

**आयकर अपीलीय अधिकरण, मुंबई "के" बेंचपीठ**

**Income-tax Appellate Tribunal -"K"Bench Mumbai**

**सर्वश्री राजेन्द्र,लेखा सदस्य एवं, शक्तिजीत डे, न्यायिक सदस्य**

**Before S/Shri Rajendra,Accountant Member and Saktijit Dey,Judicial Member**

**आयकर अपील सं/ ITA No.5997/Mum/2013 : निर्धारण वर्ष/Assessment Year-2008-09**

M/s. RBS Financial Services (India) Pvt. Ltd. (Formerly known as ABN AMRO Securities (India) Pvt. Ltd., Level 5, 4 <sup>th</sup> North Avenue, Maker Maxity,Bandra Kurla Complex Mumbai-400 051. <b>PAN:AAFCEM 6895 B</b>	Vs.	ACIT-Circle-3(3) Mumbai.
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**(Appellant)**

**(Respondent)**

**Revenue by: Shri N.K. Chand -CIT**

**Assessee by: Shri Arvind Sonde**

**सुनवाई की तारीख / Date of Hearing: 04.10.2016**

**घोषणा की तारीख / Date of Pronouncement: 02.01.2017**

**आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश**

**Order u/s.254(1)of the Income-tax Act,1961(Act)**

**लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-**

Challenging the order dt.25.07.2013 of CIT-(A)-15, Mumbai the assessee had filed the present appeal.Assessee-company,engaged in the business of trading arrangers of securities, issue management and private placement advisory services, filed its return of income on 29.09.2008, declaring income of Rs.52.84 crores. During the assessment proceedings the Assessing Officer (AO)found that assessee had entered into International Transactions (IT.s) with its Associated Enterprises (AE.s) for the year under consideration. Therefore ,he made a reference to Transfer Pricing Officer (TPO).After considering the order of the TPO, he determined income of the assessee , u/s. 143(3) of the Act ,on 25.1.2012, at Rs.75.47 crores.

2.First Ground of appeal is about determination of Arm's-Length Price(ALP) of Loan Syndication Transaction (LST) and its allocation between the assessee and its AE. During the TP proceedings ,the TPO found that the assessee had entered into IT.s worth Rs.63,60,93, 95,835/-, that it had received fee/commission from its AE of Rs.92.72 crores, that same was nomenclature as Loan Syndicate Fee (LSF).After considering the submission of the assessee ,the TPO determined the ALP of Syndicate Fee received by the assessee at 100% as against the 50% shown by the assessee . He made an adjustment of Rs. 22.63 crores to the income of the assessee holding that the ALP of the Syndicate Fee was 100% and by AE was NIL.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions before him. After considering the submission of the assessee and the orders of the TPO/AO, he held that his predecessor had decided the identical issue against the assessee, while deciding the appeal for the immediately preceding year i.e. AY. 2007-08, that facts for both the years were similar. Finally, upholding the order of the AO/TPO, he dismissed the appeal filed by the assessee.

4. During the course of hearing before us, the Authorised Representative (AR) argued that the Tribunal while deciding appeal for AY. 2007-08, filed by the assessee (ITA/3260/Mum/2012 dt. 24.6.16), had deliberated upon the issue of LSF, that facts of the case under consideration are similar to the facts of the earlier year. The Departmental Representative (DR) supported the order of the FAA and relied upon the case of Cybertech System & Software Ltd. (33 taxmann.com371).

5. We have heard the rival submission and perused the material placed before us. Before proceeding further, we would like to consider the case of Cybertech System & Software Ltd. (supra). We find that in that case the assessee was engaged in the business of providing information technology services, software development, support and consultancy and other support services. The Tribunal had decided the issue as to whether internal comparable was always preferable over external comparable once all segmental details were available. It had also decided the issue as to when the TPO can go in search for external TNMM as against the Internal TNMM. The last issue decided by the Tribunal was as to whether incurring of losses on margins from contract price would mean that its income from such transaction had to be considered at arm's length taking a view that there would be no shifting of profits. In our opinion, the case relied upon by the DR is of no help to adjudicate the issue before us.

5.1. Now we would like to reproduce relevant part of the order of the AY 2007-08 dealing with identical issue and it reads as under :-

"3. The Ld. Counsel for the assessee submits that the main issue in the appeal of the assessee is regarding adjustment in respect of loan syndication fee and its allocation between assessee and its AE. The Ld. Counsel for the assessee submits that in similar type of cases, the Hon'ble Tribunal held that only 20 to 25% loan syndication fee is attributable to the assessee but not 100% as was done by the Assessing Officer. The Ld. Counsel for the assessee placed reliance on the orders of Co-ordinate Bench in the case of Calyon Bank Vs DDIT in ITA No. 4474/M/09 dated 21.3.2014 and M/s. Credit Lyonnais Vs ADIT in ITGA No. 1935/M/07 dated 30.9.2013 in support of his contentions.

