**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**

**SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA no.5170/Mum./2016
(Assessment Year : 2012–13)

Dy. Commissioner of Income Tax
Circle–2(1)(1), Mumbai ..... Appellant

v/s

Bank of India
Star House, C–5, G–Block
Bandra Kurla Complex ..... Respondent
Bandra (E), Mumbai 400 051
PAN – AAACB0472C

ITA no 5173/Mum./2016
(Assessment Year : 2008–09)

Bank of India
Star House, C–5, G–Block
Bandra Kurla Complex ..... Appellant
Bandra (E), Mumbai 400 051
PAN – AAACB0472C

v/s

Asstt. Commissioner of Income Tax
Circle–2(1)(1), Mumbai ..... Respondent

ITA no.5174/Mum./2016
(Assessment Year : 2009–10)

Bank of India
Star House, C–5, G–Block
Bandra Kurla Complex ..... Appellant
Bandra (E), Mumbai 400 051
PAN – AAACB0472C

v/s

Asstt. Commissioner of Income Tax
Circle–2(1)(1), Mumbai ..... Respondent

ITA no.5175/Mum./2016
(Assessment Year : 2012−13)

Bank of India
Star House, C−5, G−Block
Bandra Kurla Complex ……. Appellant
Bandra (E), Mumbai 400 051
PAN − AAACB0472C

v/s

Dy. Commissioner of Income Tax
Range−2(1), Mumbai ……. Respondent

Assessee by : Shri C. Naresh
Revenue by : Shri Jasbir Chauhan a/w
Shri V. Sreekar

| Date of Hearing − 23.10.2018 | Date of Order − 30.11.2018 |
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**O R D E R**

**PER SAKTIJIT DEY, J.M**

This bunch consists of one set of cross appeals arising out of order dated 9th May 2016, passed by the learned Commissioner (Appeals)−4, Mumbai, for the assessment year 2012−13. Besides the aforesaid cross appeals, the assessee has filed appeals against two separate orders passed by the learned Commissioner (Appeals)−4, Mumbai, pertaining to assessment years 2008−09 and 2009−10.

2. At the outset, we propose to take up cross appeals for assessment years 2012−13, as the lead appeals.

3. In ground no.1, the assessee has challenged the disallowance made under section 14A of the Income Tax Act, 1961 (for short *"the Act"*) r/w rule 8D of the Income Tax Rules, 1962.

4. Brief facts are, the assessee a public sector banking company is engaged in the business of banking and related financial activities. All activities of the assessee are governed by the guidelines issued by the Reserve Bank of India (RBI). For the assessment year under dispute, the assessee filed its return of income on 28th September 2012, declaring loss of ₹ 877,65,34,549. Subsequently, the assessee filed its revised return of income on 14th March 2014, revising the loss to ₹ 975,93,74,149. During the assessment proceedings, the Assessing Officer on verifying the return of income filed by the assessee noticed that in the relevant previous year, the assessee has earned exempt income by way of interest and dividend amounting to ₹ 33,68,49,017. He also noticed that the assessee has incurred interest expenditure of ₹ 20167.23 crore on borrowed fund as against interest received of ₹ 28480.67 crore on funds given as loan. Therefore, he called upon the assessee to explain why disallowance of expenditure attributable to earning of exempt income should not be made under section 14A of the Act r/w rule 8D.

5. Though, the assessee through elaborate submissions objected to the proposed disallowance under section 14A of the Act r/w rule 8D, however, the Assessing Officer rejecting the objections of the assessee computed disallowance under section 14A of the Act r/w rule 8D which worked out to ₹ 80,33,90,425. Since the assessee itself had disallowed an amount of ₹ 9,58,601, the Assessing Officer made a further disallowance of ₹ 80,24,31,824, under section 14A of the Act. The assessee challenged the disallowance before learned Commissioner (Appeals).

6. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record having found that in assessee's own case for assessment year 2009−10, similar disallowance made under section 14A of the Act was upheld by him, confirmed the disallowance made by the Assessing Officer.

7. The learned Authorised Representative reiterating the stand taken before the Departmental authorities submitted, the assessee having not incurred any expenditure to earn exempt income no disallowance is warranted. Further, he submitted, since the assessee had huge interest free surplus fund of ₹ 38,153 crore as against investment made in exempt income yielding asset amounting to ₹

1,360 crore, neither any disallowance on account of interest expenditure nor administrative expenditure can be made. In this context, he relied upon the decision of the Hon'ble Gujarat High Court in case of PCIT v/s Sintex Industries Ltd., [2017] 82 taxmann.com 171 (Guj.). He submitted, the aforesaid decision has been upheld by the Hon'ble Supreme Court while dismissing the Special Leave Petition filed by the Revenue. In this context, he relied upon the decision of the Hon'ble Supreme Court in PCIT v/s Sintex Industries Ltd., [2017] 93 taxmann.com 24 (SC).

8. The learned Authorised Representative submitted, even for application of rule 8D, only those investments which have yielded exempt income during the relevant previous year should be considered. Finally, the learned Authorised Representative submitted, identical issue was decided by the Tribunal in assessee's own case for assessment year 2011−12, in ITA no.4357/Mum./2016, dated 25th May 2018.

9. The learned Departmental Representative relied upon the observations of the learned Commissioner (Appeals) and the Assessing Officer.

10. We have considered rival submissions and perused materials on record. As could be seen from the facts on record, in the preceding

assessment year the assessee contested the disallowance made under section 14A of the Act r/w rule 8D on the plea that the investment in shares, etc., having been held as stock–in–trade no disallowance can be made under section 14A of the Act. However, while deciding the aforesaid claim of the assessee in assessment year 2011–12, vide order passed in ITA no.4491/Mum./2016 dated 25th May 2018, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication with the following observations:–

> *"14. We have considered rival submissions and perused materials on record. The basic contention of the assessee is, since the assessee being a Bank the shares and securities are held as stock–in–trade and it constitutes a business activity, hence, no disallowance under section 14A of the Act should be made. Notably, in assessment year 2009–10, while considering similar dispute relating to disallowance under section 14A, the Tribunal in order dated 8th November 2017 (supra) has restored the issue to the Assessing Officer. It is also relevant to mention, in the meanwhile, the judgment of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. (supra) has been delivered. It is to be noted that in the said decision the Hon'ble Supreme Court has specifically dealt with the decision of the Hon'ble Punjab & Haryana High Court in case of State Bank of Patiala (supra) on identical issue. Undisputedly, the aforesaid decision of the Hon'ble Supreme Court having been delivered recently, the Departmental Authorities while deciding the issue did not have the benefit of it. In view of the aforesaid, we restore the issue to the file of the Assessing Officer for deciding afresh after considering the submissions made by the assessee and applying the ratio laid down by the Hon'ble Supreme Court in case of Maxopp Investment Ltd. (supra) and specifically keeping in view the observations made in Para–39 and 40 of the said judgment. This ground is allowed for statistical purposes."*

11. Further, in the impugned assessment year, in addition to the plea that investments are held as stock–in–trade, the learned Authorised

Representative has also submitted that it has huge surplus fund available to make investment, hence, no disallowance either of interest expenditure or administrative expenditure can be made under rule 8D. Further, he has submitted that disallowance under rule 8D should be restricted to the investments which have yielded exempt income in the relevant previous year. In view of the above, we direct the Assessing Officer to decide the issue following the direction of the Tribunal in assessment year 2011−12 (supra) as well as the additional submissions made by the assessee in the impugned assessment year. While doing so, he must keep in view the ratio laid down in the decisions to be cited by the assessee. Needless to mention, before deciding the issue, the Assessing Officer must afford reasonable opportunity of being heard to the assessee. Accordingly, we restore the issue to the Assessing Officer for de novo adjudication. Ground is allowed for statistical purposes.



12. Ground no.2, relates to disallowance of assessee's claim of amortization of lease premium amounting to ₹ 4,08,67,975.

13. The Assessing Officer after verifying the details available on record found that the aforesaid amount was paid on account of lease premium on various lease hold lands held by the assessee. After examining the nature of expenditure the Assessing Officer concluded

that it is in the nature of a capital expenditure. Accordingly, he disallowed the same.

14. The learned Commissioner (Appeals) also upheld the disallowance made by the Assessing Officer.

15. The learned Authorised Representative fairly conceded before us that the aforesaid issue has been decided against the assessee by the Tribunal in its own case for assessment year 2004–05 and 2011–12.

16. The learned Departmental Representative agreed with the aforesaid submissions of the learned Counsel for the assessee.

17. We have considered rival submissions and perused materials on record. As could be seen, the claim of amortization of lease premium on lease hold land is a recurring dispute between the assessee and the Department from the preceding assessment year. While deciding the disputed issue in assessee's own case for assessment year 2004–05 in ITA no.5977/Mum./2011, dated 26th July 2007, the Tribunal upheld the disallowance made by the Assessing Officer. The same view was reiterated by the Tribunal while deciding assessee's appeal in ITA no. 4491/Mum./2016, dated 25th May 2018, for assessment year 2011–12. Respectfully following the consistent view of the Tribunal on the disputed issue in assessee's own case as referred to above, we uphold

the disallowance made by the Assessing Officer. Ground raised is dismissed.

18. In ground no.3, the assessee has challenged the decision of the Departmental Authorities in bringing to tax the income of foreign branches.

19. Brief facts are, in course of the assessment proceedings, the Assessing Officer noticing that in the revised return of income the assessee has sought exclusion of income re ating to foreign branches amounting to ₹ 790,43,71,033, by referring to the provisions of section 90 of the Act called upon the assessee to justify its claim. After considering the submissions of the assessee, with reference to double taxation avoidance agreement between India and respective countries where branches of the assessee are situated, the Assessing Officer held that as per sub−section (3) of section 90 of the Act, any term used but not defined in the Act or in the double taxation avoidance agreement with a country shall have the same meaning as provided in Central Government notification no.S.O. 2123(E) dated 28th August 2008. Referring to the aforesaid notification, the Assessing Officer held that any income of a resident of India though may be taxed in other country, however, such income shall be included in his total income chargeable to tax in India and relief shall be granted for elimination of

double taxation as provided in the relevant DTAA. Accordingly, he included the income of the foreign branches in the total income of the assessee. Being aggrieved of the aforesaid decision of the Assessing Officer, the assessee preferred appeal before the first appellate authority.

20. However, the learned Commissioner (Appeals) also upheld the addition made by the Assessing Officer by relying upon the decision of the Tribunal in case of Bank of Baroda v/s ACIT, in ITA no.6018/Mum./ 2011, dated 25th July 2014. However he directed the Assessing Officer to grant credit for taxes paid by the foreign branches in respective countries.

21. The learned Authorised Representative submitted, the issue in dispute has been decided in favour of the assessee in assessment years 2003–04, 2004–05 and 2011–12. He further submitted, the decision of the Tribunal in assessment year 2003–04 has also been upheld by the Hon'ble Jurisdictional High Court while deciding Revenue's appeal in Income Tax Appeal no.1630/2012, dated 7th January 2015. He submitted, similar view was also expressed by the High Court while deciding the issue in assessee's own case for assessment year 2000–01. Thus, he submitted, the income of foreign branches cannot be included at the hands of the assessee.

22. The learned Departmental Representative vehemently opposing the contention of the assessee submitted that while deciding the issue in assessee's favour in the preceding assessment years the Tribunal has not taken note of the provisions of sub−section (3) of section 90 of the Act inserted w.e.f. 1st April 2004, as well as notification no.91/ 2008, dated 28th August 2008. He submitted, taking note of the provisions of section 90(3) of the Act and the notification issued in pursuance thereto, the Tribunal in case of Essar Oil Ltd. v/s ACIT, [2013] 94 DTR 153, has held that income of foreign branches has to be included in the income of the assessee for bringing into tax in India, however, necessary relief with regard to payment of tax is to be given to avoid double taxation. He submitted, following the decision of Essar Oil Ltd. (supra), the Tribunal in case of Bank of Baroda v/s ACIT, ITA no.2927/Mum./2011 and Ors., dated 25th July 2015, has held that income of foreign branches are to be included in the income of the chargeable income of the assessee in India. He submitted, while deciding identical issue in assessee's own case in the preceding assessment years the Tribunal has neither taken note of section 90(3) of the Act read with notification no.91/2008, dated 28th August 2008 nor the decisions of the Tribunal in Essar Oil Ltd. (supra) and Bank of Baroda (supra). Therefore, he submitted, the inclusion of income of

foreign branches in assessee's income is valid and as per the provisions of the Act.

23. In rejoinder, the learned Authorised Representative submitted, in course of hearing of appeal for assessment year 2009–10, the assessee had filed written submissions before the Tribunal stating the reasons why the decision in Essar Oil Ltd. (supra) will not be applicable. He submitted, the issue having been decided in favour of the assessee, not only by the Tribunal but by the Hon'ble High Court in the preceding assessment years, assessee's claim has to be allowed.

24. We have considered rival submissions and perused materials on record. No doubt, in assessee's own case for assessment year 2004–05, the Tribunal following its own decision for assessment year 2003–04, has held that income of foreign branches cannot be included for computing the taxable income of the assessee in India. Following the aforesaid decision, the Tribunal has decided the issue in favour of the assessee in assessment years 2009–10 and 2011–12 as well. However, from the material on record, it appears that though the Department in its appeal in ITA no.6016/Mum./2011, has raised a specific ground challenging the exclusion of income of foreign branches in violation of Central Govt. notification no.S.O. 2123(E), dated 28th August 2008, however, while deciding the issue the Tribunal has not

deliberated on the true import and impact of the said notification on the taxability of the income of foreign branches keeping in view the provisions of section 90(3) of the Act. Similar is the situation in the appeal orders passed for the subsequent assessment years i.e., A.Y. 2009−10 and 2011−12. It is relevant to note, in case of Essar Oil Ltd. (supra) the Co−ordinate Bench after taking note of the provisions contained under section 90(3) of the Act and Central Govt. notification dated 28th August 2008, referred to above, has held that after assessment year 2004−05 income of the foreign branches would be includible in the income of the assessee for chargeability to tax in India. It is relevant to observe, though, in the case of Essar Oil Ltd. (supra), the Tribunal and the Hon'ble Jurisdictional High Court had decided the issue in favour of the assessee in preceding assessment year, however, while deciding the appeal for subsequent assessment year, the Tribunal taking note of the change in legal position arising due to section 90(3) r/w the Central Government Notification no.91/2008, dated 28th August 2008, held that income of foreign branches shall be included in the total income chargeable in India under the Act from assessment year 2004−05 onwards. Following the aforesaid decision, the Co−ordinate Bench in Bank of Baroda v/s ACIT, in ITA no.2927/Mum./2011, dated 25th July 2014, expressed similar view. It is relevant to observe, neither the effect / impact of section

90(3) r/w Central Government notification no.S.O. 2123(E) dated 28th August 2008, nor the decisions of Essar Oil Ltd. (supra) and Bank of Baroda (supra) were taken note of or deliberated upon while deciding the issue in assessee's case for preceding assessment years. Simply relying upon the decisions of the Tribunal on identical issue arising in assessee's own case for assessment years 2000–01 and 2003–04, the issue was decided in favour of the assessee in subsequent assessment years. It is further relevant to observed, the decisions of the Hon'ble High Court in assessee's own case since pertained to assessment years 2000–01 and 2003–04, the Hon'ble High Court never had any occasion to examine the taxability of income in foreign branches in India keeping in view the provisions of section 90(3) r/w Government notification no.S.O. 2123(E) dated 28th August 2008. In the aforesaid circumstances, we are unable to accept the submission of the learned Authorised Representative that the issue is covered by earlier decisions of the Tribunal. In our view, the issue has to be decided keeping in view the provision of section 90(3) read with Central Govt. notification no S.O. 2123(E) dated 28th August 2008 as well as the decisions cited by learned Departmental Representative. However, it needs to be observed, the submissions made by the assessee before us against the applicability of the decisions of Essar Oil Ltd. (supra) and Bank of Baroda Ltd. (supra) appears to have not been made

before the Departmental Authorities, may be for the reason that the assessee thought the issue to be covered by the decisions of the Higher Appellate Authority in its own case in the preceding assessment years. Therefore, in our considered opinion, the assessee deserves an opportunity to establish its case before the Departmental Authorities that the income of the foreign branches are not includible in the income chargeable to tax in India notwithstanding the Central Government notification no.S.O. 2123(E) dated 28th August 2008 r/w section 90(3) of the Act as well as the decisions of Essar Oil Ltd. (supra) and Bank of Baroda Ltd. (supra). Accordingly, we restore the issue to the Assessing Officer fo de novo adjudication after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes

25. In grounds no.4, 4A and 4B the assessee has challenged disallowance of ₹ 128,64,00,000, on account broken period interest paid on Government and other approved securities purchased during financial year 2011−12.

26. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction of ₹ 128,64,00,000, on account of broken period interest paid on purchase of securities called upon the assessee to justify the claim. By way of an

elaborate written submission dated 14th March 2014, though the assessee justified the deduction claimed, however, the Assessing Officer disallowed assessee's claim on the reasoning that once the accrued interest is brought to tax, the broken period interest cannot be allowed. In this context, he referred to the decision of the Hon'ble Jurisdictional High Court in American Express Bank. Though, the assessee challenged the disallowance before the learned Commissioner (Appeals), however, he also upheld the disallowance made by the Assessing Officer by following his own order in assessee's case for assessment year 2010−11.

27. The learned Authorised Representative submitted, the issue has been decided partly in favour of the assessee in assessment year 2011−12 in ITA no 4357/Mum./2016, dated 25th March 2018. Further, the learned Authorised Representative relied upon the decision of the Hon'ble Supreme Court in Citi Bank, N.A., v/s CIT, Civil Appeal no. 1549/2006, and the decisions of the Hon'ble Jurisdictional High Court in CIT v/s State Bank of India, ITA no.254/2014 and American Express International Banking Corporation v/s CIT, [2002] 125 taxman 488.

28. The learned Departmental Representative relied upon the observations of the learned Commissioner (Appeals).

29. We have considered rival submissions and perused materials on record. As could be seen, identical issue came up for consideration before the Tribunal in assessee's own case for assessment year 2011–12, in ITA no.4357 and 4491/Mum./2016, dated 25th May 2018. The Tribunal after considering the submissions of the parties restored the issue to the Assessing Officer for fresh adjudication observing as under:–

> *"38. We have considered rival submissions and perused materials on record. Before we proceed to decide the issue, it is necessary to understand the exact nature of broken period interest. As mandated by the Reserve Bank of India, every bank has to maintain Statutory Liquidity Ratio. For that purpose banks invest in Government securities. Therefore, depending on the requirement a bank purchases and sells Government securities. Generally, interest in Government securities is payable on half yearly basis. When Government securities are traded the purchaser has to pay to the seller not only the purchase price of the securities but also the interest accrued from the Government securities from the last due date of the interest till the date of purchase of the securities. This interest from the last due date till the date of purchase is referred to as broken period interest. While the purchaser of the Government security pays the broken period interest the seller receives it. It is evident on record, assessee's claim of broken period interest paid has been disallowed by the Assessing Officer on the reasoning that the assessee is not offering broken period interest on accrual basis. In our view, the aforesaid reasoning of the Departmental Authorities do not stand to reason. If the assessee is consistently following an accounting method as per which the broken period interest is offered as income when it is received, the broken interest paid while purchasing the securities cannot be disallowed merely on the reasoning that the assessee is not showing the broken period interest income on accrual basis. As could be seen, the Hon'ble Jurisdictional High Court in case of State Bank of India, vide judgment dated 1st August 2016, after following the decision of the said Court in case of American Express International Corporation (supra) has rejected Revenue's appeal against allowance of assessee's claim of deduction in respect of broken period interest paid. While doing so, the Hon'ble High Court has also upheld the decision of the Tribunal in holding that the broken period interest income has to be taxed on due basis instead*

*of accrual basis. It is evident, the aforesaid decision of the Hon'ble Jurisdictional High Court was neither referred to nor examined by the Departmental Authorities while deciding the issue. In view of the aforesaid, we restore the issue to the Assessing Officer for deciding afresh keeping in view the decisions of the Hon'ble Jurisdictional High Court referred to above and only after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes."*

30. Respectfully following the aforesaid decision of the Co–ordinate Bench, we restore the issue to the Assessing Officer for fresh adjudication in terms with our directions therein. This ground is allowed for statistical purposes.

31. Ground no.5, is not pressed, hence, dismissed.

32. In the result, assessee s appeal is partly allowed.

**ITA no.5170/MuM./2016**
**Revenue's Appeal – A.Y. 2012–13**

33. The only issue raised in the present appeal by the Revenue is whether the provisions of section 115JB of the Act is applicable to the assessee.

34. At the outset, the learned Counsel for the assessee submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for assessment year 2011–12.

35. The learned Departmental Representative, though, agreed with the aforesaid submissions of the assessee, however, he relied upon the observation of the Assessing Officer.

36. We have considered rival submissions and perused materials on record. As could be seen, while deciding identical issue in assessee's own case for assessment year 2011–12, in ITA no.4357 and 4491/ Mum./2016, dated 25th May 2018, the Tribunal decided the issue in favour of the assessee holding as under:–

> *"51. We have considered rival submissions and perused materials on record. As could be seen, learned Commissioner (Appeals) relying upon certain judicial precedents held that as per the provisions of section 115JB of the Act applicable to the relevant assessment year, it cannot be extended to Banking companies.*
>
> *52. The learned Counsels appearing for the parties have fairly agreed that the issue is covered by various judicial precedents as referred to in Para–19.2 of the order of the learned Commissioner (Appeals). In view of the aforesaid, we dismiss this ground."*



37. There being no change either in factual or legal position in the impugned assessment year, our decision in assessment year 2011–12 as referred to above, will apply to the present appeal as well. Ground raised is dismissed.

38. In the result, Revenue's appeal is dismissed.

**ITA no.5173/Mum./2016**
**Assessee's Appeal – A.Y. 2008–09**

39. At the outset, the learned Authorised Representative expressed his intention not to press ground no.1, 3, 3A and 4. Accordingly, these grounds are dismissed as not pressed.

40. In grounds no.2, 2A and 2B the assessee has challenged disallowance of payment of broken period interest.

41. These grounds are identical to grounds no.4, 4A and 4B of ITA no.5175/Mum./2016. Following our decision therein, we restore the issue to the Assessing Officer with similar direction. These grounds are allowed for statistical purposes.

42. In the result, assessee's appeal is partly allowed for statistical purposes.



**ITA no.5174/Mum./2016**
**Assessee's Appeal – A.Y. 2009–10**

43. Grounds no.1, 3 and 4 are not pressed, hence, dismissed.

44. In grounds no.2, 2A and 2B the assessee has challenged disallowance of broken interest paid on purchase of Government and other approved securities.

45. These grounds are identical to grounds no.4, 4A and 4B of ITA no.5175/Mum./2016. Following our decision therein we restore the issue to the Assessing Officer for fresh adjudication with similar direction.

46. In the result, appeal is partly allowed for statistical purposes.

47. To sum up, ITA no.5175/Mum./2016 is partly allowed; ITA no. 5170/Mum./2016 is dismissed; ITA no.5173 and 5174/Mum./2016 are partly allowed for statistical purposes.

Order pronounced in the open Court on 30.11.2018

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| **Sd/-** | **Sd/-** |
| **RAJESH KUMAR** | **SAKTIJIT DEY** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**MUMBAI, DATED: 30.11.2018**

*Copy of the order forwarded to:*

*(1) The Assessee;*
*(2) The Revenue;*
*(3) The CIT(A);*
*(4) The CIT, Mumbai City concerned;*
*(5) The DR, ITAT, Mumbai;*
*(6) Guard file.*

True Copy
By Order

*Pradeep J. Chowdhury*
*Sr. Private Secretary*

(Sr. Private Secretary)
ITAT, Mumbai