IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2514/Mum./2022	**ITA no.2513/Mum./2022**
(Assessment Year : 2013–14)	(Assessment Year : 2014–15)

ITA no.2978/Mum./2022
(Assessment Year : 2015–16)

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

v/s

M/s. Cooperative Rabobank U.A.
20th Floor, Tower–A, Peninsula Business Park
Senapati Bapat Marg, Lower Parel
Mumbai 400 013 PAN – AACCC1331M .....Respondent

Assessee by : Shri Nitesh Joshi
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing – 10/04/2023	Date of Order – 21/04/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present batch of 3 appeals has been filed by the Revenue challenging the impugned orders of even date 29/07/2022, for the assessment years 2013–14 and 2014–15, and order dated 07/09/2022, for the assessment year 2015–16, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–56, Mumbai, [*"learned CIT(A)"*].

2. Since the appeals pertain to the same assessee involving similar issues, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

ITA no.2514/Mum./2022
Revenue's Appeal – A.Y. 2013–14

3. In its appeal, the Revenue has raised the following grounds:–

"1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that during the AY 2013-14, the assessee has operated through its branch Permanent Establishment unlike in AY 2010-11 where the assessee was acting through subsidiary Indian company.

2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in deciding the appeal stating that the facts of the appeal for AY 2010-11 were similar to present appeal, while the facts of the case that in AY 2010-11, the assessee acted through Indian company M/s Rabo India Finance Private Limited(Rabo India), whereas in AY 2013-14, the facts of the case is that during assessment proceeding the assessee itself disclosed that it has a branch in India (PE).

3. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that the ECB loans provided to Indian clients were linked to the activities of branch (PE) of assessee in India and therefore the interest paid by Indian clients is liable to tax as its business Income at rate of 40%.

4. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has failed to hold the receipt of interest on ECB loan as business income of its PE where he has accepted that the main business of the assessee is finance and loan to its customers and the interest income is part of the income of the assessee and Indian clients have deducted TDS on it.

5. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has erred in deleting the addition of Rs.39,94,178/- made by the AO in respect of Interest received by head office/overseas branch from branch in India (Assessee)."

4. The issue arising in grounds No. 1-4, raised in Revenue's appeal, is pertaining to the taxability of interest earned on External Commercial Borrowings ("*ECB*") loans.

5. The brief facts of the case pertaining to this issue are: The assessee is an Indian branch of Co-operative Centrale Raiffeusen-Borenleen Bank B.A., Netherlands (Rabobank, Netherlands), a company incorporated in the Netherlands. In March 2011, the assessee received approval from the Reserve Bank of India to commence its branch banking activities in India. For the year under consideration, the assessee filed its return of income on 02/12/2013,

declaring a total income of Rs.31,33,45,990. During the assessment proceedings, it was observed from the ITS (Individual Transaction System from ITD) details of the assessee that the assessee had an undisclosed TDS credit amounting to Rs.6,84,52,407. Accordingly, the assessee was asked to explain the reason for the difference in income appearing in Form 26AS vis-à-vis the profit and loss account in the return of income filed by the assessee. In response thereto, the assessee submitted that the tax credit of Rs.6,84,52,407 is not claimed by the assessee. It was further submitted that the assessee has various branches around the world, which operate independently and have separate business units conducting, inter-alia, lending, and other business activities independently. It was further submitted that the head office/overseas branches of the assessee has disbursed certain loans to Indian companies and has earned interest income thereon. The said income was directly paid by the Indian companies to the head office/overseas branches and the taxes in respect of the said income was borne by the Indian companies. It was further submitted that the income earned by the head office/overseas branches has been subjected to TDS at 10% under the India Netherlands Double Taxation Avoidance Agreement ("*DTAA*") and the same has been deposited to the Revenue using the PAN of the assessee. The assessee submitted that since the income does not pertain to the operations of the Indian branch, the TDS credit in respect of the same was not claimed in the return of income filed by the assessee. On a without prejudice basis, the assessee proposed to add back the aforesaid income as reported in Form 26AS to the total income of the assessee, however, requested that the tax be levied at the rates prescribed under the

India-Netherlands DTAA and also the credit for taxes deducted at source as reflected in the Form 26AS be granted.

6. The Assessing Officer ("*AO*") vide order dated 22/02/2017, passed under section 144C(3) r/w section 143(3) of the Act held that the assessee has not shown its complete gross receipts and available TDS credit in its return of income filed for the year under consideration. The AO proceeded to add the difference between the gross receipts as per Form 26AS and income as per the return. Accordingly, the AO made an addition of Rs.66,28,56,151, being the undisclosed gross receipts to the total income of the assessee and taxed the same @ 40%. The AO also granted the corresponding TDS credit amounting to Rs. 6,84,52,407, to the assessee.