4. The Ld. Departmental Representative placed reliance on the orders of the authorities below.

5. We have heard the rival contentions and perused the orders of the authorities below and the decisions relied on by the assessee. The brief facts are that assessee has entered into following international transactions with its associated enterprises:

S. No.	Name of the AE	Description of property and nature of transaction	Amount (Rs.)
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1.	ABN AMRO Asia Pacific PTE Ltd	Purchase of Securities	158,15,83,600
2.	ABN AMRO Bank N.V. India Branches (ABN Bank India)	Purchase of Securities	301,15,90,151
		Sale of Securities	2779,39,44,702
		Custody charges paid	27,499
		Professional charges paid/payable	1,30,000
		Bank charges paid	511
		Interest paid on Call Money Borrowing	25,80,167
		Interest paid on Repo Borrowing	14,38,727
		Interest received on short term borrowing	13,38,727
		Shared cost for co-located premises	32,70,320
		Net interest received on interest rate swaps	138,79,200
3.	ABN AMRO Bank N.V. Hong Kong Branch office	Fee/Commission received/receivable	599,84,604

5.1. The assessee received fee/commission from its AE at Rs. 5,99,84,604/- which had nomenclature as loan syndication fee. The details provided with regard to this transaction being loan syndication as provided in the TP study report was examined and accordingly it was observed that the functions performed by the AE in a loan syndication agreement were largely that of a routine loan provider. Accordingly the assessee was given a detailed show cause notice vide TPO's letter dated 11.10.2010 wherein the assessee was informed that in view of detailed reasons provided, the ALP of syndication fee receivable by the assessee was 100% and by the AE at Nil, which was in continuation of benchmarking methodology of the assessee, only the ratio had been altered.

5.2. The TPO has observed that splitting of fee between the AE and the assessee was actually not equal. The AE kept a higher amount of fees and that the AE by entering into syndication would have got favourable terms from the other members of the syndicate and benefited by spread of risk. All the functions other than the task of syndicate forming are routine tasks for a loan giver and by forming a syndicate the AE had benefitted in terms of spread of risk and in obtaining beneficial terms compared to others. The TPO has mentioned that the business of AE, M/s. ABN Amro Bank NV Hongkong Branch office was to give loans and normal risks undertaken by the loan giver are underwriting risk, marketing risk, counter party of the credit risk and operational risk. Forming of syndicate was a means of sharing risks and any loan giver would like to share risks and this was a normal instance in such a situation.

5.3. TPO held that loan was possible only because of Indian entities efforts in identification of the client and preliminary discussions with the client. Since the AE may be involved in syndicate formation it gains in the form of spread of risks and having beneficial terms for itself and would be charging some amount from the other syndicate members and that the situation is akin to the Indian entity helping the foreign principle sell its goods in India. TPO held that AE should remunerate the assessee with the benefit being net present value of interest received / receivable over the tenure of the loans. TPO held that there was no basis of so called profit split being 50:50 and this had no justification. TPO observed that in a third party situation a party which has helped the foreign party to sell in India would be charging from the ultimate buyer some commission. Similarly the Indian party would be charging some commission from foreign party whose goods have been sold in India mainly due to the efforts of Indian Party. In a comparable situation there would be no share of syndication fee. TPO held that the activities of the Indian entity had been clearly ignored.

5.4. Accordingly, TPO determined the ALP of the syndication fee received by the assessee at 100% and not 50%. TPO held that Euros 21,92,414 should have been given to the assessee. In Rupee terms taking the value of 1 euro at Rs. 60/-, it comes to Rs. 13,15,44,840/-, out of which Rs.5,99,84,604/- had been received by the assessee. TPO held that the ALP of syndicate fee receivable by the appellant was 100% and by the AE NIL, which resulted into an adjustment of Rs.7,15,60,236/-. While passing the order the TPO did not allow benefit of +/-5% to the assessee and nothing in this regard

has been discussed in his order. The Assessing Officer passed his order in conformity with the ALP so determined by the TPO.

6. The Ld. CIT(A) upheld the order of the TPO.

7. We find that in similar circumstances, the Co-ordinate Bench has taken the following view in the case of M/s. Credit Lyonnais Vs ADIT:

*“We have considered the rival submissions as well as relevant material on record. The assessee being Indian branch has helped the foreign currency loan syndication in respect of two loans to Reliance Petroleum Limited and Reliance Industries Limited to the tune of US\$ 50 million and USD\$ 11 million, respectively. There is no dispute that for these two loans, Credit Agricole Indosuez (Asia), Singapore worked as an agent and Credit Lyonnais worked as lead arrangers/coarrangers. The ANZ Investment Bank, BA Asia Ltd. as well as ABN Amro Bank were also worked as co-arrangers. The role of the assessee in these transactions of foreign currency loan under ECB was to provide financial analysis of the borrowers, general market conditions and regulatory environment. The learned AR has vehemently argued that as per para 4 of Protocol, profit cannot be attributed to the PE on account of facilitation of conclusion of loan agreement or mere signing thereof. We do not agree with the contention of the learned AR of the assessee because of the fact that the role of the assessee is not merely facilitation of conclusion of loan agreement or signing thereof but the services provided by the assessee are the core-basis for taking the decision of granting the loan by the syndicate. The assessee provided the services regarding clients creditability analysis, its capacity so as to consider the capacity to repay the loan and risk involved in the loan transaction. Therefore, the role of the assessee in providing such a crucial service is inevitable for taking the decision of providing loan and as such cannot be said to be a mere facilitation of conclusion of the loan agreement or signing thereof. At this stage, para 4 of the Protocol between the India and France is quoted for ready reference as under :-*

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

*The plain reading of para 4, mentioned above, makes it clear that if the role of the PE is only to facilitate the conclusion of foreign trade or loan agreement or mere signing thereof, then no profit shall be attributed to PE in terms of Article 7(2) of the Indo France DTAA. As we have discussed above that the assessee's role in providing the services is the core-basis of taking the decision of granting loan, therefore, the nature of services provided by the assessee do not fall under the terms facilitation of conclusion of loan agreement or signing thereof as stipulated under para 4 of the Protocol.*

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

8. Similarly following the said decision the Co-ordinate Bench in the case of Calyon Bank Vs DDIT held as under: -

*Ground No.9 disallowance of interest and commission by the TPO in respect of ECB advance to Indian borrowers.*

*24. We have heard learned AR as well as learned DR and considered the relevant material on record. The TPO made an adjustment of 25% of interest and commission received by overseas branches in respect of ECB advance to Indian borrowers. The CIT(A) granted relief of 5% and restricted the adjustment to 20% of interest and commission. At the outset, we note that an identical issue has been*

considered by the Tribunal in case of M/s. Credit Lyonnais (through their successors Calyong Bank) in vide order dated 31st September 2013 in para 8.7 to 8.8 as under:

*“8.7 We have considered the rival submissions as well as relevant material on record. The assessee being Indian branch has helped the foreign currency loan syndication in respect of two loans to Reliance Petroleum Limited and Reliance Industries Limited to the tune of US\$50 million and USD\$ 11 million, respectively. There is no dispute that for these two loans, Credit Agricole Indosuez (Asia), Syngapore worked as an agent and Credit Lyonnais worked as lead arrangers/cc- arrangers. The ANZ Investment Bank, BA Asia Ltd. as well as ABN Amro Bank were also worked as co-arrangers. The role of the assessee in these transactions of foreign currency loan under ECB was to provide financial analysis of the borrowers, general market conditions and regulatory environment. The learned AR has vehemently argued that as per para 4 of Protocol, profit cannot be attributed to the PE on account of facilitation of conclusion of loan agreement or mere signing thereof. We do not agree with the contention of the learned AR of the assessee because of the fact that the role of the assessee is not merely facilitation of conclusion of loan agreement or signing thereof but the services provided by the assessee are the corebasis for taking the decision of granting the loan by the syndicate. The assessee provided the services regarding clients creditability analysis, its capacity so as to consider the capacity to repay the loan and risk involved in the loan transaction. Therefore, the role of the assessee in providing such a crucial service is inevitable for taking the decision of providing loan and as such cannot be said to be a mere facilitation of conclusion of the loan agreement or signing thereof. At this stage, para 4 of the Protocol between the India and France is quoted for ready reference as under :-*

*“4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.” The plain reading of para 4, mentioned above, makes it clear that if the role of the PE is only to facilitate the conclusion of foreign trade or loan agreement or mere signing thereof, then no profit shall be attributed to PE in terms of Article 7(2) of the Indo France DTAA. As we have discussed above that the assessee’s role in providing the services is the core-basis of taking the decision of granting loan, therefore, the nature of services provided by the assessee do not fall under the terms facilitation of conclusion of loan agreement or signing thereof as stipulated under para 4 of the Protocol.*

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

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

*Respectfully following the above said decisions, we restore this issue to the file of the Assessing Officer to follow the decisions and decide the issue in line with the above decisions for allocation of loan syndication fee between the assessee and its AE after giving opportunity of being heard to the assessee.*

9. *In the result, the appeal filed by the assessee is allowed for statistical purpose.*

Respectfully following order for earlier AY., we are restoring back the issue to the file of the AO to follow the decision for the AY. 2007-08. He is directed to afford a reasonable opportunity of hearing to the assessee.

As a result, appeal filed by the assessee is allowed for statistical purposes.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 2<sup>nd</sup> January, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 02 जनवरी, 2017 को की गई।

Sd/-

(शक्तिजीत डे / Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 02 . 01.2017.

Jv.Sr.PS.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.