IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1076/Mum./2021	**ITA no.1670/Mum./2022**
(Assessment Year : 2017–18)	(Assessment Year : 2018–19)

BNP Paribas
BNP Paribas House, 1, North Avenue
Maker Maxity, Bandra Kurla Complex ……. Appellant
Bandra (East), Mumbai 400 051
PAN – AAACB4868Q

v/s

Asstt. Commissioner of Income Tax
International Taxation .....Respondent
Circle–1(3)(1), Mumbai

Assessee by : Shri F.V. Irani
Revenue by : Ms. Surabhi Sharma

Date of Hearing – 20/12/2022	Date of Order – 24/01/2023

O R D E R

PER BENCH

The present appeals have been filed by the assessee challenging the separate impugned final assessment orders dated 08/04/2021 and 27/04/2022 passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ('*the Act*') pursuant to the directions issued by the learned Dispute Resolution Panel ('*learned DRP*') under section 144C(5) of the Act, for the assessment years 2017-18 and 2018–19, respectively.

ITA no.1076/Mum./2021
Assessee's Appeal – A.Y. 2017–18

2. In its appeal, the assessee has raised the following grounds:–

"Aggrieved by the order passed by the Assistant Commissioner of Income-tax (International Taxation)-Circle 1(3)(1), Mumbai (AO) dated 8 April 2021 (copy of the order received vide e-mail dated 12 April 2021), under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1 (DRP), Mumbai, BNP Paribas (the Appellant') respectfully submits that the learned AO has erred in passing the order on the following grounds:

1. The learned AO has erred in not accepting the claim that the rate of tax applicable to domestic companies and/ or co-operative banks for AY 2017-18 is also applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India France tax treaty.

2. The learned AO has erred in subjecting to tax, the data processing fees paid by Indian branch offices of the Appellant to its Singapore branch amounting to Rs 40,70,47,265, as income of the Appellant.

3. Without prejudice to Ground 2 above, the learned AO has erred in levying surcharge of 5 percent and education cess of 3 percent on the tax computed at the rate of 10% under Article 13 of the India-France tax treaty.

4. The learned AO has erred in holding that interest payable/ paid by the Indian branch offices of the Appellant to the head office and its other overseas branches amounting to Rs 16,91,71,226 is chargeable to tax.

5. Without prejudice to Ground 4 above, the learned AO has erred in levying surcharge of 5 percent and education cess of 3 percent on the tax computed at the rate of 10% under Article 12 of the India - France tax treaty.

6. The learned AO has erred in granting short credit of taxes deducted at source (TDS) amounting to Rs. 2,59,91,148.

7. The learned AO has erred in computing an incorrect amount of interest leviable under section 2348 of the Act.

8. The learned AO has erred in computing an incorrect amount of interest leviable under section 234C of the Act.

9. The learned AO has erred in levying interest under section 2340 of the Act.

10. The learned AO has erred in initiating penalty proceedings under section 270A of the Act.

Each of the grounds of appeal referred above is separate and may kindly be considered independent of each other.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

3. The issue arising in ground No. 1, raised in assessee's appeal, is pertaining to the rate of tax applicable to the assessee.

4. The brief facts of the case pertaining to this issue are: The assessee is a commercial bank having its head office in France. The assessee has 8 branches in India at Mumbai, New Delhi, Kolkata, Bangalore, Pune, Ahmedabad, Chennai, and Hyderabad. The assessee is involved in normal banking activities including financing of foreign trade and foreign exchange transactions. For the year under consideration, the assessee filed its return of income on 30/11/2017, declaring a total income of Rs.710,44,21,630. During the assessment proceedings, it was submitted that the tax rate as applicable to Indian companies carrying on similar business should be applied in its case instead of the rate of tax applicable to non-resident companies. The Assessing Officer ('*AO*') observed that similar claim was made by the assessee in the earlier year also but the same was rejected. The AO vide draft assessment order dated 27/12/2019, after taking into consideration the directions issued by the learned DRP and orders passed by the coordinate bench of the Tribunal in assessee's own case in preceding assessment years rejected the claim of the assessee that the tax rate applicable to Indian companies carrying on similar business should be applied to its case. The learned DRP vide its directions dated 25/02/2021, issued under section 144C(5) of the Act rejected the objections filed by the assessee on this issue following its directions rendered

in assessee's own case for the assessment year 2014-15. In conformity, the AO, inter-alia, passed the impugned final assessment order on this issue. Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned counsel appearing for the assessee, at the outset, fairly submitted that this issue has been decided against the assessee by the decisions of the coordinate bench of the Tribunal in the preceding assessment years. The learned counsel also submitted that assessee's appeal on this issue has been admitted by the Hon'ble jurisdictional High Court and a decision on the same is awaited.

6. On the other hand, the learned Departmental Representative ('*learned DR*') placed reliance upon the orders passed by the coordinate bench of the Tribunal in the preceding assessment years.

7. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in BNP Paribas vs DCIT, in ITA no.7458/Mum/2018, vide order dated 04/01/2021, for the assessment year 2014-15, decided a similar issue against the assessee by following the judicial precedents in assessee's own case. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"10. We have perused the various orders of the coordinate benches of the Tribunal in context of the aforesaid issue under consideration and are persuaded to subscribe to the claim of the Id. A.R that the aforesaid issue had consistently been decided by the coordinate benches against the assessee. On a perusal of a recent order of the Tribunal passed in the assessee's own case for A.Y, 2013-14 in ITA No. 552/Mum/2018, dated 22.04.2019, we find, that the Tribunal by relying on its earlier order for AY. 1996-97 in ITA No. 2760/Mum/2008, dated 28.08.2013 had therein concluded that the tax levied*

at a higher rate in the case of a foreign company is not to be regarded as a violation of the non-discrimination clause. For the sake of clarity the view taken by the Tribunal in context of the aforesaid issue is reproduced as under:

> *"We find that while deciding the appeal for AY 1996-97 (ITA No. 2760/Mum/ 2008 dated 28.08.2013), the Tribunal has decided the issue as under*
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> > *4.The third issue is relating to tax rate. The assessee has submitted that the tax levied at higher rate in the case of foreign companies is discriminatory in nature and, accordingly, relief has been sought on this account. The claim has been rejected by the authorities below.*
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> *4.1 We have heard both the parties in the matter. We find that this issue has already been examined by the Tribunal in the case of M/s BNP Paribas, decided in ITA Nos, 4601 & 4602/M/ 2004,vide order dated 1-7-2013. In that case also the tax rate applied in the case of the assessee, a foreign company was 48% compared to 38% applied in case of domestic companies. The assessee had argued that it was discriminatory and not in accordance with law Reference was made to non-discrimination clause in the Treaty, as per which there should not be any discrimination between the domestic and the non-resident company. The Tribunal, however, referred to the Explanation in the Section 90, inserted in the IT Act with retrospective effect from 01-04- 1962 as per which the higher tax rate in case of foreign company, should not be regarded as violation of non-discrimination clause. The Tribunal also referred to the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. J.K. Synthetics The Tribunal accordingly, rejected the ground raised by the assessee. The facts in the present appeal are identical and, therefore, respectfully following the decision of the Tribunal in the case of M/s BNP Paribas(supra), we dismiss this ground raised by the assessee."*

Following the same, we uphold the order of the Ld. CIT(A) and dismiss the 1 ground of appeal.

As the facts and the issue in the present appeal of the assessee remains the same, therefore, we respectfully follow the aforesaid order of the Tribunal. Accordingly, the Ground of appeal No. 1 is dismissed."

8. Thus, from the above, it is evident that this issue is recurring in nature and has been decided against the assessee by the coordinate bench of the Tribunal in preceding assessment years. Therefore, respectfully following the decision of the coordinate bench of the Tribunal cited supra, ground no.1 raised in assessee's appeal is dismissed.

9. The issue arising in ground No.2, raised in assessee's appeal, is pertaining to the taxability of data processing fees paid by the Indian branch offices of the assessee to its Singapore branch.

10. The brief facts of the case pertaining to this issue are: The branch office of the assessee bank has paid Rs.40,70,47,265, as data processing fees to its Singapore branch. During the assessment proceedings, it was noticed that the assessee itself had added back the markup on cost amounting to Rs.1,93,83,203, in the computation of income pertaining to the branch office. During the assessment proceedings, the assessee submitted that payment of data processing charges to the Singapore branch constitutes a transaction between branches of the same legal entity and is therefore in the nature of payment to self. The assessee further submitted that as no income can arise from such a transaction between branches of the same legal entity, the same is not taxable in India. Without prejudice to the above, the assessee submitted that the data processing charges are also not taxable in India and the same do not constitute '*fees for technical services*' under Article 13 of the India-France Double Taxation Avoidance Agreement ('*DTAA*') read with clause 7 of the Protocol to the DTAA. The AO vide draft assessment order did not agree with the submissions of the assessee and held that the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation vs DDIT (2012) 145 TTJ 649 (Mum.)(SB) cannot be applied to data processing fees paid by the branch office to the Singapore branch in terms of the agreement entered between them as two individual entities i.e. as principal and independent contractor. The AO further held that the data processing fee paid by the branch office to the Singapore branch is taxable as fees for technical services and royalty as per the Act and the India-France DTAA and also the India-UK DTAA even if the Protocol to the India-France DTAA is invoked. The learned

DRP, inter-alia, rejected the objections filed by the assessee on this issue by following the directions rendered in assessee's own case for the assessment year 2014-15. In conformity, the AO, inter-alia, passed the impugned final assessment order on this issue. Being aggrieved, the assessee is in appeal before us.

11. During the hearing, the learned counsel submitted that this issue has been decided in favour of the assessee by the Hon'ble jurisdictional High Court and the coordinate bench of the Tribunal in assessee's own case. On the contrary, the learned DR vehemently relied upon the orders passed by the lower authorities.

12. We have considered the rival submissions and perused the material available on record. We find that the coordinate Bench of the Tribunal in assessee's own case cited supra, for the assessment year 2014-15, decided a similar issue in favour of the assessee, by observing as under:

> *"14. We have deliberated at length on the contentions advanced by the authorised representatives for both the parties in the backdrop of the orders of the lower authorities and have also perused the material available on record. On a perusal of the aforesaid ground, we find, that the issue herein involved is about taxability of data processing fees paid by the Indian branch offices of the assessee to its Singapore branch (service agent) to the tune of Rs 40.78 10,733/ under Article 13 of the India-France Tax Treaty. We find that the Tribunal while disposing off the appeal of the assessee for A.Y. 2013- 14 in ITA No. 552/Mum/2018, dated 22.04.2019 had adjudicated the said issue by relying on its earlier order passed in the assessee's own case for AY. 2009-10 in ITA No. 3541/Mum/2014, dated 31.03.2016, observing as under:–*
>
> > *"In the above ground of appeal, the issue is about data processing fees paid by Indian Branch Office of the assessee to Singapore Branch to the tune of Rs 325,963,282/- under Article 13 of the India-France treaty. We find that while deciding the appeal for AY 2009-10 (ITA No. 3541/Mum/2014 dated 31.03 2016), the Tribunal has decided the issue as under.*
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> > > *5. Ground No.3 pertains to subjecting the data processing charges paid to the Singapore branch of the assessee amounting to Rs. 132,335,594/-*

applying the provisions of Article 13(Royalties, fees for technical services and payments for use of equipment) of the India-France Tax Treaty. This issue is also covered by the order of the Tribunal in assessee's own case for AY 2001-02 to 2003-04 wherein interest paid by assessee to Head Office/overseas branches was held to be not liable to tax, following was the precise observation of the Tribunal in its order dated 20-6-2012 for AY 2002-03:-

> *"3. The solitary issue involved in the appeal of the assessee for, the AY 2002-03 relates to the addition of Rs 1,48,30,613/- made by the A.O. and confirmed by the Ld CIT (A) on account of "interest" paid by the Indian Branches of the assessee bank to its head office and other overseas branches.*
>
> *4. The assessee, in the present case is a commercial bank having its Head Office in France. It comes on the normal banking activities Including financing of foreign trade and foreign exchange transactions in India through its eight branches situated at Mumbai, New Delhi, Kolkata, Bangalore. Pune Ahmedabad, Chennai and Hyderabad During the previous year relevant to AY 2002-03, the Indian Branches of the assessee bank have paid total interest of Rs 1.48,30,613/- to its Head office and overseas branches and the same was claimed as a deduction while determining the profits attributable to Indian Branches, which was chargeable to tax in India. The said interest was treated by the AO as income of the assessee's Head office/overseas branches chargeable to tax in India. This decision of the A.O. was challenged by the assessee in the appeal filed before the Ld CIT(A) and the contention raised before the Ld. CIT (A) in this regard was that the Head office of the assessee bank as well as all its branches being the same person and one taxable entity as per the Indian Income tax Act, interest paid by Indian Braches head office and other overseas Branches was payment to se which did not give rise to any income as per the income-tax Act. In support of this contention, reliance was placed on behalf of the assessee on the decision of Hon'ble Supreme Court in the case of Sir Kikabhai Premchand CIT (Central) 24 (TR 506 as well as the decision of Kolkata Special Bench of the ITAT in the case of ABN Amro Bank NV vs. Asst. Director of Income-tax 98 TTJ 295. The contention of the assessee, however, was not accepted by the Ld CIT (A) and relying on the decision of Mumbai Bench of the ITAT in the case of Dresdner Bank AG vs Add1. CIT 108 ITD 375, he held that the interest paid by the Indian branches of the assessee bank to its head office and overseas branches was chargeable to tax in India. Accordingly, the addition made by the A.O. on this issue was confirmed by the Ld. CIT(A)*
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> *5. We have heard the arguments of both the sides and perused the relevant material on record. As agreed by the Ld. Representatives of both the sides. the issue involved in this appeal of the assessee now stands squarely covered by the decision of Special Bench of the ITAT in the case of Sumitomo Banking Corp Mumbai wherein it was held, after elaborately discussing the legal position emanating from the interpretation of relevant provisions of Indian Income tax Act as well as treaty, that interest paid to the head office of the assessee bank as well as its overseas branches by the Indian branch cannot be taxed in India being payment to self which does not give rise to income that is taxable in India as per the domestic law or even as per the*

relevant 'tax treaty' Respectfully following the said decision of Special Bench of the ITAT which is directly applicable in the present case, we delete the addition of Rs. 1.48.30.613/- made by the AO. and confirmed by the Ld. CIT (A) on this issue and allow the appeal of the assessee."

5.1 The issue has also been dealt by the Special Bench of the Tribunal in the case of Sumitomo Mitsui Banking Corporation (supra), wherein the observation of the Bench at para 88 is as under:-

"88. Keeping in view all the facts of the case and the legal position emanating from the interpretation of the relevant provisions of domestic law as well as that of the treaty as discussed above, we are of the view that although interest paid to the head office of the assessee bank by its Indian branch which constitutes its PE in India is not deductible as expenditure under the domestic law being payment to self, the same is deductible while determining the profit attributable to, the PE which is taxable in India as per the provisions of art. 7(2) and 7(3) of the Indo-Japanese Treaty read with, para 8 of the Protocol which are more beneficial to the assessee. The said interest. however, cannot be taxed in India in the hands of assessee bank, a foreign enterprise being payment to self which cannot give rise to income that is taxable in India as per the domestic law. Even otherwise, there is no express provision contained in the relevant tax treaty which is contrary to the domestic law in India on this issue, This position applicable in the case of interest paid by Indian branch of a foreign bank to its head office equally holds good for the payment of interest made by the Indian branch of a foreign bank to its branch offices abroad as the same stands on the same footing as the payment of interest made to the head office. At the time of hearing before us, the learned representatives of both the sides have also not made any separate submissions on this aspect of the matter specifically. Having held that the interest paid by the Indian branch of the assessee bank to its head office and other branches outside India is not chargeable to tax in India, it follows that the provisions of s. 195 would not be attracted and there being no failure to deduct tax at source from the said payment of interest made by the PE. the question of disallowance of the said interest by invoking the provisions of s 40 (a)(i) does not arise. Accordingly we answer question No. 1 referred to this Special Bench in the negative ie in favour of the assessee and question No. 2 in affirmative Le again in favour of the assessee."

As the facts and circumstances of the case during the year under consideration are perimateria, where payment made by assessee to Singapore Branch for data processing was brought to tax. Respectfully following the order of the Tribunal in assessee's own case as well as the order of the Special Bench of the Tribunal in the case of Sumitomo Mitsu Banking Corporation (supra), we hold that the department was not justified in taxing the data processing charges to the Singapore Branch of the assessee by applying the provisions of Article 13 of the India-France Tax Treaty."

13. In effect thus, reversing the stand of the DRP, the coordinate bench has come to the conclusion that the payment on account of data processing charges paid to

> *BNP Singapore cannot be taxed in the hands of the assessee. The conclusion arrived at by the coordinate bench, whatever may have been the path traversed by the coordinate bench to reach this point, are the same as arrived at by us. Of course, our reasons are different, as set out earlier in this order, but that does not really matter as of now. We fully agree with the conclusions arrived at by the coordinate bench. We, therefore, direct the Assessing Officer to delete the impugned disallowance of Rs 13.10,97,790 The assessee gets the relief accordingly.*
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> *14. Ground no 2 is thus allowed."*
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> *6. We see no reasons to take any other view of the matter than the view so taken in assessee's own case in assessment year 2008-09. Respectfully following the same, we direct the Assessing Officer to delete the impugned disallowance of Rs 18,53,83,446/- The assessee gets the relief accordingly."*
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> *Also, the above order has been followed by ITAT 'L' Bench, Mumbai in assessee's own case in A.Y.2010-11 (ITA No. 1182/Mum/2015). Further, the Bombay High Court has not admitted the Department's appeal on this ground for AYS 2006-07 and 2007-08.*
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> *Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 2 ground of appeal."*
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> *As the facts in context of the aforesaid issue under consideration remains the same as was there before the Tribunal in the assessee's own case for A.Y. 2013-14, therefore, we respectfully follow the view therein taken. Accordingly. we herein direct the AO to delete the impugned addition of Rs 40,78,10.733/- The Ground of appeal No. 2 is allowed."*

13. We further find that the Hon'ble jurisdictional High Court dismissed the appeal filed by the Revenue against the order passed by the coordinate bench of the Tribunal in assessee's own case for the assessment year 2009-10 on a similar issue. The relevant findings of the Hon'ble jurisdictional High Court in CIT vs BNP Paribas SA, in ITAs No.825 and 826 of 2017, vide order dated 27/08/2019, in this regard, are as under:–

> *"4. The Tribunal placed reliance upon the orders of its Coordinate Bench for the Assessment Year 2006-07 in respect of the same Assessee raising the same issue while allowing the appeal of the Assessee. We are informed that from the order of the Co-ordinate bench of the Tribunal for Assessment Year 2006-07, Revenue filed an appeal to this Court being Tax Appeal No.1192 of 2015 raising this very issue. This Court's order did not entertain this question as proposed therein on the grounds that the same in the facts of the case was academic in*

nature. This for the reason what was being paid by the Indian entity to its Singapore branch was only in the nature of reimbursement of expenses. This finding of fact was not challenged in the Revenue's appeal for Assessment Year 2006-07 or in these appeals for Assessment Year 2008-09 and 2009-10. The Revenue has not been able to show any difference in facts and/or in law in the subject Assessment Years to that in Assessment Year 2006- 07. Therefore, the above decision of this Court for Assessment Year 2006-07 will apply in these two Appeals.

5. Therefore in view of the reasons stated in our order dated 20 March 2018 passed in Income Tax Appeal No.1192 of 2015 relating to Assessment Year 2006-07, the identical question as proposed in the two appeals do not give rise to any substantial question of law. Thus not entertained."

14. We find that this issue is recurring in nature and has been decided in favour of the assessee in the preceding assessment years. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the judicial precedents in assessee's own case cited supra, ground no.2 raised in assessee's appeal is allowed.

15. The issue arising in ground no.3, raised in assessee's appeal, is pertaining to the levy of surcharge of 5% and education cess of 3% on tax computed under Article 13 of the India France DTAA. During the hearing, it was, inter-alia, submitted by the learned counsel that in case ground no.2, raised in assessee's appeal, is decided in assessee's favour, then ground no.3 would be rendered academic in nature. As we have decided ground no.2 in favour of the assessee, therefore, in view of the submission of the learned counsel, ground no.3 is dismissed as having been rendered academic.

16. The issue arising in ground no.4, raised in assessee's appeal, is pertaining to the taxability of interest payable/paid by the Indian branch office to the head office and its other overseas branches.

17. The brief facts of the case pertaining to this issue are: During the assessment proceedings, it was noticed that the Indian branch office has paid an amount of Rs.16,91,71,226 to its head office/overseas branches as interest on the subordinated debt. Further, the assessee has paid an amount of Rs.55,38,692 as interest on Nostro overdrafts. The Indian branch office has claimed a deduction of such an amount citing the provisions of Article 7(3) of the India-France DTAA. During the assessment proceedings, the assessee submitted that such interest paid by the Indian branch office to the head office/overseas branches constitutes a '*payment of self*' and hence such payment is not taxable in India by placing reliance upon the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). The assessee also placed reliance upon the decisions of the coordinate bench of the Tribunal in assessee's own case for the assessment years 2002-03 to 2005-06. The AO vide draft assessment order did not agree with the submissions of the assessee and held that under the Act there cannot be income from self and neither could there be payment to self as an allowable business expenditure. Thus, under the Act, the assessee bank could not debit interest payments to the head office and other branches and claimed the same as an expense, nor could it show interest received from its head office and other branches as interest income while determining the business income attributable to activities carried out in India. By referring to the provisions of India-France DTAA, the AO held that the Permanent Establishment ('*PE*') is considered as a separate entity then the enterprise of which it is a PE while dealing with the said enterprise. The AO further held that once the assessee has opted to be governed under the beneficial provisions of the India-France

DTAA and it is accepted that the assessee has a PE in India under the DTAA, then the single entity approach of the Act gives way to the distinct and independent entity or separate entity approach under the DTAA. Thus, the principle of mutuality as followed in Sumitomo Mitsui Banking Corporation (supra) is not applicable in the present case. Thereafter, the AO proceeded to hold that the interest paid by the Indian branch office (i.e. PE) is chargeable in the hands of the head office in terms of the provisions of section 9(1)(v)(c) of the Act. In support of its conclusion, the AO placed reliance upon the Explanation to section 9(1)(v)(c) of the Act, inserted by the Finance Act, 2015, and held that the said amendment is retrospective being clarificatory in nature. Accordingly, the AO held that the interest income of the head office/overseas branches would be taxable under Article 12 of the India-France DTAA at the rate of 10%.

18. The learned DRP, vide directions issued under section 144C of the Act, rejected the objections filed by the assessee by placing reliance upon its findings rendered in assessee's own case, for assessment year 2014-15 on the basis that issue is pending adjudication before higher judicial forums and for the year under consideration, only the assessee has the right to file the appeal against the final assessment order. In conformity, the AO, inter-alia, passed the impugned final assessment order on this issue. Being aggrieved, the assessee is in appeal before us.

19. During the hearing, the learned counsel submitted that the Explanation to section 9(1)(v)(c) of the Act was inserted by the Finance Act 2015 to overcome the decision of the Special Bench of the Tribunal in Sumitomo Mitsui

Banking Corporation (supra). However, even under the provisions of the India-France DTAA, the impugned payment has been held to be not taxable by the coordinate bench of the Tribunal in assessee's own case for the assessment year 2004-05. The learned counsel submitted that the taxability of the interest paid by the Indian branch office to the head office/overseas branch is governed by the provisions of Article 12 r/w Article 7 of the India-France DTAA and the amendment in the Act cannot override the provisions of the DTAA.

20. On the contrary, the learned DR filed detailed written submissions in line with the findings of the AO in the draft assessment order and vehemently relied upon the orders passed by the lower authority.

21. We have considered the rival submissions and perused the material available on record. During the year, the Indian branch office paid interest to its head office and other overseas branches on debt and overdrafts. In the present case, it is undisputed that the various branches of the assessee in India constitute the PE of the assessee under the provisions of the India-France DTAA. Further, it can also not be disputed that in terms of section 90(2), the provisions of the Act or the DTAA, whichever is more beneficial to the assessee shall be applicable. Thus, being an entity covered under the provisions of the India-France DTAA, the payment of interest to the head office and other overseas branches was claimed as a deduction by the Indian branch office under the provisions of Article 7(3) of the DTAA. The Revenue, in the present case, has not disputed the deduction claimed by the Indian branch office. However, as per the Revenue, the interest received by the head

office/overseas branches is taxable under the provisions of section 9(1)(v)(c) of the Act.

22. Since the India-France DTAA is applicable in the present case, therefore, before proceeding further it is pertinent to consider the relevant provisions of the said DTAA vis-à-vis the facts of the present case. As per Article 12(1) of the DTAA, interest arising in a contracting state (i.e. *say* India) and paid to a resident of the other contracting state (i.e. *say* France) may be taxed in the other contracting state (i.e. France). Further, under Article 12(2) of the DTAA, such interest may also be taxed in the contracting state in which it arises (i.e. *say* India), and according to the laws of that state, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10% of the gross amount of interest. Para 5 of Article 12 provides that the provisions of para 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a contracting state (i.e. *say* France), carries on the business in the other contracting state (i.e. *say* India) in which interest arises, through a PE situated therein, or performs in that other contracting state independent personal services from a fixed base situated therein, and the debt claim in respect of which the interest is paid is effectively connected with such PE or fixed base. Para 5 further provides that in such a case, the provisions of Article 7 or Article 15 as the case may be shall apply. Article 15 deals with independent personal services, which is not relevant to the present case. Since the assessee has PE in India, therefore, Article 7 which deals with business profits, becomes relevant for consideration in the present case. As per Article 7(1) of the DTAA, the profit of an enterprise is taxable in the other contracting

state to the extent it is attributable to the PE. Further, Article 7(2) of the DTAA provides that the profit attributed to the PE shall be the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE. Article 7(3)(b) deals with payment by the PE to the head office of the enterprise and vice versa, and the same reads as under:

> *"(b) However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices."*

23. Thus, in the case of a banking enterprise, any payment by the PE to the head office of the enterprise by way of interest on money lent to the PE shall be allowed as a deduction. Further, the amount charged by the PE to the head office of the enterprise by way of interest on money lent to the head office of the enterprise shall be considered for the determination of profits of the PE. In the present case, it is not in dispute that the money has been lent to the PE and not the other way around. Thus, the first part of Article 7(3)(b) of the Act is only applicable in the present case, as the second part of this Article deals with the case wherein money is lent by the PE to the head office. Accordingly,

in the present case, the assessee has claimed a deduction in respect of interest paid by the PE to its head office/overseas branches.

24. Further, in view of Article 7 of the India-France DTAA, the Revenue though has rightly accepted that the fiction of hypothetical independence or a separate entity approach, as stated in this Article, comes into play for the limited purpose of computing the profit attributable to the PE. However, extended this fiction of hypothetical independence also for the computation of profit of the head office, for bringing to tax the interest received from the Indian branch office under the provisions of the Act. We are of the considered opinion that the latter approach is flawed. This aspect was extensively dealt with by the coordinate bench of the Tribunal in assessee's own case in BNP Paribas SA vs ADIT, in ITA No. 3422/Mum/2009, for the assessment year 2004-05. In the aforesaid decision, the coordinate bench held that the principles for determining the profits of the PE and GE/head office are not the same, and the fiction of hypothetical independence does not extend to the computation of the profit of the GE/head office. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"22. Clearly, the principles for determining the profits of the PE and GE are not the same, and the fiction of hypothetical independence does not extend to computation of profit of the GE. The principles of computing separate profits for the PE and the GE treating them as distinct entities, in the case of Dresdner Bank AG (supra),was in the context of Section 5(2). The separate profit centre accounting approach for the HO does not hold good in the treaty context, because, even if it is an income of the GE as a profit centre, all that is taxable as business profits of the GE is the income attributable to the PE. As regards its being treated as interest income of the assessee, arising in the source jurisdiction, i.e. India, can only be taxed under Article 12 but then as provided in article 12 (5), the charging provisions of Article 12(1) and (2), which deal with taxability of interest in the source state, will not apply "if the beneficial owner of the interest of the interest, being a resident of a contract state, carries on business in the other contracting state in which the interest arises,*

through a permanent establishment situated therein" and that in such a case the provisions of Article 7, which deal with taxability of profits of the permanent establishment alone will apply. In plain words, when interest income arises to a GE even if that be so, the taxability under article 12 will not apply, and it will remain restricted to taxability of profits attributable to the permanent establishment under article 7. The profits attributable to the PE have anyway been offered to tax. As regards the theory, as advanced by learned Assessing Officer in considerable detail, that for taxing the GE, the taxability has to be in respect of (i) income attributable to the permanent establishment as a profit centre; and (ii) income of the GE in its own capacity by treating it as another independent separate profit centre, for the detailed reasons set out above and particularly as the fiction of hypothetical independence does not extend to the computation of GE profits, we reject the same. The authorities below were, therefore, clearly in error in holding that the interest of Rs.1,59,32,854 paid by the Indian PE to the GE, or its constituents outside India are taxable in India.

23. We may also add that in the case of Sumitomo Mitsui Banking Corpn. (supra),a five member bench has held that interest payment by PE to the GE is a payment by a foreign company's Indian PE to the foreign company itself, it cannot give rise to any income, in the hands of the GE, which is chargeable to tax under the Income Tax Act, 1961 itself, and, as such, treaty provisions are not really relevant. We humbly bow before the conclusions arrived at in this judicial precedent. Of course, we have reached the same destination by following a different path but then as long as reach the same destination, our traversing through a different path does not really matter at all. For this reason also, the grievance of the assessee deserves to be upheld."

25. From the aforesaid findings, it is also relevant to note that the coordinate bench of the Tribunal came to the conclusion that the interest paid by the Indian branch/PE to the head office/GE is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). Thus, in view of the above, even though the submission of the Revenue that the amendment by Finance Act 2015, whereby Explanation to section 9(1)(v) of the Act was inserted specifically to overcome the decision in Sumitomo Mitsui Banking Corporation (supra), is accepted, the same would still not lead to taxation of the interest paid to the head office/overseas branches under the provisions of the DTAA. Accordingly, in view of aforesaid findings and respectfully following the judicial precedent in assessee's own case cite supra, we direct the AO to delete the addition on

account of interest income received by the head office/overseas branches. As a result, ground no.4 raised in assessee's appeal is allowed.

26. During the hearing, it was, inter-alia, submitted by the learned counsel that in case ground no.4, raised in assessee's appeal, is decided in assessee's favour, then ground no.5 would be rendered academic in nature. As we have decided ground no.4 in favour of the assessee, therefore, in view of the submission of the learned counsel, ground no.5 is dismissed as having been rendered academic.

27. Ground no.6, raised in assessee's appeal is pertaining to short grant of credit of TDS. This issue is restored to the file of the AO with the direction to grant TDS credit, in accordance with the law, after conducting the necessary verification. As a result, ground no.6 raised in assessee's appeal is allowed for statistical purposes.

28. Grounds no.7 to 9, raised in assessee's appeal, is pertaining to the levy of interest under sections 234B, 234C and 234D of the Act, which is consequential in nature. Therefore, grounds no.7 to 9 are allowed for statistical purposes.

29. Ground no.10 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

30. In the result, the appeal by the assessee is partly allowed for statistical purposes.

ITA no.1670/Mum./2022
Assessee's Appeal – A.Y. 2018–19

31. In its appeal, the assessee has raised the following grounds:–

"Aggrieved by the order passed by the Assistant Commissioner of Income-tax (International Taxation Circle 1(3X1), Mumbai (AO) dated 27 April 2022 (copy of the order received vide e- mail dated 29 April 2022), under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1(DRP), Mumbai, BNP Paribas (the Appellant) respectfully submits that the learned AO has erred in passing the order on the following ground.

1. The learned AO has erred in not accepting the claim that the rate of tax applicable to domestic companies and/or co-operative banks for AY 2018-19 is also applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India - France tax treaty.

2. The learned AO has erred in subjecting to tax, the data processing fees paid by Indian branch offices of the Appellant to its Singapore branch, as income of the Appellant.

3. Strictly without prejudice to Ground 2 above, the learned AO has erred in subjecting to tax, an amount of Rs 37,74,77,350 regarded by the learned AO as data processing fee accrued by the Appellant in its books of account, as against the data processing fee paid by the Appellant amounting to Rs 35,69,66,701.

4. Strictly without prejudice to Grounds 2 and 3 above, the Appellant has accrued data processing fee in its books of account pertaining to the financial year (FY) relevant to the AY under consideration amounting to Rs 37,74,47,350 and accordingly, the learned AO has subjected to tax an incorrect amount of data processing fee accrued by the Appellant ie Rs 37,74,77,350.

5. The learned AO has erred in holding that interest payable/ paid by the Indian branch offices of the Appellant to the head office and its other overseas branches amounting to Rs 19,68,55,632 is chargeable to tax.

6. The learned AO has erred in initiating penalty proceedings under section 270A of the Act:

Each of the grounds of appeal referred above is separate and may kindly be considered independent of each other.

The Appellant craves leave to add, alter, vary, emit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

32. The issue arising in ground no.1, raised in assessee's appeal, is pertaining to the rate of tax applicable to the assessee. Since a similar issue has been decided in assessee's appeal for the assessment year 2017-18, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground No. 1 raised in assessee's appeal is dismissed.

33. The issue arising in ground no.2, raised in assessee's appeal, is pertaining to the taxability of data processing fees paid by the Indian branch offices of the assessee to its Singapore branch. Since a similar issue has been decided in assessee's appeal for the assessment year 2017-18, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.2 raised in assessee's appeal is allowed.

34. During the hearing, it was, inter-alia, submitted by the learned counsel that in case ground no.2, raised in assessee's appeal, is decided in assessee's favour, then ground no.3 would be rendered academic in nature. As we have decided ground no.2 in favour of the assessee, therefore, in view of the submission of the learned counsel, ground no.3 is dismissed as having been rendered academic.

35. As regards ground no.4, raised in assessee's appeal, the learned counsel submitted that the AO has considered the incorrect amount in respect of data processing charges. Learned counsel further submitted that the assessee has already applied for rectification before the AO in this regard. Accordingly, we deem it appropriate to remand this issue to the file of AO for necessary

verification. As a result, ground no.4 raised in assessee's appeal is allowed for statistical purposes.

36. The issue arising in ground no.5, raised in assessee's appeal, is pertaining to the taxability of interest payable/paid by the Indian branch office to the head office and its other overseas branches. Since a similar issue has been decided in assessee's appeal for the assessment year 2017-18, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.5 raised in assessee's appeal is allowed.

37. Ground no.6 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

38. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 24/01/2023.

Sd/-	**Sd/-**
G.S. PANNU	**SANDEEP SINGH KARHAIL**
PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 24/01/2023
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

Assistant Registrar
ITAT, Mumbai