7. The learned CIT(A) vide impugned order, following its order rendered in assessee's own case for the assessment year 2010-11, held that the interest income is includable in the hands of the assessee and the same is required to be taxed as per the rate provided in the India-Netherlands DTAA read with the provisions of the Act. Being aggrieved, the Revenue is in appeal before us.

8. We have considered the rival submissions and perused the material available on record. The assessee is an Indian branch of Rabobank Netherlands, a company incorporated in the Netherlands. During the assessment proceedings, it was observed that the tax credit of Rs.6,84,52,407, was not claimed by the assessee. As per the assessee, it has various branches around the world, which operate independently and have separate business units conducting, inter-alia, lending, and other business

activities independently, which would include dealing with Indian companies. The loans which were disbursed by the head office/overseas branches of the assessee to Indian companies have earned interest income, which was paid directly by the Indian companies to the head office/overseas branches after deduction of tax at the rate of 10% under the India-Netherlands DTAA. It is the plea of the assessee that since this income doesn't pertain to the operations of the Indian branch, the TDS credit in respect of the same was not claimed in the return of income filed by the assessee. However, during the assessment proceedings, on without prejudice basis, the assessee accepted the proposition of adding back the income as reported in Form 26AS to the total income of the assessee and the grant of taxes deducted at source as reflected in Form 26AS. The AO added the undisclosed gross receipts amounting to Rs.66,28,56,151, to the total income of the assessee and taxed the same @ 40%. The AO also granted the corresponding TDS credit amounting to Rs.6,48,52,407. The learned CIT(A) vide impugned order, following its earlier order for the assessment year 2010-11, held that interest income is taxable in the hands of the assessee as per the rate provided in the India-Netherlands DTAA read with the provisions of the Act.

9. Against this order, the assessee has not filed any appeal and only the Revenue is in appeal before us. Thus, it is evident that the assessee is not aggrieved against the taxability of interest income in its hands. The only plea of the assessee is that the rate of tax of 10% as per Article 11(2) of the India Netherlands DTAA be applied in the present case. In support of this submission, reliance was placed upon the decision of the coordinate bench of

the Tribunal in assessee's own case for the assessment year 2012-13. On the other hand, as per the Revenue, the income is in the nature of business income in the hands of the assessee and therefore is required to be taxed at the rate of 40%.

10. From the record, it is evident that the AO as well as the learned CIT(A) though held that the interest income is includable in the hands of the assessee, however, did not analyse the applicability of the provisions of the DTAA in the present case. Further, the assessee has also not made any submission before the lower authorities as regards the provision under which this income is taxable under the DTAA. It is evident from the record that during the assessment proceedings, the assessee merely requested that the income be taxed at the rates prescribed under the treaty. Before us the assessee has prayed for the applicability of the rate of tax of 10% as per Article 11(2), however, the assessee has also not proved the beneficial ownership of the interest for the applicability of the aforesaid rate of tax under Article 11(2) of the India-Netherlands DTAA. Therefore, in view of the above, we deem it appropriate to remand this issue to the file of the AO for *de novo* adjudication after examining the applicability of the India-Netherlands DTAA in the present case. As the matter is remanded to the AO for fresh consideration, the assessee shall be at liberty to adduce all the evidence in support of its submission of taxability @10% under Article 11(2) of the India-Netherlands DTAA. As a result, grounds no.1-4 raised in Revenue's appeal are allowed for statistical purposes.

11. The issue arising in ground No. 5, raised in Revenue's appeal, is pertaining to the deletion of addition in respect of interest received by the head office/overseas branches from the Indian branch.

12. The brief facts of the case as emanating from the record are: The assessee is a banking company that is engaged in the business of borrowing and lending funds. Further, in the regular course of its banking business, the assessee maintains NOSTRO/VOSTRO/deposit accounts with its head office and overseas branches in order to facilitate the easy movement of funds. During the year under consideration, the assessee accepted overseas deposits placed with it by its head office and other overseas branches on which payment of interest was made by the assessee to head office/overseas branches. Accordingly, during the year under consideration, the assessee paid interest amounting to Rs.39,94,178, to its head office/overseas branches on the aforesaid deposits on which taxes were not deducted at source. Further, the assessee has claimed a deduction for the said payment made to the head office/overseas branches. During the assessment proceedings, the assessee was asked to show cause as to why the interest income paid to head office/overseas branches should not be treated as attributed to it. In response thereto, the assessee, inter-alia, placed reliance upon the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation vs DDIT (2012) 145 TTJ 649 (Mum.)(SB), wherein it was held that the head office and branch are two separate entities and the interest expenditure is deductible under the tax treaty, therefore the tax need not be deducted under section 195(1) of the Act as the income of the head office is not chargeable to tax in

India. The AO vide order passed under section 144C(3) r/w 143(3) of the Act did not agree with the submissions of the assessee and held that branch and head office of banking enterprise are distinct entities for the purpose of taxation under the Act as well as DTAA based on the principle of apportionment enshrined under the Act as well as the DTAA in respect of cross-border transactions of the non-residents. The AO also referred to the amendment to section 9(1)(v) of the Act vide Finance Act, 2015. Accordingly, the AO treated the interest paid by the assessee as income of the head office apportioned in the hands of the branch office which is attributable to India.

13. The learned CIT(A), vide impugned order allowed the appeal filed by the assessee on this issue, by observing as under:-

> *"5.3 Decision: I have perused and considered the AO's order and the submission of the Appellant. The AO has taxed interest paid by India branch in the hands of HO.*
>
> *The Appellant has disputed the addition stating that a branch and HO are one person for taxation purposes. The amount received by the HO from India branch is receipt from self and cannot be treated as income. Reliance is placed on Hon'ble SC decision in the case of Sir Kikabhai Premchand vs CIT (1953) 24 ITR 506 and some High Court decisions. Reliance is also placed on various decisions on the issue like decision of the Kolkata High Court in the case of ABN Amro Bank NV 198 Taxman 376 (SLP dismissed by Hon'ble SC on 03.08.2012) and Special Bench decision of jurisdictional Tribunal in the case of Sumitomo Mitsui Banking Corporation (2012) (136 ITD 66). It is also submitted that legal fiction with regard to Article 7(2) of IN treaty is essentially created to enable determination of profit of the PE and should not be extended to or have a bearing on any other provisions of treaty / act, except specifically provided for.*
>
> *In the case of Sumitomo Mitsui Banking Corporation, it was held that interest paid by the Indian Branch is not taxable in the hands of H.O. or overseas branches, all being a single entity. As regards reliance on amendment to section 9(1)(v)(c) by way of the Finance Act, 2015 w.e.f. 01.04.2016, being clarificatory in nature, the jurisdictional Tribunal in the cases of BNP Paribas SA (ITA No.1689/MUM/2018 dated 17.07.2019) and J.P. Morgan Chase Bank, N.A. (ITA No.3747/MUM/2018 and ITA No.363/MUM/2018, dated 30.12.2019) have held the said amendment to be prospective, applicable from A.Y. 2016-17. Further, the issue of taxability of interest in the hands of HO has been decided in favour of the appellant BNP Paribas SA for AY 2012-13 and in favour of J.P. Morgan Chase Bank, N.A. for AY 2011-12 and AY 2012-13, in these decisions.*
>
> *In view of the above, I decide the issue in favour of the appellant. The ground no. 2 is accordingly allowed."*

14. We have considered the rival submissions and perused the material available on record. We find that the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra) observed as under:-

> *"70. The purpose and function of article 7 is to determine whether the source State may tax the profit of an enterprise carried on by a resident of other contracting State through a PE in the source State and if so, how much of the profits the source State may tax. The resident State has to determine the profits attributable to the PE considering it as a separate entity mainly for the purpose of granting double taxation relief according to the relevant treaty and not for the purpose of determining the total taxable income of the enterprise carried on by such resident. Article 7 provides for taxation of the profits attributable to the PE in the PE State which is source State and for determining such profits attributable to the PE, it is treated as independent entity. There is thus a departure from preparation of the accounts of PE and GE symmetrically to the extent that independent fiction is applied only to the PE treating the PE and the enterprise of which it is a part as two separate entities only for the purpose of determining the profits attributable to the PE and not for the purpose of determining the total profits of the enterprise as a whole."*

15. Thus, the Special Bench held that the interest paid by the Indian branch is not taxable in the hands of the head office or overseas branches, all being the same entity. Further, as regards the reliance placed upon the amendment to section 9(1)(v) of the Act vide Finance Act, 2015 w.e.f. 01/04/2016 by the AO, we find that the said amendment was held to be applicable prospectively from 01/04/2016 and not prior thereto by the coordinate bench of the Tribunal in JP Morgan Chase Bank N.A. vs DCIT, [2020] 183 ITD 190 (Mumbai - Trib.). Thus, this amendment is not applicable to the year under consideration and would only be applicable to the assessment year 2016-17 and onwards. Therefore, respectfully following the aforesaid judicial pronouncements, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 5 raised in Revenue's appeal is dismissed.

