IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, D: NEW DELHI
BEFORE VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER
ITA No.- 7212/Del/2017
[Assessment Year: 2013-14]

The Bank of Tokyo-Mitsubishi UFJ Ltd. 5th Floor, Worldmark-2, Asset 8, Aerocity, NH-8, New Delhi 110037	Vs	The DCIT, Circle-3(1)(1), International Taxation, New Delhi
PAN- AABCT-3880-D		
Assessee		Revenue

Assessee by	Shri Percy Pardiwala, Sr. Advocate with Shri Hiten Thakkar, Advocate
Revenue by	Shri M.S Nethrapal, Sr. DR

Date of Hearing	**16.12.2025**
Date of Pronouncement	**13 .03.2026**

ORDER

PER BRAJESH KUMAR SINGH, AM,

This appeal filed by the assessee is directed against the Final Assessment Order (FAO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 31-10-2017 pursuant to the directions of the Hon'ble Dispute Resolution Panel (DRP) vide order dated 18-09-2017 u/s 144C(5) of the Act for Assessment Years (AY.) 2013-14.

2. Brief facts of the case : The assessee filed its return of income for assessment year 2013-14 on 30-11-2013 declaring total income of Rs. 499,28,25,060/-. Later, the return was revised by the assessee on 31-03-2015 and income from ECBs amounting to Rs. 668,07,07,663/- was also declared by the assessee. The revised return was filed at the total income of Rs. 1167,35,32,730/-. The case was selected for scrutiny and notice under section 143(2) of the Act dated 04-09-2014 was issued to the assessee.

2.1 During the year under consideration, the assessee had received an amount of Rs, 668,07,07,663/- (after grossing with the amount of tax) in respect of interest income of its head office and other overseas branches on External Commercial Borrowing (ECB) from India. The assessee had not included this income in its computation of total income in original return, however, in revised return the same was offered to tax. During the assessment proceedings the assessee claimed that this amount should be excluded from its income since the same was not taxable in India. The assessee was asked by the Assessing Officer to explain the reasons for including this income in the computation of total income and the reasons for claiming it as exempt during the course of assessment its proceedings. The assessee filed reply in support of its claim.

2.2 However, the same was not accepted by the Assessing Officer and AO taxed the said amount of Rs, 668,07,07,663/- in the draft assessment order dated 26-12-2016 under section 144 C (1) of the Act. Further, the Assessing Officer did not

allow the claim of the assessee for deduction u/s 44C of the Act in respect of ECB interest income by observing that if any addition is made in assessee's income on the ground that the income of ECB interest is taxed under the provisions of Article 11(2) of the India-Japan DTAA on gross basis then there was no question of allowing any deduction from such income. The relevant extracts of the draft assessment order are reproduced as under :

16. *The assessee's contentions are duly considered. However, it is found that in the light of provisions of the Act as well as provisions of India-Japan DTAA the contentions of assessee are not acceptable. The fact that income from ECB interest has accrued or arose in India is not under dispute. The only disputed whether it is chargeable to tax in India or not. In this regard, assessee has taken the help of Article-11(6) of the India-Japan DTAA and has claimed that the income is not taxable in India as it is effectively connected to the assessee's PE in India. This argument needs to be examined in the light of the provisions of Article- 11(6) which is reproduced below-*

"6. The provisions of paragraphs 1, 2 and 3 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 14, as the case may be, shall apply."

17. From the above provisions it is clear that any interest arising to the assessee will not be taxable only if 'the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base.' In this case the loans in respect of which interest income accrued to the assessee were given by the head office or other overseas branches of the assessee. These loans

were not given by the Indian branch which is treated as Permanent Establishment of the assessee. Therefore, these loans have nothing to do with the assessee's PE in India. If the loan itself were not given by the PE nor the same were accounted for in the books of account of the PE, it is beyond any stretch of imagination that the debt claims (loans) in respect of which interest in question was paid were effectively connected to the PE in India.

18. Further, the assessee has claimed that the PE has performed certain services in respect of these loans (such services are termed as 'syndication services'). However, performance of such services may not render such debt claims effectively connected to the PE. These services may be of services pertaining to marketing and sales promotions services. The PE has also been remunerated in respect of these services, which has been accounted for by the PE in its books of account. From this very fact itself, it is clear that the interest and debt claims in question are not connected with the PE in anyway because no one can provide services to himself and receive charges for the same.

19. Assessee has tried to confuse two things into one. It has already been stated in foregoing paras that the PE and head office/other overseas branches are two distinct entities. The loans given by head office and other overseas branches are not connected with the PE in any way because such loans were granted from the funds belonging to head office and other overseas branches in the course of their normal business. In fact if any loan or amount was advanced to the PE by the head office or any other overseas branch, interest was charged from the PE by such overseas branch or head office. Therefore, the claim that loans/ debts advanced by head office or overseas branches are effectively connected to the PE is devoid of any merit and accordingly rejected.

20. In view of the above discussion it is clear that assessee's claim that in view of provisions of Article-11(6) of the India-Japan DTAA, the income from ECB interest is not chargeable to tax in India is not correct and accordingly not accepted. Therefore, it is held that the interest in question is chargeable to tax in India in view of Article-11(2) of the India-Japan DTAA.

21. Further, it is to be noted that assessee itself has offered this income to tax in its revised return of income after due consideration of provisions of IT Act as well as DTAA between India and Japan. Therefore, even if the income is otherwise not taxable, it has to be claimed in the return of income. No fresh claim can be made

/ allowed during the assessment proceedings, if the same was not made in the return of income or in revised return. The principle is clearly expounded by the Hon'ble Supreme Court of India in the case of Goetze (India) Ltd. vs. CIT (284 ITR 323) where the question before the Hon'ble Court was whether the assessee could make a claim for deduction other than by filing a revised return." The Apex court after examining the facts of the case held that the Assessing Officer does not have any such power. In this regard, relevant part of the order is reproduced below-

> *"The decision in question is that the power of the Tribunal under section 254 of the Income Tax Act, 1961, is to entertain for the first time a point. of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal under section 254 of the Income Tax Act, 1961."*

23. The assessee has also claimed deduction u/s 44C of the Act in respect of ECB interest income if any addition in this regard is made in assessee's income. Assessee's this contention is also considered and not accepted. The income of ECB interest is taxed under the provisions of Article 11(2) of the India-Japan DTAA on gross basis, therefore, there is no question of allowing any deduction from such income.

3. Aggrieved with the said order the assessee filed its objections before the Ld. DRP which rejected the objections of the Assessee vide its order dated 18-09-2017. The relevant extracts of the order of the Ld DRP are reproduced as under :

> *"2.4.2 Before the DRP the assessee has reiterated its submissions made before the AO. The assessee has contended that this matter has been allowed by the Hon'ble ITAT Deihi in favour of the assessee vide its order dt. 25/01/2017 in ITA No. 1174/Del/2015 in the case of the*

assessee for AY 2010-11. The Hon'ble ITAT has observed as under:

"26. After having gone through the above cited decision, we find that Mumbai Bench of the Tribunal in the case of Credit Lyonnais (supra) has held that ECB interest is not attributable to the India branches of the assessee and only the fee is taxable in the hands of the Indian branches of the assessee for the role played by it in arranging the ECB. The Hon'ble High Court of Delhi in the case of GE Package Powerink (supra) has been pleased to hold that no interest under section 234B of the Act can be levied where the payment to non-resident payee is subject to tax deduction at source. In the present case, the Assessing Officer himself had admitted by grossing up the ECB interest by the amount of tax borne by the borrowers that tax at source has been deducted. We are thus of the view that no interest under section 234B of the Act can be levied for the tax demand on account of ECB interest and interest u/s 234B is also not chargeable since ECB interest received by the assessee from the borrowers was subject to tax deduction at source u/s 195 of the Act. The Assessing Office is thus directed t delete the addition made on account of interest received from ECB given to Indian borrowers. The ground NO. 7 is accordingly allowed."

Further, the Hon'ble ITAT in its order of dt. 19/09/2014 in the assessee's case for AYs 2007-08 and 2008-09 [2014] 49 taxmann.com 441 (Delhi - Trib.) has observed as under:

"82.2 The syndication fee was received by Indian Branch for the aforementioned services. But that part of interest earned by head office/foreign branches which was attributable to the PE in India was not returned by assessee. At page 203 of the paper book, the assessee has admitted that the Indian branches of the bank play an active roie in the disbursement of ECB loan and also regularly monitor the same. Therefore, the ECB loans disbursed by the Head office/foreign branches were effectively connected with the Indian branches. Therefore, interest income had to be appropriated to the PE in India as it had accrued and arisen in India. Now the question would be as to how much interest is allocable to the PE in India. The AO has taxed 10% of the gross interest. The assessee's contention is that the interest paid to head office/foreign branches are net of tax for which the loan agreements have to be examined which has been filed by way of additional evidence, We agree with Id. Sr. Counsel that these agreements, though filed as additional evidence, are necessarily to be taken into consideration for arriving at

the correct taxability of interest. We, therefore, admit these agreements and restore the matter to the file of AO for de novo consideration."

Thus, while the Hon'ble ITAT held that the ECB loans disbursed by the Head office/foreign branches were effectively connected with the Indian branches and therefore interest income had to be appropriated to the PE in India as it had accrued and arisen in India, the matter was restored to the file of the AO for consideration of the loan agreements for arriving at the correct taxability of interest. The Hon'ble Delhi High Court declined to frame question of law on this issue in its order dt. 08/04/2016 in ITA 604 & 605/2015. Thereafter, the fresh computation was made by the AO which was confirmed by the DRP.

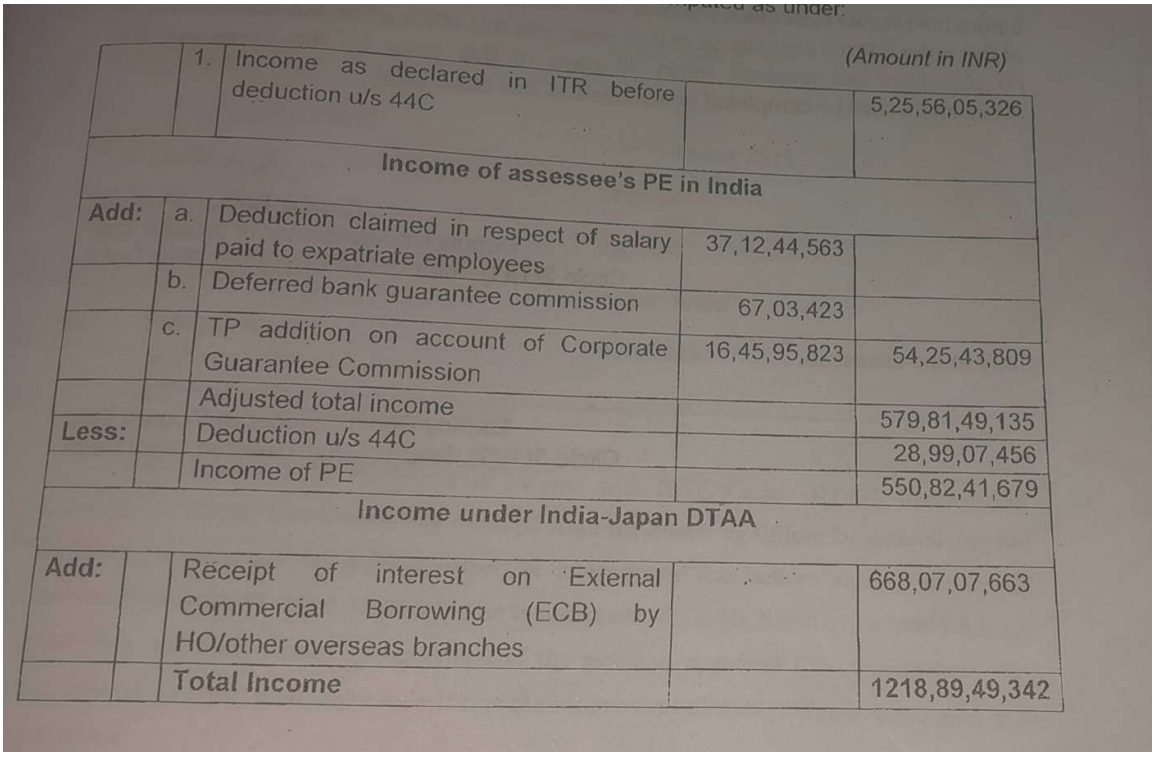
2.4.3 However, as per facts of the matter, as brought out by the AO, the interest income had accrued and arisen from India and therefore taxable in India as per the provision of section 9(1)(v) r.w. Article 11 of the Double Taxation Avoidance Agreement ("DTAA") between India and Japan. The said interest has been received by the HO/Foreign Branches which has not been offered for tax and the assessee has itself declared the interest income from ECBs in its return of income for AY 2013-14. The, ECB do not form part of the asset base of the PE in India and is not effectively connected with the PE. The ECB interest is, therefore, chargeable to tax in India in terms of Article 11 of the Indo-Japan DAA on gross basis beside the fee received by the Indian Branch/PE for its role played in arranging the ECBs.

2.4.4 in this view of the matter the objection is rejected.

(emphasis supplied by us)

4. Upon receipt of the above directions the AO passed the final assessment under section passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 31-10-2017 in which the said income Rs. 668,07,07,663/- was added by the Assessing Officer not as income of assessee's PE in India but as "Income under India-Japan DTAA" and deduction under 44C section of the Act on the said income Rs, 668,07,07,663/- was denied by the Assessing Officer. The calculation of the taxable income in the final assessment order by the AO is

reproduced as under.



(Amount in INR)

	1.	Income as declared in ITR before deduction u/s 44C		5,25,56,05,326
Income of assessee's PE in India				
Add:	a.	Deduction claimed in respect of salary paid to expatriate employees	37,12,44,563	
	b.	Deferred bank guarantee commission	67,03,423	
	c.	TP addition on account of Corporate Guarantee Commission	16,45,95,823	54,25,43,809
		Adjusted total income		579,81,49,135
Less:		Deduction u/s 44C		28,99,07,456
		Income of PE		550,82,41,679
Income under India-Japan DTAA				
Add:		Receipt of interest on External Commercial Borrowing (ECB) by HO/other overseas branches		668,07,07,663
		Total Income		1218,89,49,342

4.1 Further, the Assessing Officer assessed the income of the assessee at the total income of Rs. 1215,60,19,956/- under the normal provisions of the Act and India-Japan DTAA. The Assessing Officer taxed the income of Rs. 650,73,04,828/- from ECB @ 10% as per provisions of Article 11of India-Japan DTAA and amount to Rs. 17,34,02,835/- from ECB to be taxed @ 5% under section 194 LC of the Act.

5. Aggrieved with the said order the assessee filed an appeal before the Tribunal. The co-ordinate Bench of the Tribunal by its order dated 11-06-2018 in ITA No. 7212/Del/2017 allowed the appeal of assessee against which the department filed an

appeal before the Hon'ble Delhi High Court. However, the assessee before the Hon'ble Delhi High Court submitted they are willing to give up their challenge to the addition of INR 668,07,07,663/- which represented the interest received by the Head Office and Branches of the respondent-assessee in respect of External Commercial Borrowings given to Indian customers and restricted its dispute to its claim deduction under 44C section of the Act on the said income Rs, 668,07,07,663/-. The Hon'ble Delhi High Court by its order dated 06-02-2025 in the appeal no. ITA no. 1459/2018 & CM APPL.22499/2019 in assessee's own case after observing that the solitary issue which would thus appear to survive for consideration would be whether the respondent-assessee would be entitled in law to claim various deductions which are otherwise permissible and flow from the Income Tax Act, 1961 pursuant to INR 668,07,07,663/- coming to be added to its total income. The relevant extracts of the order of the Hon'ble Delhi High Court are reproduced as under :

> *" 1. We had in terms of our order of 20 December 2023, taken note of the questions of law which were admitted for consideration and had been identified by the Court in its order of 09 May 2019 and which reads as follows: -*
>
> *xxxxxxxx*
>
> *3. Whether the ITAT has erred in law and on facts in deleting the addition of Rs.6,68,07,07,663/- on account of interest received by HO/foreign branches on External Commercial Borrowings (ECBs) given to Indian Borrowers? "*
>
> *xxxxxxxx*

3. The assessee now and during the course of the pendency of this appeal, have instructed Mr. Pardiwalla, learned senior counsel to make a statement that they are willing give up their challenge to the addition of INR 6,68,07,07,663/- and which represented the interest received by the Head Office and Branches of the respondent-assessee in respect of External Commercial Borrowings given to Indian customers.

4. Although, it was this issue which was also sought to be addressed by way of a cross objection and the maintainability of which was questioned by the appellant, we find that in order to render a closure to the dispute which now stands narrowed down to the aforesaid issue only, the end of justice would warrant the appeal being allowed in part and in light of the statement made on behalf of the respondents for the consideration of the Tribunal.

5. The solitary issue which would thus appear to survive for consideration would be whether the respondent-assessee would be entitled in law to claim various deductions which are otherwise permissible and flow from the Income Tax Act, 1961 pursuant to INR 6,68,07,07,663/- coming to be added to its total income.

6. Since this aspect does not appear to have been examined or considered by the Tribunal, we allow and dispose of this appeal by remitting this issue for the consideration of the Tribunal.

7. All rights and contentions of the respective parties on merit are left open.

8. We are informed that the tax liability in respect of the remittance of INR 6,68,07,07,663/- was duly borne by the Indian borrowers and the tax in respect thereof deducted at source. The aforesaid statement shall be subject to due verification by the Tribunal.

9. Since we have disposed of the appeal on the aforesaid terms and in light of the subsequent developments, we leave the question of whether a cross objection would be maintainable in an appeal under Section 260A of the Act open to be considered in an appropriate case."

6. Before us, the Ld Sr. Counsel drawing attention to the provisions of section 44C of the Act and the explanation to clause (i) of section 44C of the Act submitted that there was no restriction to restrict the claim of the assessee for deduction @ 5 % under section 44C of the Act on the ECB income of Rs. 668,07,07,663/- despite the said income being taxed under Article 11(2) of the India-Japan DTAA. In this regard the Ld AR relied upon the decisions of the Hon'ble Bombay High Court in the case of Bombay High Court in case of CIT vs. Deutsche Bank AG. (284 ITR 463) (Bom.) and American Bureau of Shipping vs. CIT (263 ITR 590) (Bom.). Further, the assessee also relied upon the order dated 01-01-1986 of the ITAT Kolkata in the case of_Linotpye & Machinery ltd. vs income tax officer [1986] 25 TTJ (Cal).

6.1 The Ld AR also filed a written submission dated 18-08-2025 and relevant extracts of the same are reproduced as under :

"1. The aforesaid appeal was initially disposed off by the Tribunal vide an order dated 11 June 2018. The Revenue filed an appeal before the Hon'ble Delhi High Court wherein one of the questions raised was regarding the taxability of interest on External Commercial Borrowings (ECBs) received by the Appellant's Head Office/overseas branches from the Indian borrowers (Question - 3). On 6 February 2025, the High Court disposed off the appeal of the Revenue and, inter alia, the question of taxability of interest on ECBs was decided in favour of the Revenue since the assessee conceded to the taxability of the same and as a consequence, (a) the issue of deduction under section 44C of the Act and (b) the credit for tax deducted at source (TDS) on the aforesaid interest income was

remanded back to the Tribunal as those issues were not decided by the Tribunal in the order dated 11 June 2018.

Facts of the case:

2. *The assessee is a company incorporated as per laws of Japan and carries on the business of Banking in India. The banking business in India is carried out through its branches in Mumbai, Delhi, Chennai. The assessee being a resident of Japan is entitled benefits of Double Taxation Avoidance Agreement between India and Japan ("the DTAA"). The branches in India constitute a permanent establishments (PEs) of the assessee accordingly, the income of the assessee is computed in terms of Article - 7 of the DTAA*
3. *During the previous year relevant to AY. 2013-14, the assessee received interest on ECBs of Rs. 668,07,07,663 on the loans given by the Head Office (HO) to the Indian borrowers. The aforesaid loans are serviced by the PEs in India for which the PEs have offered an amount of Rs. 51,64,11,900 to tax. The interest received by the HO is taxed @ 10% by virtue of Article - 11 of the India-Japan DTAA and the amount received by the PE for servicing the loans is offered to tax under Article - 7 of the DTAA.*
4. *During the course of assessment proceeding, the Assessing Officer (AO) sought to tax the interest on ECBs in the hands of the assessee as according to him the same was taxable @10% under Article - 11 of the DTAA The issue of taxability has been accepted by the assessee before the High Court therefore, the same does not arise for consideration. However, during the assessment proceeding, the assessee had filed a submission and made an additional claim before the AO that in the event the interest ECBs is taxed in the hands of the assessee, then as a consequence, the deduction for head office expenditure under section 44C of the Act ought to be recomputed after taking into account the interest on ECB to be added to the total income of the assessee.*
5. *The AO, in the draft assessment order, taxed the interest on ECBs in the hands of the assessee however, rejected the claim of the assessee to recompute the deduction for head office expenditure on the ground that the interest on ECBs is taxed under the provisions of Article - 11(2) of the India-Japan DTAA on gross basis, therefore, there is no question of allowing any deduction from such income (Para 23 Pg. 222). The assessee challenged the denial of deduction under section 44C of the Act by filing objections before*

the DRP (Ground No. 4.2 Pg.9) however, the DRP has not decided the aforesaid issue in the order dated 18 September 2017.

6. *Accordingly, in the final assessment order, the AO reiterated the stand taken by him in the draft assessment order and computed deduction for head office expenditure under section 44C of the Act without considering the interest on ECBs taxed in the hands of the assessee (Para 41 Pg. 174).*
7. *The assessee brings to the notice of the Hon'ble bench that the aforesaid issue had come up for consideration for the first time before the Tribunal in assessee's own case for AY. 2015- 16 (ITA No. 7895/Del/2019) wherein the Tribunal approved of the reasoning of the AO and denied a deduction under section 44C of the Act holding as under:*

> *"24... It is the option of the assessee to govern by the provisions of the Domestic Law or DTAA, whichever is more beneficial to assessee. Bat there is no mandate that assessee can opt for lower taxes as per DTAA and claim expenses as per Domestic law. Therefore, there cannot be any farther expenditure claimed as deduction from that income. That will dilute the amount of tax payable on interest income in the source country as payable according to the Doable Taxation Avoidance Agreement. There is no mandate in the DTAA to grant any such deduction from income taxed u/s 11(2)) of the Act. In view of this, we do not find any infirmity in the order of the learned assessing officer in not granting deduction u/s 44C of the act from the above income which is taxed under article 11(2)) of the DTAA engross basis at the rate of l0%. As we hold that there is no need to go to section 44C of the act in this case, reliance placed by the assessee on several judicial precedents with respect to the definition of meaning of total income/adjusted income is not relevant. In view of this ground number (4) of the act of the appeal is dismissed"*

8. *The aforesaid order for AY. 2015-16 was followed by the Tribunal in assessee's appeal for AY. 2014-15 (ITANo. 8112/Del/2018).*

<u>Submissions of the assessee;</u>

9. *The assessee submits that the order of the Tribunal for the AY. 2015-16, with respect, is erroneous and requires reconsideration as the Tribunal has*

proceeded on an incorrect basis that the assessee is claiming a deduction of head office expenditure under section 44C of the Act against the interest on ECBs which is taxed under Article - 11 of the DTAA

10. *It is submitted that the assessee is claiming deduction under section 37(1) for the head office expenditure incurred outside India against the profits of the PE which are assessed under the provisions of the Act in India. The assessee is not claiming any deduction against the interest on ECBs which is taxed under Article - 11 of the DTAA The assessee submits that the head office expenditure incurred by the assessee outside India which is relatable to income of the PEs in India is allowable as a deduction under section a 37(1) of the Act. Similarly, when the income of the PE is chargeable under Article - 7 (1) of the DTAA para (3) of the Article - 7 allows a deduction for the expenses incurred for the purpose of the PE whether incurred in the Contracting State or elsewhere. Therefore, head office expenditure claimed by the assessee is a deduction against the profits of the PE computed by the AO under Article - 7 of the DTAA.*

11. *Section under 44C of the Act is a provision which puts a ceiling on the deduction that can be allowed, for the expenses incurred outside India by a Head Office termed as "head office expenditure", and allows the deduction only up to 5% of the adjusted total income. It is pertinent to note that although the deduction is allowed under the head "Profits and gains from business or profession" however, the same is computed with reference to the total income computed under the provisions of the Act. clause (i) of Explanation to section 44C provides that the total income computed under the provisions of the Act is to be adjusted by excluding the deductions under section 32, 32A 33, 33A, etc. and deduction is to be computed based on such adjusted total income. In this regard, the assessee draws the attention of the Hon'ble bench to the judgment of Bombay High Court in case of CIT vs. Deutsche Bank AG. (284 ITR 463) (Bom.) as under:*

> *"7... We do not find any merit in the arguments advanced on behalf of the department As stated above, section 44C begins with a non obstante danse. It restricts deduction to the least of the three parameters mentioned in clauses (a}, (b) and (c) of section 44C Section 44C begins by a non obstante dause which states that notwithstanding anything to the contrary contained in sections 28*

to 43A, deduction in respect of head office expenditure shall be restricted to the least of the three deductions mentioned in clauses (a), (b) and (c). Therefore, section 44C overrides the provisions of sections 29 to 37 of the Income- tax Act. Section 44C is not conferring deductions on the assessee. It is restricting the deduction under section 37(1) of the Act by virtue of the overriding provisions contemplated by section 44C. Therefore, when the working of section 44C fails, the entire section 44C becomes non-workable and consequently, the assessee would become entitled to the full deduction under section 37(1) of the Act. Section 44C restricts the head office expenditure. Section 44C provides for three parameters in the matter of computing deduction for head office expenditure incurred by a non-resident. Section 44C specifically states that deduction for the head office expenditure should be restricted to the least of the three parameters. The expression used in section 44Cis "whichever is the least". This expression show that the least of the three parameters should be taken into account for computing allowance under section 44C for head office expenditure incurred by the non-resident Therefore, in the absence of one of the parameters out of the three parameters, the entire section becomes non-workable. Hence, the entire section 44C stands ruled out This is the ratio of the judgment of the Calcutta High Court also in the case of Rupenjuli Tea Ca Ltd v CIT[1990] 186 HR 3011 with which we respectfully agree... "

12. *For eg. If an assessee has incurred a head office expenditure of Rs. 10 and the adjusted total income of the assessee is Rs. 100 then as per the provisions of section 44C of the Act, the assessee entitled to a deduction of only Rs.5 (5% of Rs. 100) and the balance amount is to be ignored while computing income under the head "Profits and gains from business or profession". In the event, the provisions of section 44C are not applicable, the entire head office expenditure of Rs. 10 is allowable as a deduction under section 37(1) of the Act as held by the Bombay High Court in case of Deutsche Bank (supra).*

13. *The assessee submits that the aforesaid aspect of the matter has been completely missed by the Tribunal while deciding the issue for AY. 2015-16*

and the Tribunal proceeded on an erroneous basis that the assessee is seeking to claim a deduction of expenses against the interest on ECBs and failed to appreciate that the deduction is being claimed by the assessee for head office expenditure against the profits of the PE.

14. *It is further submitted that the Tribunal in AY. 2015-16 has not considered the provisions of clause (i) of the Explanation to section 44C of the Act which provides that the total income computed under the Act is adjusted by excluding the items specified in clause (i) of Explanation to section 44C, and, it is pertinent to note that the same does not exclude the income which is taxed under the Act at a special rate provided under the Act or DTAA. Hence, the Tribunal missed out that the adjusted total income includes the interest on ECBs brought to tax by the AO as can be seen from the final assessment order wherein the AO himself has included the interest on ECBs of Rs. 668,07,07,663 and computed total income at Rs. 1215,60,19,956. Therefore, the deduction computed by the AO under section 44C of the Act excluding the interest on ECBs is not supported by the provisions clause (i) of Explanation to section 44C. In this regard, the assessee relies on the judgment of Bombay High Court in case of American Bureau of Shipping vs. CIT (263 ITR 590) (Bom.) wherein the High Court held that adjusted total income includes all the taxable income under the provisions of the Act, The relevant portion is extracted as under:*

> *"6... Now whether one looks at Explanation(i) or Explanation(ii), it is clear that both these Explanations referred to the concept of Total Income. The expression "Total Income" has been defined under section 2(45) to mean total amount of income referred to in section 5 and computed in the manner laid down under the provisions of the Income-tax Act, Therefore, the words "Total Income" in the two Explanations connote Taxable Income... "*

15. *It is submitted that the order of the Tribunal for the A.Y. 2015-16 is per incuriam as the same has not considered the binding precedents submitted above and has failed to consider the provisions of clause (i) of Explanation to section 44C of Act therefore, the same is not binding on the Hon'ble bench deciding the present appeal. In this regard, the Appellant relies on the judgment of Supreme Court in case of State of MP vs. Narmada Bachao Andolan (2011) 7 SCC 639) (Para 65 & 68).*

16. Therefore, the denial of deduction under section 44C of the Act after excluding the interest on ECBs which is included in the total income chargeable under the provisions of the Act is unsustainable and bad in law.

In view of the above submissions, the Appellant submits that the aforesaid grounds in the appeal remanded back by the High Court deserve to be allowed."

7. The Ld DR on the other hand submitted that this issue was squarely covered by the order dated 16-10-2020 of the co-ordinate Bench of the Tribunal in the assessee's own case in ITA No. 7895/Del/2019 for AY 2015-16. The Ld DR also filed a written submission and relevant extracts of the same are reproduced as under :

1. *The assessee is a company incorporated as per the laws of Japan and carries on die business of banking in India. It is stated that die assessee, being a resident of Japan, is entitled to benefits of die Double Taxation Avoidance Agreement between India and Japan. The only issue that arises now is whether deduction u/s 44C of the Income Tax Act should be allowed on interest taxed on a gross basis under the provisions of the India-Japan DTAA. The assessee has contended that there should be a liberal interpretation of the DTAA, and the deduction should be allowed even when the interest is taxed on a gross basis.*
2. *Covered issue in favor of Department: In this case, this issue is already settied in the assessee's own case for AY 2015-16 (ITA No. 7895/Del/2019), wherein the Tribunal approved the reasoning of the AO and has stated that there is no mandate in the DTAA to grant any such deduction from income taxed u/s 11(2) of the Act. It was upheld that there is no infirmity in the order wherein there is no deduction u/s 44C of the act from the above income. This is already decided in the department's favor, and there is no ambiguity in the interpretations.*
3. *No scope for liberal interpretations of DTAA: The Supreme Court consistently underscores that DTAAs are international agreements that must be interpreted as treaties under principles of customary international law and the Vienna Convention on the Law of Treaties (VCLT). Treaties are to be interpreted*

according to the ordinary meaning of the treaty text in light of context, and object and purpose, with care to avoid interpretations that render any provisions redundant, or absurd. In Nestle SA(2023), Hon'ble Supreme Court has held that ordinary meaning of words must be given effect to unless the context requires otherwise. The extracts of the same are enclosed below:

"Although India is not a party to the Vienna Convention on the Law of Treaties, the convention contains principles of customary' international law on treaty interpretation which are broadly applicable in the Indian context... The ordinary meaning of words must he given effect to unless the context requires otherwise... Care has to be taken not to render any word or phrase redundant or otiose."

The Court held that different DTAAs must be respected in their own terms, cautioning against broad, uniform, or purposive readings that override the specific negotiated text. The Court analysed the MFN clauses in various India DTAAs (e.g., with Netherlands, France, Switzerland) and distinguished triggers for their operation—automatic application versus requiring government notification or bilateral negotiation.

"The word 'is' in the MFN clause describing OECD membership refers to the status at the time the benefit is claimed, not necessarily at treaty signing... However, extending benefits under MFN also requires procedural compliance (notifications) to bring the amendments into effect." The practical approach is that MFN benefits are not self-executing in India without notification, reflecting strict adherence to procedural formalities that respect legislative supremacy. So clearly without a notification between both the countries, deduction cannot be automatically imported into the provisions of the DTAA.

4. *Even in the case of In Hyatt International (2025), the Hon'ble Supreme Court elaborated on the concept of PE under the DTAA consistent with OECD Models, emphasizing the strict definition and requirements that create a taxable presence in India.*

"PE means a fixed place of business through which business is wholly or partly carried on... Must satisfy the 'disposal test': the enterprise must have the right to use premises to conduct its business... The OECD commentary and prior judgments dictate stable, productive, and independent presence for PE."

The Court held that incidental or temporary presence of personnel does not create a PE, but a long-term agreement giving control over premises and business operations meets the test. So the assessee's argument that liberal interpretation is possible is not applicable while interpreting the DTAA, and the principle laid down is strict interpretation of the words used to the DTAA.

5. *Gross Basis Judicial Interpretation does not allow for any deduction: Now in a general sense, the word "gross basis" has been interpreted by various judicial precedents as one where there would be no deduction allowable. In the case of CIT v. Smt. Santosh Jain (Punjab & Haryana HQ 296 ITR 324, the court held that when income is computed by applying a gross profit rate, the question of making disallowances under provisions like section 40A(3) does not arise. The gross profit rate computation is deemed to have allowed for expenses; hence, no separate deduction or disallowance would be applicable. The extracts are reproduced,*

   "When income is computed on a gross profit basis, it excludes detailed examination of claimed expenses since the gross profit rate already assumes such expenses."

   In the case CIT vs. Banwari Lal Banshidhar, the Allahabad High Court held that where income is computed by applying a gross profit rate, no disallowance can be made under sections like 40A or 14A. The gross profit approach essentially accepts certain profit margins as net income inclusive of expenses. The extracts are reproduced below:

   "No disallowance is permissible where income is computed as a percentage of gross receipts or turnover."

   So, the assessee's contention to import domestic deduction to DTAA is a violation of the Supreme Court judgement of strict interpretation of DTAA and is not permissible.

6. *Section 44C is chargeable under the head "Profits and Gains of Business or Profession." - Section 44C lays down the principles of deduction of head office expenditure in the case of non-residents. The extracts of the same are reproduced below:*

   44C. Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, no allowance shall be made, in computing the income chargeable under the head "Profits and gains of business or profession", in respect of so much of the expenditure in the nature of head office expenditure as is in excess of the amount computed as hereunder, namely:-

   (a) an amount equal to five per cent of the adjusted total

   income; or

   (b) [***]

   (c) the amount of so much of the expenditure in the nature of

   head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India, whichever is the least:

Provided that in a case where the adjusted total income of the assessee is a loss, the amount under clause (a) shall be computed at the rate of five per cent of the average adjusted- total income of the assessee.

Now a careful perusal of section 44C clearly mentions the head income chargeable under the head "profits and gains of business or profession." It would be clear that sections 28 and 43A are all deductions for the determination of business income, and this section is mainly for the determination of income from business. Now it is clear that section 44C is to place a limit on head office expenditure on profits and gains of business or profession. The limit of 5% of adjusted total income or the actual head office expenditure incurred, whichever is the least, should be deducted. In a sense the head office expenditure cannot be more than 5%. Business profits in the DTAA are defined by Article 7, wherein it is clearly mentioned that when the profits of a permanent establishment are there, then the deductions can be allowed for executive and general administrative expenses.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses that are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere.

However, in the protocol notes in 1989, it is clearly mentioned that

7. With reference to paragraph 3 of article 7 of the Convention, it is understood, that in India the deductions in respect of the executive and general administrative expenses as referred to in the said paragraph shall be allowed in accordance with the domestic law of India, but such deductions shall in no case be less than what are allowable under the Indian Income-tax Act as effective on the date of signature of this Convention.

The convention clearly gave effect to section 44C of the Income Tax Act, wherein the upper limit, of 5% of adjusted total income as Head Office Expenditure was allowed even under the DTAA. However, this is not the same with interest income. The interest income under the DTAA has been charged on a gross basis in at 10% and the provisions of Article 11 is enclosed below

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that Contracting 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.

Clearly the wording in the DTAA is clear that what needs to be charged is only 10% of the gross amount of interest, which is a very nominal amount. In this AO has already taxed the same at 10% of the gross. Now in this case the AO has clearly mentioned that the assessee has declared Rs 525,56,05,326/- as income declared before deduction u/s 44C. Now after this addition was made and adjusted, total income was allowed and was determined to be Rs 579,814,913,500/-. On this adjusted total income is determined, and head office expenditure is allowed at 5%, which is the correct interpretation as per section 44C. AO has not added the receipt of interest on ECBs and wherein Rs 650,73,04.828/- of the interest from ECB is charged under 10% as per provisions of ..Article 11 of the India Japan DTAA on a gross basis. There is no ambiguity, and there is no need for any reference to a higher bench. Hence, this issue, which has been correctly decided by the Hon'ble Bench, may be followed, and favourable orders may be passed in favor of the department.

8. In response to the above written submission of the Ld CIT (DR) the assessee filed a rejoinder dated 23-12-2025 and the relevant extracts of the same are reproduced as under :

"Rejoinder to Written Submissions of Revenue

1. *During the course of the hearing on 16 December 2025, the learned Department Representative ("DR") handed over a copy of his written submissions. The Appellant seeks to file its rejoinder to the arguments put forth in the written submission by the Revenue which given herein below.*
2. *With regard to Para-2 of the Written submission, the Appellant would like to submit that the order of the Tribunal for A.Y. 2015-16 is perineurium as:*

a. *the Tribunal has proceeded on an erroneous basis that the Appellant seeking deduction of expenses against the interest income taxed under Article -11 of the DTAA.*
b. *the Tribunal has not considered the provisions of clause (i) of Explanation — 1 to section 44C of the Act which does not exclude interest income taxed at a special rate under the DTAA or the Act.*
c. *the Tribunal has not considered the binding judgments of Bombay High Court in case of CIT vs. Deutsche Bank A.G. (284 ITR 463) (Bom.) and American Bureau of Shipping vs. CIT (263 ITR 590) (Bom.) which have interpreted the provisions of section 44C differently than done by the Tribunal in A.Y. 2015-16.*

3. *With regard to Para — 3 of the Written Submissions, the Appellant would like to submit that the issue before the Tribunal is whether the Assessing Officer was correct in computing the limit of deduction provided under section 44C of the Act without considering the interest income chargeable to tax at a special rate under the DTAA or the Act. The Appellant submits that there is no dispute on the entitlement to claim a deduction for the expenses incurred by the head office, which has been granted by the AO in the assessment order. Therefore, the argument of the learned DR that in the absence of a notification, the Appellant is not entitled to a deduction of the expenses incurred by head office is contrary to the assessment order wherein the AO himself has granted the deduction by computing limits provided under section 44C of the Act (Pg. 174 of the appeal set).*
4. *In any case, the Appellant submits that the protocol to the India-Japan DTAA, which forms part of the DTAA, specifically provides in Para — 7 that the deduction in respect of executive and general administrative expenses (defined as "head office expenditure" under section 44C of the Act) shall be allowed in accordance with the domestic laws of India. The protocol forms part of the DTAA and was notified along with DTAA vide Notification No. GSR 101(E)dated 1 Match 1990 which has been relied upon by the learned DR himself later on in Para — 6 of his Written Submission. Therefore, the reliance placed by the DR on the judgment of Nestle SA (458 ITR 756) (SC) to argue that a notification is required to claim a deduction by the Permanent Establishment in India is incorrect and contrary to facts on record.*
5. *With regard to Para - 4 of the Written Submissions, the Appellant would like to submit that the judgment of Hyatt International (478 ITR 238) (SC) is not relevant to decide the issue arising in the present appeal as it was not concerned with the interpretation of Article — 11 of the DTAA or section 44C of the Act. The only issue arising for consideration of the Tribunal in the present appeal is whether the limit provided under section 44C of the Act is required to be computed without considering the interest income chargeable to tax at a special rate even though it forms part of the total income, which the judgment of Hyatt International (supra) was not concerned with at all. Therefore, the reliance placed by the learned DR on the judgment of Hyatt International(supra) is incorrect and bad in law.*
6. *With regard to Para - 5 of the Written Submissions, it is submitted that gross taxation of interest income under Article — 11 of the DTAA is not relevant to decide the limit provided under section 44C of the Act. The Appellant submits that the interest income of Rs. 668,07,07,663 has been offered to tax without claiming any deduction against such interest income. Therefore, the argument of the learned DR is incorrect and contrary to facts on record. The only issue to be decided by the Tribunal is whether the interest income which forms part of the total income is to be considered while computing limits provided under section 44C of the Act. The taxation of interest income on gross basis under Article -11 of the DTAA is not relevant to decide the*

issue as the Appellant is not claiming any deduction against the interest income offered to tax. Therefore, the reliance placed by the learned DR on the judgment of CIT vs. Smt. Santosh J ain (296 ITR 324), CIT vs. Banwari Lal Banshidhar (229 ITR 229) is incorrect and not applicable to facts of the present case.

7. *With regard to Para — 6 of the Written Submissions, it is submitted that the limit provided under section 44C of the Act is computed with reference to total income as adjusted by the exclusions provided in clause (i) to Explanation therein. As held by Bombay High Court in case of American Bureau of Shipping (263 ITR 590), while interpreting section 44C of the Act, the word "total income" connotes taxable income. The aforesaid is also evident from the total income computed by the Assessing Officer in the final assessment order wherein he has included the interest income in the computation of total income. Therefore, the limit provided under section 44C ought to be computed after including the interest income of Rs. 668,07,07,663 in the adjusted total income. The argument of the learned DR that the interest income is chargeable to tax on gross basis therefore, no deduction is allowable is factually incorrect as the Appellant is not claiming any deduction against the interest income offered to tax on the gross basis for the year under consideration.*
8. *In view of the above, the Appellant submits that the limit provided under section 44C of the Act ought to be computed after including interest income of Rs. 668,07,07,663 and consequently, appeal be decided in favour of the Appellant."*

9. We have heard both the parties and perused the material available. In this case as discussed above the Hon'ble Delhi High Court in assessee's own case has remanded the issue of assessee's claim for deduction under section 44C of the Act on the addition of Rs. 668,07,07,663/- on account of interest received by HO/foreign branches on External Commercial Borrowings (ECBs) given to Indian Borrowers. While remanding the said issue the Hon'ble court observed that since this aspect does not appear to have been examined or considered by the Tribunal, we allow and dispose of this appeal by remitting this issue for the consideration of the Tribunal. The said ground before the co-ordinate Bench for Tribunal in assessee's own case as referred above was ground no. 4.3 which is reproduced as

under :

Without prejudice to above ground, on the facts and circumstances of the case and in law, the Id. AO has erred in not determining the correct amount of deduction under section 44C of the Act, by ignoring the alleged addition made to the total income on account of interest received by the Appellant on ECBs.

9.1 However, as discussed later in this order on similar issue the co-ordinate Bench of the Tribunal in assessee's own case for AY. 2015- 16 (ITA No. 7895/Del/2019) vide its order dated 16-10-2020 had approved of the reasoning of the AO and denied a deduction under section 44C of the Act regarding the assessee's claim for deduction under section 44C of the Act on the addition of Rs. 668,93,71,324/- on account of interest received by HO/foreign branches on External Commercial Borrowings (ECBs) given to Indian Borrowers.

9.2 Earlier as discussed above the return for the present assessment year i.e. for 2013-14 was revised by the assessee on 31-03-2015 and income from ECBs amounting to Rs. 668,07,07,663/- was declared by the assessee in the said revised return. The, assessee had not included this income in its computation of total income in original return, however, in revised return the same was offered to tax. However, during the assessment proceedings the assessee claimed that this amount should be

excluded from its income since the same was not taxable in India. The assessee was asked by the Assessing Officer to explain the reasons for including this income in the computation of total income and the reasons for claiming it as exempt during the course of assessment its proceedings. The assessee filed reply in support of its claim. However, the Assessing Officer did not allow the claim of the assessee for deduction u/s 44C of the Act in respect of ECB interest income on the addition made in this regard in assessee's income on the ground that when the income of ECB interest is taxed under the provisions of Article 11(2) of the India-Japan DTAA on gross basis then there was no question of allowing any deduction from such income. Subsequently, when the matter reached the Hon'ble Delhi High Court in the appeal filed by the assessee, wherein Mr. Pardiwalla, learned senior counsel made a statement that they were willing to give up their challenge to the addition of INR 6,68,07,07,663/- which represented the interest received by the Head Office and Branches of the respondent-assessee in respect of External Commercial Borrowings given to Indian customers and restricted the dispute to the claim of assessee for claiming deduction under section 44C of the Act on the interest earned of Rs. 668,07,07,663/- on the said ECBs which has now been remanded back to us.

9.3 The main thrust of the argument of Ld. Sr Counsel was that according to the provisions of Section 44C of the act non-residents carrying on any business or

profession in India through the branches are entitled to deduction in computing the taxable business profits in respect of general administrative expenses incurred by the foreign head office insofar as such expenses can be related to the business or profession in India. It was further submitted that for computing the business income of those assesses, standard deduction of 5% of their adjusted total income as computed in accordance with the provision of section 44C of the Act is granted as deduction. The Ld Sr. Counsel further relied upon the expression of 'Adjusted Total Income' as defined in explanation (i) of that Section to mean that the total income computed in accordance with the provisions of this act and it does not exclude any income which has been taxed under the provisions of Tax Treaty as in the present case being the India-Japan DTAA. In this regard as referred in the written submission filed by the assessee, it relied upon the decisions of Hon'ble Bombay High Court in the case of Bombay High Court in case of CIT vs. Deutsche Bank AG. (284 ITR 463) (Bom.) and American Bureau of Shipping vs. CIT (263 ITR 590) (Bom.). Further, the assessee also relied upon the order dated 01-01-1986 of the ITAT Kolkata in the case of Linotpye & Machinery ltd. vs income tax officer [1986] 25 TTJ (Cal). Relying upon the two orders of the Hon'ble Bombay High Court the Ld AR submitted that the order of the Tribunal for the A.Y. 2015-16 is per incuriam as the same has not considered the binding precedents as laid down in the above order and has failed to consider the provisions of clause (i) of Explanation to section 44C of Act. In this regard to support the claim that the order

of the Tribunal for AY 2015-16 was per incuriam , the Ld AR also relied on the judgment of Supreme Court in case of State of MP vs. Narmada Bachao Andolan (2011) 7 SCC 639) (Para 65 & 68).

9.4 However, the identical issue being the claim of deduction under section 44C of the Act on the interest of Rs. 6,689,371,324 received by the assessee during the present assessment year from external commercial borrowing loan given by the head office/overseas branches to various customers in India, which the AO had taxed at the rate of 10% applying the article 11 (2) of double Taxation Avoidance Agreement was considered by the co-ordinate Bench of the Tribunal in assessee's own case for AY. 2015- 16 (ITA No. 7895/Del/2019) wherein the Tribunal vide its order dated 16-10-2020 had rejected the claim of assessee for deduction under section 44C of the Act on the said interest income of Rs. 6,689,371,324. The relevant extracts of the said order of the Tribunal for AY 2015-16 are reproduced as under.

"1. This appeal is filed by the assessee against the assessment order passed by the Assistant Commissioner of Income Tax, (IT), Circle-2(2)(1), New Delhi (ld AO), u/s 143(3) of The Income Tax Act (The Act) dated 29.08.2019 for Assessment Year 2015-16.

1.The assessee has raised following grounds of appeal:-

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4 Addition on account of interest received on External Commercial Borrowings („ECBs") given to the Indian Borrowers

4.1 That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and Id AO were unjustified in holding that interest received by the Appellant on ECBs given to Indian borrower parties are taxable in India.

4.2 That on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not following the favourable decisions of the Hon'ble Tribunal in the Appellant's own case for earlier years.

4.3 Without prejudice to above ground, on the facts and circumstances of the case and in law, the Id. AO has erred in not determining the correct amount of deduction under section 44C of the Act, by ignoring the alleged addition made to the total income on account of interest received by the Appellant on ECBs.

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20. *One limb of Ground number [4] of the appeal is against the taxability of interest earned on external commercial borrowing to Indian customers. During the year the assessee has received interest of ₹ 6,689,371,324 from external commercial borrowing loan given by the head office/overseas branches to various customers in India. The learned assessing officer has taxed this income at the rate of 10% applying the article 11 (2) of double Taxation Avoidance Agreement. In view of this we dismiss ground number [4] of the appeal to that extent.*
21. *The other limb of ground number (4) is with respect to the deduction u/s 40 4C. The learned assessing officer has held that since the interest on external commercial borrowing loans are taxed on gross basis, therefore there is no question of allowing any deduction from such income and accordingly did not consider the interest on external commercial borrowing loans for the purpose of computing deduction under that Section. The assessee is aggrieved with that.*
22. *The learned authorised representative submitted that the deduction u/s 44C is granted either at the rate of 5% of adjusted total income or amount of expenditure attributable to the business of assessee in India. He referred to the explanation to that Section where "Adjusted Total Income" is defined. He submitted that there are certain exclusions which are not required to be given effect to while computing the adjusted total income, however, the total income is required to be computed in accordance with the provisions*

of this act. Therefore, according to him the deduction u/s 44C is computed based on the total income as adjusted by such specific provisions mentioned therein only. The assessee contended that the learned assessing officer in the assessment order has computed the total income of the assessee at ₹ 11,683,361,699/– however has still computed the deduction u/s 44C of the act without considering the interest taxed Under article 11 (2) of Double Taxation Avoidance Agreement. Assessee submits that the assessee is not seeking deduction against the interest income tax under article 11 (2) of the DTAA or u/s 194LC of the act. But in fact, it is seeking deduction under the head profits and gains from business or profession which has not been computed correctly by the assessing officer u/s 44C of the act. Thus the argument of the assessee is that the assessing officer may be directed to compute deduction u/s 44C of the act after including the interest income tax Under article 11 (2) of the double taxation avoidance agreement and u/s 194LC of the act. In nutshell, assessee claims that 5% deduction on account of the head office expenses should also be granted as deduction u/s 44C of the act taking into account the income that is charged to tax u/s 11 (2) of the Double Taxation Avoidance Agreement. The assessee relied upon the decision of the honourable Bombay High Court in 263 ITR 590 wherein in paragraph number six it has been held that the expression total income has been defined u/s 2(45) to mean total income of the income referred to in Section five and computed in the manner laid down Under the provisions of the income tax act. He further relied upon the decision of the honourable Delhi High Court in CIT versus Kribhco 349 ITR 618. Therefore he submitted that the deduction u/s 44C of the act shall be granted after considering the interest taxed under article 11 (2) of the double taxation avoidance agreement and u/s 194LC of the act.

23. *The learned departmental representative vehemently supported the order of the learned assessing officer and stated that the above income has been taxed according to the provisions of article 11 (2) of the Double Taxation Avoidance Agreement and therefore same cannot be included in the adjusted total income as same has not been computed in accordance with the provisions of the income tax act as business income but by applying the provisions of the Double Taxation Avoidance Agreement. He submitted that the ECB loans are given to the Indian parties and thus the interest arises as such in India and is liable to be brought to tax as per article 11 of the Double Taxation*

Avoidance Agreement. He further stated that the debt claim is not connected with the permanent establishment as the loan has been given by the head office or other overseas branches of the assessee and it does not have anything to do with the Indian permanent establishment of the assessee. He submitted that Section 44C of the act applies only when the income of the assessee is included under the provisions of Section 28 to Section 43A of the act. Therefore he submitted that assessee is not entitled to claim of deduction of 5% on the interest income on ECB loans.

24. *We have carefully considered the rival contention and perused the order of the learned AO. We have perused the objections raised by the assessee before the learned dispute resolution panel. As per objection number 3.3 before the learned Dispute Resolution Panel assessee stated without prejudice to the taxability of the interest received on external commercial borrowing that the learned assessing officer has erred in not determining the correct amount of deduction u/s 44C of the act by ignoring the alleged addition made to the total income on account of interest received by the assessee on external commercial borrowings. This objection of the assessee has not been subject matter of the direction by the learned Dispute Resolution Panel. In short, the learned dispute resolution panel did not give any direction to the AO on this account. However, as no fresh facts are required to be investigated, we proceed to adjudicate this argument of the assessee. According to the provisions of Section 44C of the act nonresidents carrying on any business or profession in India through the branches are entitled to deduction in computing the taxable business profits in respect of general administrative expenses incurred by the foreign head office insofar as such expenses can be related to the business or profession in India. Therefore for computing the business income of those assesses, standard deduction of 5% of their adjusted total income as computed in accordance with the provisions of this act is granted as deduction. The 'Adjusted Total Income' is defined in explanation (i) of that Section to mean that the total income computed in accordance with the provisions of this act. It excludes certain allowances such as depreciation, additional depreciation and certain expenditure covered u/s 36 (1) (ix) of the act. It also prohibits allowance under sections 72, 73, 74 and 74A with respect to the losses carried forward. <u>The ld AR has not addressed any argument on the facts of the case that when the assessee's income is taxed on gross basis as per rates adopted as per DTAA, can for claiming expenses out of that income , assessee look at</u>*

the Domestic tax laws, i.e. section 44C of the act. Our answer is emphatic No. In the present case the income of the interest on external commercial borrowing is not computed under the head of income chargeable under the head profits and gains of the business as provided u/s 28 to 43A of the act. Further the income of the assessee is taxed under article 11 (2) of the India Japan DTAA on gross basis at the rate of 10%. It is the option of the assessee to govern by the provision of the Domestic tax Laws or DTAA, whichever is more beneficial to assessee. But there is no mandate that assessee can opt for lower taxes as per DTAA and claim expenses as per Domestic tax laws. Therefore there cannot be any further expenditure claimed as deduction from that income. That will dilute the amount of tax payable on interest income in the source country as payable according to the Double Taxation Avoidance Agreement. There is no mandate in the DTAA to grant any such deduction from income taxed u/s 11 (2) of the Act. In view of this, we do not find any infirmity in the order of the learned assessing officer in not granting deduction u/s 44C of the act from the above income which is taxed under article 11 (2) of the DTAA on gross basis at the rate of 10%. As we hold that there is no need to go to Section 44C of the act in this case, reliance placed by the assessee on the several judicial precedents with respect to the definition of meaning of total income/ adjusted income is not relevant. In view of this ground number (4) of the act of the appeal is dismissed.

(emphasis supplied by us)

9.5 Similar view following the above order was taken by the co-ordinate Bench of the Tribunal in assessee's own case for AY 2014-15 (ITA NO. 8112/Del/2018). The relevant extracts of the said order are reproduced as under :

"1 Briefly the facts are, in the year under consideration, the assessee received an amount of Rs.647,17,71,103/- in respect of interest income of its head office and other overseas branches of ECBs from India. Though, in the original return of income, the

assessee did not include the amount so received as income, however, in the revised return of income, the assessee offered it to tax. The assessee again reversed its stand in course of assessment proceeding by claiming that the amount should be excluded from its income, since, it is not taxable in India. Without prejudice, the assessee submitted that, in case the interest received is added as income, then deduction under section 44C of the Act should be allowed. The Assessing Officer negated both the contentions of the assessee. As far as without prejudice submission relating to claim of deduction under section 44C of the Act is concerned, the Assessing Officer held that since, the ECB interest is taxed under the provisions of Article 11(2) of India – Japan Double Taxation Avoidance Agreement (DTAA) on gross basis, no deduction can be allowed. Learned DRP also upheld the aforesaid decision of the Assessing Officer.

5.2 Before us, learned counsel appearing for the assessee fairly conceded that the issue has been decided against the assessee in its own case by the Tribunal in assessment year 2015-16.

5.3 Having considered the submissions of the parties, we find, while deciding identical issue arising in the assessee's own case in assessment year 2015-16, the Tribunal in ITA No. 7895/Del/2019, dated 16.10.2020, has accepted the decision of

the revenue authorities that no deduction under section 44C of the Act in relation to interest earned on ECB is allowable. In view of the aforesaid, we dismiss the ground raised by the assessee.

9.6 The facts are identical in the present case with respect to the claim of the assessee for deduction under section 44C of the Act on the interest amounting to Rs. 668,07,07,663/- received by the assessee on ECBs given to Indian borrowers as in the case of the assessee for AY 2015-16 and 2014-15 wherein the co-ordinate Bench of the Tribunal had rejected similar claims for AY 2015-16 and 2014-15. The claim of the assessee that the above orders of the Tribunal for AY 2015-16 and 2014-15 are per incuriam as the same had not considered the binding precedents as laid down in the orders of the Hon'ble Bombay High Court as referred above and had also failed to consider the provisions of clause (i) of Explanation to section 44C of Act relying upon the judgment of Supreme Court in case of State of MP vs. Narmada Bachao Andolan (2011) 7 SCC 639) (Para 65 & 68) has been carefully considered by us but not found to be acceptable. The Tribunal in the above orders denied the claim of the assessee for its findings in para no. 24 of its order for AY 2015-16 duly highlighted above wherein it observed that the Ld AR did not address any argument on the facts of the case that when the assessee's income is taxed on gross basis as per rates adopted as per DTAA, can for claiming expenses out of that income , the assessee can look at the Domestic tax laws, i.e. section 44C of the act. Further, the Tribunal

observed that the income of the assessee is taxed under article 11 (2) of the India Japan DTAA on gross basis at the rate of 10% and it was the option of the assessee to govern by the provision of the Domestic tax Laws or DTAA, whichever is more beneficial to assessee, but there was no mandate that assessee can opt for lower taxes as per DTAA and claim expenses as per Domestic tax laws. The facts in the case laws relied upon by the assessee has also not dealt with the above issue nor give any finding which is canvassed by the assessee. Therefore, after careful consideration we are of the considered view that the case laws relied upon by the assessee do not support its claim and therefore the submission of the assessee that the order of the tribunal for AY 2015-16 is *per incuriam* is not acceptable. We therefore following the above orders of the Tribunal for AY 2015-16 and 2014-15 as referred above, uphold the findings of the Assessing Officer and dismiss the ground no 4 to 4.3 of the appeal.

10. **TDS on interest on ECBs:**

The assessee submitted as under :

The High Court vide order dated 6 February 2025 has remanded the issue of TDS credit on the interest on ECBs to the Tribunal (Para 8 Pg. 3). In this regard, the assessee submits that the tax deducted by the borrowers have been included in the figure of interest income by virtue of section 195A of the Act and the same is also reflected in the Form 26AS for the

year under consideration. Accordingly, a direction be issued to the AO to grant credit for the tax deducted on the interest on ECBs brought to tax in the assessment order.

10.1 The Assessing Officer is directed to grant credit for the tax deducted on the interest on ECBs brought to tax in the assessment order after necessary verification.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 13th March, 2026.

Sd/-	**Sd/-**
[VIKAS AWASTHY]	**[BRAJESH KUMARSINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated- 13.03.2026.
Pooja Mittal

Copy forwarded to:
1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi,