In the ITAT MUMBAI BENCH 'L'

Sumitomo Mitsui Banking Corporation

v.

Deputy Commissioner of Income-tax (International Taxation), Range 2(1)

IT Appeal Nos. 2720 to 2722 & 2864 to 2866 & 6495 (Mum.) of 2006

[Assessment Years 1997-98 to 2000-01]

October 12, 2012

ORDER

Per Bench – This batch of seven appeals comprises of cross appeals for assessment years 1997-98, 1998-1999 and 1999-2000 along with one appeal by the Revenue against the deletion of penalty u/s 271(1)(c) in relation to assessment year 2000-2001. Since some common issues are raised in these appeals, we are therefore, proceeding to dispose them off by this consolidated order for the sake of convenience. Assessment Year 1997-98

2. First ground of the assessee's appeal is against the validity of reassessment proceedings.

3. Briefly stated the facts of the case are that the assessee filed its return on 28.11.1997 declaring total income of Rs. 45.71 crore. The assessment was reopened by notice u/s 148 dated 31.03.2004, recording the following reasons :- "The CIT(A) in his order in appeal No. CIT(A)XXXI/ DDIT(IT)2(1)/IT-94/03-04 dated 12/12/2003 for A.Y.2000-01 has confirmed the addition of AO in taxing the interest paid to its Head Office and overseas branches amounting to Rs. 14,92,62,998/-. Similarly for A.Y.2001-02, the amount of Rs. 21,46,12,294/- has been brought to tax on account of interest paid to the Head Office and Overseas Branches by the assessee. The assessee has paid such interest to its HO and other overseas branches for earlier years also including A.Y. 1997-98, though the details of such interest paid are not available on records. However, considering the quantum of interest paid to HO and other overseas branches, which runs into crores of rupees for A.Y. 2000-01 and 2001-02, the quantum of such interest paid must be above Rs. 1,00,000/- in A.Y. 1997-98, which has not been brought to tax. I, therefore, have reason to believe that income exceeding Rs. 1,00,000/- has escaped assessment within the meaning of the provisions of section 147 of the I.T. Act, 1961."

4. The assessee raised objections to the initiation of reassessment proceedings before the Assessing Officer. Such objections were repelled. The Assessing Officer assessed the total income at Rs. 85.42 crore. The assessee remained unsuccessful before the learned CIT(A) on the question of initiation of the reassessment proceedings, against which it has raised ground no. 1.

5. After considering the rival submissions and perusing the relevant material on record it is observed that pursuant to the return filed by the assessee, the AO finalized the assessment u/s 143(3), which fact is evident from the assessment order itself. Notice u/s 148 dated 31.3.2004 was issued and served on the assessee. Obviously a period of more than 4 years elapsed from the end of the relevant assessment year till the issuance of notice u/s 148. Proviso to section 147 provides that where an assessment has been completed u/s 143(3), no action shall be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless an income chargeable to tax has escaped assessment of such assessment year by reason of

failure on the part of the assessee to make a return u/s 139 etc or "to disclose fully and truly all material facts necessary for reassessment" for that assessment year.

6. A bare perusal of this provision indicates that where an assessment has been completed u/s 143(3), no action can be taken by issue of notice u/s 148 after the expiry of four years from the end of relevant assessment year unless the income chargeable to tax escaped assessment by reason of the assessee's failure to disclose all material facts fully and truly. In other words, if the assessee disclosed all material facts fully and truly and the assessment was framed u/s 143(3), then no action can be taken u/s 147 after the expiry of four years from the end of the relevant assessment year.

7. The instant case is the one where original assessment was made u/s 143(3). Now, from the reasons recorded by the Assessing Officer, we need to examine as to whether there is any failure on the part of the assessee to disclose all material facts fully and truly. It is noticed that the Assessing Officer initiated reassessment proceedings on the strength of the order passed by the first appellate authority for assessment year 2000-2001 confirming the addition made by the A.O. by disallowing the interest paid to its head office and other overseas branches. There can be no dispute for the proposition that a subsequent decision rendered by a superior authority on a particular issue can be a good reason to initiate reassessment proceedings for the earlier years in which a contrary view has been accepted by the Assessing Officer. In the current year, the assessee claimed deduction on account of such interest, which came to be granted by the AO in the order passed u/s 143(3). As it subsequently turned out from the order of the CIT(A) for a later year that such a deduction is not permissible, in our opinion no fault can be found with the AO in initiating reassessment proceedings on this score. This proposition would have correctly applied to validate the initiation of reassessment proceedings if there had been no original assessment u/s 143(3) and further, a period of four years had not expired in issuing notice.

8. Once a case falls within the proviso to section 147, one needs to concentrate on the fact as to whether there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for reassessment where the original assessment was completed u/s 143(3) and a period of four years has expired from the end of the relevant assessment year. The examination of such condition is de hors all other relevant criterion, such as the view taken in subsequent years.

9. Adverting to the facts of the instant case it is observed that the Assessing Officer initiated reassessment proceedings on the ground that the assessee claimed deduction towards interest paid to head office and overseas branches. There is nothing in the reasons to indicate, even remotely, that the assessee did not disclose this necessary fact in its return or accompanying documents. It can naturally not be so because the deduction on account of interest paid to head office and overseas branches can only be claimed by way of a debit to the Profit and loss account which is always a part and parcel of the documents accompanying the return of income. Once the assessee disclosed the fact of claim of deduction on account of interest paid to head office or other overseas branches and the original assessment was completed u/s

143(3) accepting such claim, there can be no question of initiation of reassessment proceedings after a gap of four years from the end of relevant assessment year. All the necessary conditions about the applicability of proviso to section 147 are duly satisfied. First, the assessee filed its return claiming deduction on account of interest paid to head office / other overseas branches. Second, the assessment was completed u/s 143(3). Third, notice u/s 148 was issued beyond a period of four years from the end of the relevant assessment year. And last, since there is no failure on the part of the assessee to disclose fully and truly all material facts on the question of deduction claimed for interest paid to head office and other overseas branches, in our considered opinion, the initiation of reassessment proceedings cannot be declared as valid. We, therefore, strike down the notice issued u/s 148 and the resultant assessment order passed by the Assessing Officer flowing out of such invalid notice issued by the A.O. In view of our decision on the quashing of the reassessment order, there is no need to adjudicate upon the grounds taken by both the sides in their respective appeals.

10. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.
Assessment Year 1998-99

11. Both the sides are in agreement that the facts and circumstances for this year, being disclosure by the assessee of claim of deduction for interest paid to head office and other overseas branches; the completion of assessment u/s 143(3); initiation of reassessment proceedings after four years from the end of the relevant assessment year are mutatis mutandis similar to those for assessment year 1997-98. Following the view taken hereinabove we hold that the assessment was wrongly reopened. The assessment order pursuant to notice u/s 148 is set aside. Resultantly there is no need to adjudicate the other grounds taken by both the sides.

12. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.
Assessment Year 1999-2000.

13. First ground of the assessees's appeal is against the initiation of reassessment proceedings. Here it is relevant to mention that the reasons recorded by the Assessing Officer continue to remain the same as were there in preceding two years. One relevant factor which has changed the complexion of the case for the current year vis-à-vis the preceding years, is that the issuance of notice u/s 148 is within a period of four years from the end of the relevant assessment year. In such a case proviso to section 147 cannot apply. While dealing with the initiation of reassessment for the AY 1997-98 we have held that an order passed by a higher authority for a subsequent year contrary to what was accepted by the Assessing Officer for the year in respect of which initiation of reassessment is sought, is a good and valid reason. Our view is fortified by the judgment of the Hon'ble jurisdictional High Court in the case of Multiscreen Media Private Limited v. Union of India [2010] 324 ITR 54 (Bom.)], in which it has been held by the Hon'ble jurisdictional High Court that the reopening on the basis of finding in an order of assessment passed for a subsequent assessment year, where additional material has emerged before the A.O. to lead to the formation of belief that income chargeable to tax had escaped tax, is sustainable. The facts of the instant case stand on a rather stronger footing

because here the reassessment is on the basis of the CIT(A)'s order for a subsequent year. Finding no merit in the contention raised on behalf of the assessee, we hold that the initiation of reassessment proceedings for the current year is in order and no interference is called for in the impugned order on this issue. This ground is not allowed.

14. Ground no. 2 of the assessee's appeal is against the disallowance of interest payable by the assessee to its head office and other overseas branches. The Assessing Officer did not allow deduction towards interest paid to head office and other overseas branches on the ground that there was failure on the part of the assessee to deduct tax at source. Thus the disallowance was made u/s 40(a)(i) on the premise that the said amount of interest received by head office and other overseas branches was taxable in their hands. The Assessing Officer summed up his view by holding that firstly, the interest income in the hands of head office is liable to tax and further no deduction can be allowed to the Indian branch towards interest paid to head office because of the application of section 40(a)(i). The learned CIT(A) upheld the disallowance of interest paid by the assessee on the ground of mutuality and also directed that the interest income cannot be charged to tax in the hands of the head office because of mutuality. The Revenue is also aggrieved against the finding given by the learned CIT(A) in this regard through ground no. 1 of its appeal.

15. Before taking up the grounds taken by both the sides, it is relevant to mention that a Special Bench in assessee's own case has decided these aspects in Sumitomo Mitsui Banking Corporation v. DDIT [(147 TTJ 649 (Mum.)] in relation to assessment year 2003-2004. The finding of the Special Bench can be summarized as under:-

(i) Principle of mutuality applies under the Act. As such, there can be no deduction of interest paid by Indian branch to head office/other overseas branches.

(ii) However, the assessee is entitled to deduction of interest paid to head office/other overseas branches as per the terms of the DTAA.

(iii) Mutuality applies in relation to income earned by the Indian branch from head office/other overseas branches. As such the interest income so earned cannot be charged to tax.

(iv) Consequently, the provisions of section 40(a)(i) cannot apply.

16. In view of the ratio of the above discussed Special Bench decision, it becomes manifest that the assessee is entitled to deduction of interest paid to its head office and other overseas branches. Accordingly ground no. 2 of the assessee's appeal is allowed. Since the amount cannot be charged to tax in the hands of the head office by reason of principle of mutuality, the ground taken by the Revenue is dismissed.

17. The only other ground taken by the assessee in its appeal is against the disallowance of inter office commission paid/payable by the assessee to head office and other overseas branches.

18. From the aforesaid order passed by the special Bench in assessee's own case it is noticed that the principle of mutuality has been held to be applicable under domestic law as a result of which no deduction can be allowed in respect of payments made by Indian branch to its head office and other overseas branches. It is only by virtue of the provisions of DTAA read with the relevant clauses of the Protocol that the assessee became entitled to deduction of interest paid to its head office and other overseas branches. It has been fairly admitted by the learned AR that commission paid by the assessee to its head office and other overseas branches is not covered along with the deductibility of interest as per the provisions of the relevant clauses of the DTAA. Resultantly, the deductibility of commission by the assessee to its head office and other overseas branches would come for consideration under the domestic law alone. Since the principle of mutuality is applicable on transactions between Indian branch and head office and other overseas branches, there cannot be any income or any expenditure due to such internal transactions. As the inter office commission has been paid by the assessee to its head office and other overseas branches, it is obviously a transaction with the self. Accordingly the rule of mutuality applies and the assessee cannot be allowed any deduction in this regard. The view taken by the learned CIT(A) on this issue is upheld. This ground is not allowed.

19. Ground no. 2 of the Revenue's appeal is against the direction of the learned CIT(A) for not taxing inter office commission paid/payable to the head office. Following the view taken in the preceding para on the ground of the assessee's appeal, this ground taken by the Revenue is also liable to be dismissed because of the principle of mutuality. Neither there can be any deduction towards inter office commission paid/payable to the head office nor there can be any income on account of inter office commission paid/payable in the hands of the head office. This ground is not allowed.

20. Next ground of the Revenue's appeal is against the direction of the ld. CIT(A) for not charging of interest u/s 234B. Having heard the rival submissions and perused the relevant material on record we find that the issue of charging of interest u/s 234B in the present case is no more res integra in view of the judgment of the Hon'ble jurisdictional High Court in the case of Director of income-tax (International Taxation) v. NGC Network Asia LLC [(2009) 313 ITR 187 (Bom.)] in which it has been held that when the duty is cast on the payer to deduct tax at source, on failure of the payer to do so, no interest can be charged from the payee assessee u/s 234B. The same view has been reiterated in DIT (IT) v. Krupp UDHE GmbH [(2010) 38 DTR (Bom.) 251]. As the assessee before us is a non-resident, naturally any amount payable to it which is chargeable to tax under the Act, is otherwise liable for deduction of tax at source. In that view of the matter and respectfully following the above precedents, we hold that no interest can be charged under sections 234B and 234C of the Act. This ground is, therefore, not allowed.

21. In the result, the appeal of the assessee is partly allowed and that of the Revenue is dismissed.

Assessment Year 2000-2001

22. This appeal by the Revenue is against the deletion of penalty of Rs. 8,56,72,539 imposed by the Assessing Officer u/s 271(1)(c) of the Act.

23. Shorn of unnecessary details it is observed that the Assessing Officer imposed penalty in respect of two disallowances, viz., first, u/s 40(a)(i) to the tune of Rs. 14.92 crore and second, income of the head office/foreign branches at Rs. 14.92 crore. When the matter came up before the Tribunal in quantum proceedings, both the additions so made by the Assessing Officer were finally deleted by following the Special Bench order passed in assessee's own case. When the additions made in the assessment order have been deleted, obviously there cannot be any foundation for imposition of penalty qua such additions. We, therefore, uphold the impugned order in deleting the penalty imposed by the A.O. u/s 271(1)(c) of the Act.

24. In the result, the appeal is dismissed.