16. In the result, the appeal by the Revenue is partly allowed for statistical purposes.

ITA no.2513/Mum./2022
Revenue's Appeal – A.Y. 2014–15

17. In its appeal, the Revenue has raised the following grounds:–

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that during the AY 2014-15, the assessee has operated through its branch Permanent Establishment unlike in AY 2010-11 where the assessee was acting through subsidiary Indian company.*
>
> *2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in deciding the appeal stating that the facts of the appeal for AY 2010-11 were similar to present appeal, while the facts of the case that in AY 2010-11, the assessee acted through Indian company M/s Rabo India Finance Private Limited(Rabo India), whereas in AY 2014-15, the facts of the case is that during assessment proceeding the assessee itself disclosed that it has a branch in India (PE).*
>
> *3. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that the ECB loans provided to Indian clients were linked to the activities of branch (PE) of assessee in India and therefore the interest paid by Indian clients is liable to tax as its business Income at rate of 40%.*
>
> *4. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has failed to hold the receipt of interest on ECB loan as business income of its PE where he has accepted that the main business of the assessee is finance and loan to its customers and the interest income is part of the income of the assessee and Indian clients have deducted TDS on it.*
>
> *5. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has erred in deleting the addition of Rs.26,66,995/- made by the AO in respect of Interest received by head office/overseas branch from branch in India (Assessee)."*

18. The issue arising in grounds no.1-4, raised in Revenue's appeal, is pertaining to the taxability of interest earned on External Commercial Borrowings ("*ECB*") loans. Since a similar issue on the basis of a similar factual matrix has been decided in Revenue's appeal in ITA No.2514/Mum./2022, for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no. 1-4 raised in Revenue's appeal are allowed for statistical purposes.

19. The issue arising in ground No. 5, raised in Revenue's appeal, is pertaining to the deletion of addition in respect of interest received by the

head office/overseas branches from the Indian branch. Since a similar issue on the basis of a similar factual matrix has been decided in Revenue's appeal in ITA No.2514/Mum./2022, for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.5 raised in Revenue's appeal are dismissed.

20. In the result, the appeal by the Revenue is partly allowed for statistical purposes.

ITA no.2978/Mum./2022
Revenue's Appeal – A.Y. 2015–16

21. In its appeal, the Revenue has raised the following grounds:–

"1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that during the AY 2015- 16, the assessee has operated through its branch Permanent Establishment unlike in AY 2010-11 where the assessee was acting through subsidiary Indian company.

2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in deciding the appeal stating that the facts of the appeal for AY 2010-11 were similar to present appeal, while the facts of the case that in AY 2010-11, the assessee acted through Indian company M/s Rabo India Finance Private Limited(Rabo India), whereas in AY 2015-16, the facts of the case is that during assessment proceeding the assessee itself disclosed that it has a branch in India (PE).

3. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has failed to appreciate that the ECB loans provided to Indian clients were linked to the activities of branch (PE) of assessee in India and therefore the interest paid by Indian clients is liable to tax as its business Income at rate of 40%.

4. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has failed to hold the receipt of interest on ECB loan! as business income of its PE where he has accepted that the main business of the assessee is finance and loan to its customers and the interest income is part of the income of the assessee and Indian clients have deducted TDS on it.

5. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) has erred in deleting the addition of Rs.38,06,815/- made by the AO in respect of Interest received by head office/overseas branch from branch in India (Assessee)."

22. The issue arising in grounds no.1-4, raised in Revenue's appeal, is pertaining to the taxability of interest earned on External Commercial Borrowings ("*ECB*") loans. Since a similar issue on the basis of a similar factual

matrix has been decided in Revenue's appeal in ITA No.2514/Mum./2022, for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no. 1-4 raised in Revenue's appeal are allowed for statistical purposes.

23. The issue arising in ground No. 5, raised in Revenue's appeal, is pertaining to the deletion of addition in respect of interest received by the head office/overseas branches from the Indian branch. Since a similar issue on the basis of a similar factual matrix has been decided in Revenue's appeal in ITA No.2514/Mum./2022, for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.5 raised in Revenue's appeal are dismissed.

24. In the result, the appeal by the Revenue is partly allowed for statistical purposes.

25. To sum up, all the appeals by the Revenue are partly allowed for statistical purposes.

Order pronounced in the open Court on 21/04/2023

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 21/04/2023

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai