1.Interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other contracting state."*
>
> *2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.*
>
> *3 & 4* ****
>
> *5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 15, as the case may be, shall apply."*

89. The ld AR submitted that as per article 7(1) of the DTAA, the profit of an enterprise is taxable in the other contracting state to the extent it is attributable to the PE and as per Article 7(2) the profit attributed to the PE shall be the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE. The ld AR argued that deeming fiction of hypothetical independence or a separate entity approach (i.e. the PE being separate from the HO), as stated in this Article, is limited to the extent of computing the profit attributable to the PE under Article 7. The ld AR further argued that the interest paid by the Indian Branch to HO is not a

profit attributable to Indian Branch and therefore not taxable in India under Article 7 of the DTAA. The ld AR in this regard placed reliance on the decision of the coordinate bench in the case of BNP Paribas [2023] 149 taxmann.com 56 (Mumbai - Trib.).

90. The heard the parties and perused the material on record. The explanation is inserted in section 9(1)(v) w.e.f. 01.04.2016 which provides that the interest payable by the PE i.e. Indian Branch to the HO shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to the income attributable to the PE in India. Therefore for the year under consideration, there is no ambiguity that the interest paid by the Indian Branch to the HO is taxable in the hands of HO as per the Act. Now coming to the question of whether the income earned by the HO by way of interest from the Indian Branch is taxable under DTAA, it is relevant to examine Article 12 and Article 7 as extracted herein above. Article 12 which deals with the taxation of interest provides under clause 5 that if the beneficial owner of the interest (i.e. HO) carries on business in the other contracting state (i.e.India) through a PE (i.e. Indian Branch) and the interest paid is effectively connected with the PE (i.e.Indian Branch) then provisions of Article 7 would apply. As per article 7(1) of the DTAA, the profit of an enterprise is taxable in the other contracting state to the extent it is attributable to the PE and as per Article 7(2) the profit attributed to the PE shall be the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE. The argument of the ld AR is that the hypothetical independence provided by the deeming fiction of Article 7 is limited only to the profit attributable to the Indian Branch and the same cannot be extended to the income of the HO towards the interest received to which the principle of mutuality will still

be applicable. We notice in this regard that the coordinate bench has considered a similar issue for AY 2018-19 in the case of BNP Paribas (supra) where it has been held that –

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

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

enterprise is taxable in the other contracting state to the extent it is attributable to the PE Further, article 7(2) of the DTAA provides that the profit attributed to the PE shall be the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE Article 7(3)(b) deals with payment by the PE to the head office of the enterprise and vice versa, and the same reads as under.

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

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

24. Further, in view of article 7 of the India-France DTAA, the Revenue though has rightly accepted that the fiction of hypothetical independence or a separate entity approach, as stated in this article, comes into play for the limited purpose of computing the profit attributable to the PE. However, extended this fiction of

hypothetical independence also for the computation of profit of the head office, for bringing to tax the interest received from the Indian branch office under the provisions of the Act. We are of the considered opinion that the latter approach is flawed. This aspect was extensively dealt with by the coordinate bench of the Tribunal in assessee's own case in BNP Paribas SA v. Asstt. DIT (International Taxation) [2016] 69 taxmann.com 6 (Mum. Trib.). In the aforesaid decision, the coordinate bench held that the principles for determining the profits of the PE and GE/head office are not the same, and the fiction of hypothetical independence does not extend to the computation of the profit of the GE/head office. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"22. Clearly, the principles for determining the profits of the PE and GE are not the same, and the fiction of hypothetical independence does not extend to computation of profit of the GE. The principles of computing separate profits for the PE and the GE treating them as distinct entities, in the case of Dresdner Bank AG (supra), was in the context of section 5(2). The separate profit centre accounting approach for the HO does not hold good in the treaty context, because, even if it is an income of the GE as a profit centre, all that is taxable as business profits of the GE is the income attributable to the PE. As regards its being treated as interest income of the assessee, arising in the source jurisdiction, ie. India, can only be taxed under article 12 but then as provided in article 12(5), the charging provisions of article 12(1) and (2), which deal with taxability of interest in the source state, will not apply "if the beneficial owner of the interest of the interest, being a resident of a contract state, carries on business in the other contracting state in which the interest arises, through a permanent establishment situated therein and that in such a case the provisions of Article 7, which deal with taxability of profits of the permanent establishment alone will apply. In plain words, when interest income arises to a GE even if that be so, the taxability under article 12 will not apply, and it will remain restricted to taxability of profits attributable to the permanent establishment under article 7. The profits attributable to the PE have anyway been offered to tax. As regards the theory, as advanced by learned Assessing Officer in considerable detail, that for taxing the GE, the taxability has to be in respect of (1) income attributable to the permanent establishment as a profit centre; and (if) income of the GE in its own capacity by treating it as another independent separate profit centre, for the detailed reasons set out above and particularly as the fiction of hypothetical independence does not extend to the computation of GE profits, we reject the same. The authorities below were, therefore, clearly in error in holding that the interest of Rs. 1,59,32,854 paid*

by the Indian PE to the GE, or its constituents outside India are taxable in India.

23. We may also add that in the case of Sumitomo Mitsui Banking Corpn. (supra), a five member bench has held that interest payment by PE to the GE is a payment by a foreign company's Indian PE to the foreign company itself, it cannot give rise to any income, in the hands of the GE, which is chargeable to tax under the Income-tax Act, 1961 itself, and, as such, treaty provisions are not really relevant. We humbly bow before the conclusions arrived at in this judicial precedent. Of course, we have reached the same destination by following a different path but then as long as reach the same destination, our traversing through a different path does not really matter at all. For this reason also, the grievance of the assessee deserves to be upheld."

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

91. The facts in assessee's case being identical, respectfully following the above decision, we hold that the interest received by the HO from the Indian Branch is not taxable and accordingly direct the AO to delete the addition made in this regard. This ground of the assessee is allowed.

ITA.No. 749/Mum/2022 – AY 2017-18

92. The issues contended by the assessee in the appeal for AY 2017-18 which are identical to the issues contended in AY 2016-17 are tabulated below –

Issue	AY 2017-18	AY 2016-17
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.1 & 2	Ground No.1 & 2
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.4	Ground No.4
Taxability of interest paid by Indian Branch to HO/OB	Ground No.3	Ground No.3
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.9	Ground No.9
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.7	Ground No.7
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.6	Ground No.6
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.5	Ground No.5
TP adjustment with regard to interest on call borrowings	Ground No.8	Ground No.8
Lower credit for TDS	Ground No.10	Ground No.10
Computing lower interest under section 244A due to non-grant of tax credit in ECB interest income	Ground No.11	
Levy of interest under section 234D	Ground No.12	
Initiating penalty proceedings under section 274 r.w.s.270A	Ground No.13	

93. From the perusal of the above table, it is clear that all the issues pertaining AY 2017-18 are common to AY 2016-17. Since the facts are identical we are of the considered view that our decision with respect to these issues in AY 2016-17 are mutatis mutandis applicable to AY 2017-18 also. It is ordered accordingly.

94. Ground no. 11 to 13 raised for AY 2017-18 are consequential not warranting a separate adjudication.

ITA.No. 1234/Mum/2022 – AY 2018-19

95. The issues contended by the assessee in the appeal for AY 2018-19 which are identical to the issues contended in AY 2017-18 are tabulated below –

Issue	AY 2018-19	AY 2017-18
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.1 & 2	Ground No.1 & 2
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.4	Ground No.4
Taxability of interest paid by Indian Branch to HO/OB	Ground No.3	Ground No.3
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.9	Ground No.9
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.7	Ground No.7
TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.6	Ground No.6
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.5	Ground No.5
TP adjustment with regard to interest on call borrowings	Ground No.8	Ground No.8
Interest under section 244A to be taxed as per the rate prescribed in Article 12 of the Treaty	Ground No.10,11 and 12	
Credit for TDS on interest on Income Tax	Ground No.13	

refund		
Levy of interest under section 234B	Ground No.14	
Initiating penalty proceedings under section 274 r.w.s.270A	Ground No.15	Ground No.13

96. From the perusal of the above table, it is clear that all the issues pertaining AY 2018-19 are common to AY 2017-18 except for Ground No.11 to 14. Since the facts pertaining to rest of the grounds are identical we are of the considered view that our decision with respect to these issues in AY 2017-18 are mutatis mutandis applicable to AY 2018-19 also. It is ordered accordingly.

97. The Ld.AR submitted that ground number 10,11 and 12 pertains to taxability of interest received by the assessee under section 244 A of the Act. The Ld.AR submitted the said interest is taxable in the hands of the assessee at the rates prescribed in the Article 10 of DTAA between India and France as against Article 7 pertaining to the business profits attributable to the PE. In support of the claim the ld AR placed reliance on the decision of Hon'ble Bombay High Court in assessee's own case for assessment year 1997-98 in ITA No.1430 of 2013 vide order dated 17/06/2015. The ld AR also placed reliance on the decision of Special bench of Hon'ble Delhi Tribunal in case of ACIT vs. Clough Engineering Ltd., reported in 130 ITD 137 and coordinate of this Tribunal in case of DHL Operations BV vs DDIT in ITA No.183/MUM/2010. The ld AR submitted that this decision of coordinate bench has been upheld by Hon'ble Bombay High Court in ITA number 431 of 2012 in an appeal filed by the revenue.

98. On the contrary the Ld.AR relied on the orders passed by the authorities below.

99. We heard the parties and perused the material on record. We notice that the issue of taxability of the interest under section 244A by the assessee has been considered by the Hon'ble Bombay High Court in assessee's own case for AY 1997-98 (supra). The question of law and the relevant findings of the Hon'ble High Court are extracted below –

> *"(4) Whether, on the facts and in the circumstances of the case and in law, the ITAT has erred in directing the A.O. to tax the interest received u/s 244A at the rate prescribed in Article 12 of DTAA between India and France?*
>
> *6. Regarding Question 4 -*
>
> *(a) The Tribunal by the impugned order restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the Act to the Assessing Officer to be decided in the light of Indo-France DTAA and the decision of the Special Bench of the Tribunal in the matter of Assistant Commissioner of Income Tax vs. Clough Engineering Ltd. -[130 ITD 137].*
>
> *(b) The grievance of the Revenue is with the impugned order following the decision of the Special bench in Clough Engineering Ltd. (supra)*
>
> *(c) However we find that the decision in Clough Engineering (supra) of the Special Bench had been followed by the Tribunal in ITA No.183/Mum/2010 -[M/s DHL Operations B.V, The Netherlands Vs. Dy. Director of Income Tax]. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Therefore, taxable under the Article 11(2) of Indo-Netherlands tax treaty. The Revenue carried the aforesaid decision of M/s DHL Operations B.V.(supra) in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17 July 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing officer to determine / adopt the rate of tax on refund in the light of the relevant clauses of Indo-France DTAA and the decision of Special Bench in Clough Engineering (supra) Accordingly, question 4 does not raise any substantial question of law so as to be entertained."*

100. Respectfully following above decision of the Hon'ble High Court we direct the AO to recomputed the tax liability on the interest received by the assessee under section 244A of the Act by applying the rate as per the DTAA between India and France. These grounds raised by the assessee are thus allowed.

101. With regard to Ground No.13 on the issue of TDS credit towards the tax deducted on the income tax refund, we direct the AO to examine and allow the credit in accordance with law.

102. Ground No. 14 pertaining to interest under section 234B is consequential and therefore does not warrant a separate adjudication.

ITA.No. 897/Mum/2023 – AY 2019-20

103. The issues contended by the assessee in the appeal for AY 2019-20 which are identical to the issues contended in AY 2018-19 are tabulated below –

Issue	AY 2019-20	AY 2018-19
Disallowance of expenses incurred by HO/OB towards credit risk assistance, EDP assistance HO-System Implementation Charges, and Information System Asia Pacific charges on behalf of Indian Branch	Ground No.2 & 3	Ground No.1 & 2
Taxability of Fees for Technical Services towards credit risk evaluation and software services paid/payable by Indian Branches to HO	Ground No.5	Ground No.4
Taxability of interest paid by Indian Branch to HO/OB	Ground No.4	Ground No.3
Taxability of interest on external commercial borrowing (ECB) extended by various branches outside India to Indian borrowers	Ground No.11 & 12	Ground No.9
TP adjustment in the hands of Indian Branch towards commission on back to back Bank guarantee extended to AE	Ground No.8	Ground No.7

TP adjustment in the hands of Indian Branch of Interest & commission arising to Overseas Branches in respect of ECB to Indian Borrowers	Ground No.7	Ground No.6
TP Adjustment made in respect of commission earned by Indian Branch for marketing of derivative products (60% of INPV was attributed)	Ground No.6	Ground No.5
TP adjustment with regard to interest on call borrowings	Ground No.9	Ground No.8
Interest under section 244A to be taxed as per the rate prescribed in Article 12 of the Treaty	Ground No.14	Ground No.10,11 and 12
Credit for TDS on interest on Income Tax refund	Ground No.16	Ground No.13
Levy of interest under section 234B	Ground No.17	Ground No.14
Initiating penalty proceedings under section 274 r.w.s.270A	Ground No.20	Ground No.15
Validity of the directions issued by the DRP	Ground No.1	
Addition towards interest on fixed deposits	Ground No.10	
Credit for TDS on interest from ECB	Ground No.13	
Setoff of business against the income received under section 244A of the Act	Ground No.15	
Incorrect granting of interest under section 244A	Ground No.19	
Levy of interest under section 234D	Ground No.18	
Initiating penalty proceedings under section 274 r.w.s.270A	Ground No.20	

104. From the perusal of the above table, it is clear that all the issues pertaining AY 2019-20 are common to AY 2018-19 except for Ground No.1, 10, 15, 19, 18 & 20. Since the facts pertaining to rest of the grounds are identical we are of the considered view that our decision with respect to these issues in AY 2018-19 are mutatis mutandis applicable to AY 2019-20 also. It is ordered accordingly.

105. During the course of hearing the ld AR submitted that Ground No.1 pertaining to the legal issue of validity of the DRP order and Ground No.15 on setoff of business are not pressed. The ld AR further submitted that Ground No.10

on addition towards interest on deposits is also not pressed due to the smallness of the amount. Accordingly these grounds are dismissed as not pressed.

106. Ground No.13 and 18 to 20 are consequential and do not warrant separate adjudication.

107. In result appeal for AY 2010-11 to AY 2019-20 filed by the assessee are partly allowed and appeal filed by the revenue for AY 2010-11 and 2011-12 are dismissed.

Order pronounced in the open court on 20-03-2025.

Sd/-	***Sd/-***
(BEENA PILLAI)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai