IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.7891/Mum./2004
(Assessment Year : 1997–98)

Standard Chartered Bank
Taxation Department
23–25, M.B. Road, 3rd Floor
Fort, Mumbai 400 001
PAN – AABCS4681D

..... Appellant

v/s

Jt. Commissioner of Income Tax
Special Range–27, Mumbai

..... Respondent

ITA no.9229/Mum./2004
(Assessment Year : 1997–98)

Dy. Director of Income Tax (I.T)
Range–2(1), Mumbai

..... Appellant

v/s

Standard Chartered Bank
4th Floor, New Excelsior Building
A.K. Naik Marg, Mumbai 400 001
PAN – AABCS4681D

..... Respondent

Assessee by : Shri P.J. Pardiwala a/w
Shri Madhur Agrawal
Revenue by : Shri Manoj Kumar

Date of Hearing – 14.01.2019	Date of Order – 12.04.2019

O R D E R

PER SAKTIJIT DEY. J.M.

These cross appeals arise out of the order dated 27th September 2004, passed by the learned Commissioner (Appeals)–XXXI, Mumbai, pertaining to the assessment year 1997–98.

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Assessee's Appeal

2. Shri P.J. Pardiwala, learned Sr. Counsel, appearing for the assessee, at the outset, submitted that the issues raised in grounds no.1 and 2, have become infructuous as the assessee has been granted consequential relief in assessment year 1999–2000 and 2005–06 respectively. In view of the aforesaid submissions of the learned Sr. Counsel for the assessee, grounds no.1 and 2 are dismissed as infructuous.

3. In ground no.3, the assessee has challenged the computation of income under section 115JA of the Income-tax Act, 1961 (for short *"the Act"*).

4. Brief facts are, the assessee is a foreign company incorporated by the Royal Charter under the laws of England and Wales. It carries on business of banking, financial service and allied activities. The

assessee company opened branches in India to carry on such activities with the permission of Reserve Bank of India (RBI) under the Banking Regulations Act, 1949. For the impugned assessment year, the assessee filed its return of income on 28th November 1997, declaring total income of ₹ 2,54,830. In the course of assessment proceeding when the Assessing Officer proposed to compute assessee's tax liabilities under section 115JA of the Act, it was contended by the assessee that as per Article–7 of India–U.K. Double Taxation Avoidance Agreement (DTAA) only business profit directly attributable to the Indian branches can be taxed in India. Thus, it was submitted, the assessee has no liability under the provisions of section115JA of the Act. It was submitted, the provisions of the Act would apply to the assessee only to the extent they are beneficial to it as provided under section 90(2) of the Act. In this context, the assessee also relied upon CBDT Circular no.333, dated 12th April 1982. Thus, in sum and substance, it was submitted by the assessee that when the India–U.K. Tax Treaty specifically provides mode of computation of profit, it will override the provisions of section 115JA of the Act. The Assessing Officer after considering the submissions of the assessee observed that under the Article–7 of the Tax Treaty no specific method of computation for calculation of tax has been provided. He observed, the said Article only provides for taxability of business profit directly

attributable to Bank's branches in India. Whereas, what section 115JA of the Act seeks to tax is nothing but the profits derived by the assessee shown in the Profit & Loss Account in respect of Indian branches. Thus, ultimately, he held that the assessee is liable to pay tax under section 115JA of the Act and computed the tax accordingly under the said provision. The assessee challenged the aforesaid decision of the Assessing Officer before the first appellate authority.

5. Learned Commissioner (Appeals) after considering the submissions of the assessee did not find merit in them. Relying upon a decision of the Authority for Advance Ruling reported in 234 ITR 335, he held that the provisions of section 115JA of the Act would apply to a non−resident company. Accordingly, he upheld the decision of the Assessing Officer insofar as applicability of section 115JA of the Act is concerned.

6. Learned Sr. Counsel for the assessee drawing our attention to the provisions contained under section 115JA of the Act submitted, as per sub−section (2) of section 115JA of the Act, the companies whose Profit & Loss Account is prepared in accordance with the provisions of Part−I & II of Schedule−VI to the Companies Act, 1956, are amenable to the provisions of section 115JA of the Act. He submitted, assessee has to prepare its accounts as per Banking Regulations Act and not as

per the Companies Act. He submitted, clause (e) to Explanation to section 115JA of the Act further makes it clear that the provision of section 115JA of the Act is applicable only to domestic companies as it speaks of increasing the income by the amount of dividend paid or proposed. Learned Sr. Counsel for the assessee submitted, section 115JB of the Act, which is pari−material to section 115JA of the Act, an amendment was made by Finance Act, 2012, effective from 1st April 2013, making it mandatory for all companies including banking companies to prepare their Profit & Loss Account as per Schedule−VI of the Companies Act, 1956. He submitted, the said amendment would be applicable form assessment year 2012−13 onwards. Learned Sr. Counsel for the assessee submitted, no such corresponding amendment like section 115JB(2)(b) of the Act was made to the provisions of section 115JA of the Act. Thus, he submitted, the provisions of section 115JA of the Act cannot be applied to the assessee. In support of his contention, learned Sr. Counsel relied upon the following decisions:−

i) ICICI Lombard General Insurance Co. Ltd. v/s ACIT, 54 SOT 538 (Mum.);

ii) UCO Bank v/s DCIT, 156 ITD 146 (Kol.);

iii) State Bank of Hyderabad v/s DCIT, 58 SOT 278 (Hyd.);

iv) DCIT v/s Royal Bank of Scotland, 76 taxmann.com 91; and

v) Bank of Tokyo Mitsubishi UFJ Ltd. v/s ADIT, 49 taxmann.com 441."

7. The learned Departmental Representative submitted, since the assessee has a Permanent Establishment (PE) in India, its accounts have to be maintained as per the provisions of the Act. In this context, he strongly relied upon the observations of learned Commissioner (Appeals).

8. We have considered rival submissions and perused material on record. The main plank of assessee's argument against applicability of section 115JA of the Act is, assessee being a banking company maintaining its accounts under the Banking Regulations Act, 1949, the provision contained under section 115JA of the Act will not apply. Undisputedly, the assessee is a banking company and has opened its branches in India after obtaining permission of the RBI. Therefore, the assessee is governed under the Banking Regulations Act, 1949. Section 115JA of the Act provides for computation of total income chargeable to tax to be an amount equal to 30% of the book profit in case such income is less than 30% of the book profit. However, sub–section (2) of section 115JA of the Act mandates that the company for the purpose of section 115JA of the Act has to prepare its Profit & Loss Account in accordance with the provisions of Part–II & III of Schedule–VI of the Companies Act, 1956. Undisputedly, the assessee being

governed under the Banking Regulations Act, 1949, is not required to prepare its Profit & Loss Account under the provisions of Part–II & III of Schedule–VI of the Companies Act, 1956. That being the case, the provisions of section 115JA of the Act are not applicable to the assessee. The Tribunal, Mumbai Bench, in Krung Thai Bank (supra) has held that the provisions of section 115JB of the Act, which is more or less pari–materia to section 115JA of the Act, can only come into play when the assessee is required to prepa e its Profit & Loss Account in accordance with the provisions of Part–II & III of Schedule–VI of the Companies Act, 1956. It was observed by the Branch that the starting point of computation of minimum alternate tax (MAT) is the result shown by such Profit & Loss Account. Since, in case of Banking company, the provisions of Schedule–VI of the Companies Act, 1956 are not applicable, as, they are required to prepare their accounts under the provisions of Banking Regulations Act, the provision of section 115JB will not be applicable. The other decisions cited by the learned Sr. Counsel for the assessee also support this view. Further, the Tribunal, Mumbai Bench, in MSEB (supra), has held that since the assessee is not constituted as a company under the Companies Act, 1956, the provisions of section 115JA of the Act cannot be applied. While doing so, the Bench further observed that since the assessee Corporation is not required to distribute any dividend, it cannot be

considered to be a company under the Companies Act, 1956. The facts involved in assessee's case are more or less identical to the facts of MSEB (supra). In view of the aforesaid, we hold that the provisions of section 115JA of the Act are not applicable to the assessee. This ground is allowed.

9. In addition to the original grounds raised in the memorandum of appeal, the assessee has raised following additional grounds vide letter dated 9th May 2011, subsequent to the filing of the present appeal before the Tribunal.

> *"1. The learned Joint Commissioner of Income-tax, Special Bench 27, Mumbai (JCIT) erred in restricting the claim of Head Office Expenditure of Rs.28,87,23,772/- to Rs. 5,91,00,313/- being 5% of the 'Adjusted Total Income' under the provisions of section 44C of the Income Tax Act, 1961 (the Act) having failed to appreciate that section 44C has no application to the Appellant's case. The learned JCIT ought to have held that in view of Article 26 of the Double Tax Avoidance Agreement between India and the United Kingdom ("the DTAA"), section 44C could not have been applied in computing the Appellant's income for the purposes of the Act.*
>
> *It is respectfully submitted that the in view of express provisions of Article 26 of the DTAA, section 44C will have no application since the provisions of section 44C are discriminatory in favour of an Indian enterprise vis-à-vis Permanent Establishment of a UK enterprise. In this connection, reliance is placed on the Mumbai tribunal's decision in Metchem Canada Inc. v/s. DCIT [284 ITR (A.T.) 196].*
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> *2. The Appellant craves leave to add, alter and/or amend one or more of the above grounds of appeal.*
>
> *3. The Appellant prays for appropriate relief."*

10. In course of assessment proceedings, the Assessing Officer found that the assessee had claimed that amount of ₹ 28,87,23,772, being expenditure incurred by the head office in the nature of general, administrative expenses, is allowable as deduction under section 44C of the Act. In support of such claim, the assessee furnished documentary evidences providing details of allocation of expenditure. However, it was submitted by the assessee that since it did not had any positive income, no deduction has been claimed under section 44C of the Act. However, it was submitted that in case of positive income, deduction under section 44C of the Act could be granted. The Assessing Officer, after considering the submissions of the assessee and verifying the evidences furnished, accepted assessee's claim that direct expenditure as well as expatriate salaries and bonus should be considered for deduction under section 44C of the Act. Accordingly, out of the common Head Office expenses of ₹ 28,87,23,772, the Assessing Officer allowed deduction of ₹ 5,91,00,313, under section 44C of the Act. This decision of the Assessing Officer was accepted by the assessee. However, before us, the assessee has contested the applicability of section 44C of the Act by raising the aforesaid additional ground.

11. Learned Sr. Counsel for the assessee submitted, since, the assessee is governed by India–U.K. Tax Treaty, it is eligible to claim

benefit under the said tax treaty. He submitted, as per Article−26 of the India−U.K. Tax Treaty, the assessee cannot be subjected to the restriction imposed under section 44C of the Act since such restriction is not applicable to an Indian Enterprises. He submitted, non−discrimination clause under Article−26 of India−U.K. Tax Treaty will be applicable to the assessee, hence, the Head Office expenditure incurred cannot be curtailed by applying provisions of section 44C of the Act. In support of such contention, he relied upon the following decisions:−

i) Rajeev Sureshbhai Gajwani v/s ACIT, 129 ITD 145;

ii) Standard Chartered Bank v/s IAC, 39 ITD 145;

iii) Metchem Canada Inc. v/s DCIT, 284 itr (AT) 196;

iv) Rolls Royce Indl. Power Ltd. v/s ACIT, 42 SOT 264; and

v) Daimler Chrysler India, 29 SOT 502.

12. The learned Departmental Representative strongly opposing admission of the additional ground submitted, assessee having claimed deduction under section 44C of the Act and having not contested the issue either before the Assessing Officer or before the learned Commissioner (Appeals), cannot raise the issue at this late stage before the Tribunal, since, the issue raised by the assessee requires investigation into fresh facts. Without prejudice to the aforesaid, the learned Departmental Representative submitted, the provisions of

section 44C of the Act being non discriminatory, assessee's claim of benefit under Article–26 of the India–U.K. Tax Treaty is not acceptable.

13. We have considered rival submissions and perused material on record. Undisputedly, the assessee itself in the return of income had claimed deduction under section 44C of the Act. Accepting assessee's claim the Assessing Officer has computed deduction of Head Office expenses under section 44C of the Act. Further, the computation of deduction under section 44C of the Act was not contested before the learned Commissioner (Appeals). Subsequent to filing of the present appeal, the assessee has raised the additional ground challenging the applicability of section 44C of the Act on the ground that in view of Article–26 of the India–U.K. Tax Treaty, section 44C of the Act will not be applicable to the assessee, since, it is discriminatory to the non–resident companies. In support of such contention, learned Sr. Counsel for the assessee has relied upon certain judicial precedents.

14. After considering the rival contentions, we are of the view that the issue raised in the additional ground, does not require investigation into fresh facts and can be decided on the basis of facts available on record. Therefore, the additional ground raised by the assessee deserves to be admitted keeping in view the ratio laid down

in National Thermal Power Corporation v/s CIT, 229 ITR 383 and CIT v/s Prithvi Brokers and Shareholders, 349 ITR 336. However, since the assessee has not contested the applicability of section 44C of the Act either before the Assessing Officer or before learned Commissioner (Appeals) and has raised it for the first time before us, in our considered opinion, the Department should be given a fair opportunity to examine assessee's claim with regard to applicability or otherwise of section 44C of the Act qua Article–26 of India–U.K. Tax Treaty. Therefore, we consider it fair and reasonable to restore the issue to the Assessing Officer for examining assessee's claim with regard to the applicability of section 44C of the Act keeping in view the relevant provisions of India–U.K. Tax Treaty and the judicial precedents dealing with the issue. Needless to mention, the Assessing Officer must provide reasonable opportunity of being heard to the assessee. Ground is allowed for statistical purpose.

15. In the result, appeal is partly allowed.

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Revenue's Appeal

16. In ground no.1, the Department has challenged the deletion of disallowance of expenses amounting to ₹ 24,85,49,931.

17. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of expenditure incurred outside India amounted to ₹ 24,85,49,931 comprising of salaries of expatriate employees, direct expenditure attributable to Indian branches and NRI expenses. The Assessing Officer after examining the nature of expenses held that the aforesaid expenditure claimed by the assessee being part of Head Office expenses is eligible for deduction under sec ion 44C of the Act, hence, cannot be claimed as deduction separately. Being aggrieved with the aforesaid decision of the Assessing Officer, assessee preferred appeal before the first appellate authority.

18. Learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and materials on record found that identical disallowance made by the Assessing Officer in assessee's own case in assessment year 1994–95 to 1996–97 was deleted by his predecessor–in–office by holding that such expenditures are incurred by the assessee exclusively for the purpose of business of the assessee in India and are not in the nature of Head Office expenses covered under section 44C of the Act. Following the decision of his predecessor–in–office, learned Commissioner (Appeals) deleted the disallowance by holding that the expenditure is allowable under

section 37(1) of the Act without imposing restrictions contained under section 44C of the Act.

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

20. In ground no.2, the Revenue has challenged deletion of addition made of ₹ 9,03,97,100, on account of broken period interest paid on purchase of securities. In the course of assessment proceedings, the Assessing Officer noticing that the assessee has debited an amount of ₹ 9,03,97,100, towards payment of broken period interest on securities called for necessary details and after rejecting the submissions of the assessee held that broken period interest being part of capital cost cannot be allowed as revenue expenditure. While deciding assessee's appeal on the issue, learned Commissioner (Appeals) allowed assessee's claim having found that identical issue

was decided in favour of the assessee by the Tribunal and the Hon'ble Jurisdictional High Court.

21. We have considered rival submissions and perused material on record. Learned Counsels appearing for the parties have agreed before us that the issue has been decided in favour of the assessee by the Hon'ble Jurisdictional High Court while deciding the reference application filed by the Department in assessment year 1985−86 and 1986−87 as well as by the Tribunal in subsequent assessment years.

22. Having considered rival submissions we find that the allowability of broken period interest is a recurring dispute between the parties since long. The Hon'ble Jurisdictional High Court while deciding Income Tax Reference no.87/1996, for the assessment year 1985−86 and 1986−87, vide order dated 16th July 2003, has decided the issue in favour of the assessee. Subsequently, the Tribunal has allowed assessee's claim while deciding appeals for the assessment years 1989−90 to 1995−96 which is evident from the appeal orders placed in the legal paper book. Facts being identical, respectfully following the decision of the Hon'ble Jurisdictional High Court and the Tribunal in assessee's own case in preceding assessment years, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

23. In ground no.3, the Revenue has challenged the deletion of addition of ₹ 6,78,011, on account of Guest House expenses.

24. At the outset, learned Sr. Counsel for the assessee submitted that the issue has to be decided against the assessee in view of the decision of the Hon'ble Supreme Court in Britannia Industries Ltd. v/s CIT, 278 ITR 546 (SC).

25. The learned Departmental Representative agreed with the aforesaid submission of learned Sr. counsel.

26. We have considered rival submissions and perused material on record. It is observed, while the Assessing Officer has disallowed the guest house expenses by invoking the provision of section 37(4) of the Act, learned Commissioner (Appeals) has allowed assessee's claim relying upon his own decision for the assessment year 1996–97. However, as agreed before us by learned Counsels appearing for the rival parties, the issue has now been settled by virtue of the decision of the Hon'ble Supreme Court in case of Britannia Industries Ltd. (supra), wherein it is held that in view of the provisions of section 37(4) of the Act such expenditure is not allowable. In view of the aforesaid, we reverse the decision of learned Commissioner (Appeals) on the issue and restore the addition made by the Assessing Officer.

27. In ground no.4, the Revenue has challenged the disallowance of interest expenditure attributable to earning of exempt income. During the assessment proceedings the Assessing Officer noticed that the assessee has claimed interest income of ₹ 4,43,41,446, received on tax free bonds as exempt under section 10(15)(iv) of the Act. He further found that the assessee has paid interest amounting to ₹ 352.98 crore. Whereas, the total interest income earned by the assessee amounted to ₹ 548.61 crore. Therefore he disallowed a part of exemption claimed on the interest income. Being aggrieved of such disallowance, assessee preferred appeal before the first appellate authority.

28. Learned Commissioner (Appeals) after considering the submissions of the assessee having found that there is no nexus between the interest bearing funds and the investment made in tax free bonds and further, the assessee had sufficient own fund to finance investment in tax free bonds, directed the Assessing Officer to delete the disallowance made.

29. We have considered rival submissions and perused material on record. As could be seen, learned Commissioner (Appeals) has recorded a categorical factual finding that the interest bearing funds have no nexus with the investment made in tax free bonds. Further,

he has also recorded a finding of fact that the assessee had sufficient own fund to make investment in tax free bonds. The aforesaid factual finding of the first appellate authority has not been controverted by the Revenue through any substantive evidence brought on record. That being the case, we do not find any valid ground to interfere with the decision of learned Commissioner (Appeals) on the issue the issue. Accordingly, the ground raised is dismissed.

30. In the result, appeal is partly allowed.

31. To sum up, both the appeals are partly allowed.

Order pronounced in the open Court on

MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED:

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.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai