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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 604/2015

PR. CIT

..... Appellant

Through: Mr. Dileep Shivpuri, Senior Standing
counsel with Mr. Sanjay Kumar, Junior Standing
counsel.

versus

THE BANK OF TOKYO MISUBISHI UFJ LTD..... Respondent

Through: Mr. Percy Pardiwala, Senior Advocate
with Mr. Nageswar Rao, Mr. Parth, Advocates.

And

ITA 605/2015

PR. CIT-1

..... Appellant

Through: Mr. Dileep Shivpuri, Senior Standing
counsel with Mr. Sanjay Kumar, Junior Standing
counsel.

versus

THE BANK OF TOKYO MISUBISHI UFJ LTD..... Respondent

Through: Mr. Percy Pardiwala, Senior Advocate
with Mr. Nageswar Rao, Mr. Parth, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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08.04.2016

1. These two appeals by the Revenue are against the common order dated 19th September 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5364/Del/2010 for the Assessment Year (AY) 2007-08 and ITA

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No. 5104/Del/2011 for AY 2008-09.

2. The Respondent, the Bank of Tokyo Mitsubishi UFJ Ltd. is a company incorporated in Japan and is resident of Japan within the meaning of Article 4 of the Double Taxation Avoidance Agreement ('DTAA') between India and Japan. It is stated that during the relevant AYs under consideration, the Assessee was engaged in banking operations in India mainly catering to the requirements of Japan-based corporate and individual clients. These included Japanese companies and joint ventures in India and the Japanese expatriates working in those companies and deputed in India. It is stated that the Assessee operated in India under the licence issued by the Reserve Bank of India. The case of the Revenue is that the branches of the Assessee in India constituted a permanent establishment ('PE') in India within the meaning of Article 5 of the DTAA and, therefore, the profits earned by the Assessee were computed in accordance with Article 7 of DTAA.

3. For the AYs in question, the Assessee filed its income tax returns declaring nil income after setting off the brought forward losses. The returns were picked up for scrutiny and a draft assessment order was passed by the Assessing Officer ('AO') on 23rd December 2009 as far as AY 2007-08 was concerned and on 27th December 2011 as far as AY 2008-09 was concerned. The additions made by the AO mainly pertained to the following:

(i) On account of salaries paid in Japan to expatriates of the Assessee over and above the salary paid in Indian rupees by the branches in India which were routed through profit and loss account.

(ii) Additions on account of the interest paid to the Head Office ('HO') and other overseas branches.

(iii) Receipt of interest from Indian branches.

(iv) Addition on account of deferred bank guarantee commission received by the Indian PE from its HO/overseas branches.

(v) Additions on account of interest received on external commercial borrowings ('ECB') given to Indian borrowers under Section 9(1)(v) of the Income Tax Act, 1961 ('Act') in terms of Article 11 of the DTAA.

(vi) Applicability of Section 115JB of the Act relating to the minimum alternative tax ('MAT'), which was held applicable to the Assessee as it was having a PE in India.

4. Aggrieved by the above assessment order, the Assessee filed objections before the Dispute Resolution Panel ('DRP'). For AY 2007-08, the DRP confirmed the order of the AO by order dated 24th September 2010 which was subsequently modified/rectified on 28th October 2010. As regards AY 2008-09, the DRP passed an order on 19th September 2012, confirming the draft assessment order dated 27th December 2011.

5. Consequent upon the directions of the DRP, the AO passed a final assessment order for AY 2007-08 on 29th October 2010 and for AY 2008-09 on 29th August 2012.

6. The Assessee being aggrieved by the final assessment orders for the said

AYs filed the aforementioned appeals before the ITAT which came to be disposed of by the impugned common order, holding in favour of the Assessee and against the Revenue.

7. In the present appeals, the questions of law that have been urged by the Revenue concern the additions made in the final assessment order of the AO, which have been deleted by the ITAT.

8. This Court has heard the submissions of Mr. Dileep Shivpuri, learned Senior counsel for the Revenue and Mr. Percy Pardiwala, learned Senior counsel appearing for the Assessee.

Salaries paid to expatriates

9. The first question urged concerns the payment of salaries to the expatriates. In deciding this issue in favour of the Assessee, the ITAT has in the impugned common order referred to and relied upon the decision of its coordinate bench at Kolkata in ***ABN Amro Bank v. JCIT (2005)97 ITD 1(ITAT [Kol])***. Further the ITAT followed the decision of the Bombay High Court in ***CIT v. Emirates Commercial Bank Ltd. (2003) 262 ITR 55 (Bom.)*** where the Bombay High Court approved the view taken by the ITAT. The ITAT agreed that the expenses have been incurred wholly and exclusively by the Indian branch and therefore no part of these expenses can be allocated to any other branch of the HO and that there was no dispute with regard to the non-applicability of Section 44C of the Act.

10. This Court has perused the order of the Bombay High Court in ***Emirates Commercial (supra)*** where on identical facts, the issue was decided in

favour of the Assessee. This order of the Bombay High Court has been affirmed by the Supreme Court by order dated 26th August 2008 in *Commissioner of Income Tax v. M/s Emirates Commercial Bank Ltd.*, which in turn referred to an order of the same date in *Commissioner of Income Tax v. Deutsche Bank AG* (CA No. 1544 of 2006).

11. In that view of the matter, this Court declines to frame a question on this issue.

Interest paid to the HO and interest received from Indian branches

12. This issue appears to be covered against the Revenue by the decision of the Calcutta High Court dated 23rd December 2010 in *ABN Amro Bank(2012) 343 ITR 81 (Cal)*. The ITAT has followed the above decision of the Calcutta High Court and decided the question in favour of the Assessee.

13. On this issue, the Court further finds that the order of the Calcutta High Court dated 17th November 2014 in ITA No. 175 of 2004 (*Bank of Tokyo-Mitsubishi Ltd. v. Director of Income Tax, International Taxation, Mumbai*) has also decided this issue in favour of the Assessee by following its judgment of *ABN Amro Bank(supra)*. The two specific questions urged by the Assessee in that case were answered in its favour:

(i) Whether interest payment made by the Indian Branch of the appellant to its head office abroad was to be allowed as a deduction in computing the profits of the appellant's branch in India ?

(ii) Whether making such payment to the head office, the appellant's said branch was required to deduct tax at source under section 195 of the Income Tax Act, 1961?

14. It is significant that in the aforementioned order, the Calcutta High Court noted the fact that the Special Leave Petition preferred by the Revenue against the judgment of the Calcutta High Court in *ABN Amro Bank (supra)* was dismissed by the Supreme Court on 3rd August 2012.

15. Accordingly, this Court declines to frame any question on this issue of interest paid to the HO as well as the interest received from the Indian branches.

Deferred bank guarantee commission

16. This issue appears to be covered in favour of the Assessee by the decision of the Calcutta High Court in *CIT v. Bank of Tokyo Ltd. (1993) 71 Taxman 85 (Cal)*.

17. Accordingly, this Court declines to frame any question on this issue.

Interest on ECB

18. As regards the interest received on interest on ECB and deduction under Section 44C of the Act, the question related to this issue appears to have not been decided by the ITAT in favour of the Assessee, but remanded to the AO for a fresh decision since it held that the loan agreements filed as additional evidence has to be considered for arriving at the correct taxability of interest.

19. In that view of the matter, no substantial question of law arises for consideration of this Court.

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Applicability of Section 115JB

20. The ITAT has after an elaborate discussion had come to the conclusion that the Assessee's claim for lower tax will have to be accepted because Section 115JB is subject to Section 90(2) of the Act and the taxable income of the Assessee would have to be computed in terms of Article 7(3) of the DTAA. What is significant is that the profit and loss account of the Assessee has not been prepared in terms of Part II of Schedule VI of the Companies Act, 1956 and in fact could not have been prepared in terms thereof. Consequently, the question of applicability of Section 115JB did not arise. As rightly pointed out till the insertion of Section 115JB, banking companies were required to prepare their accounts in terms of special acts that they were governed by, and therefore there were no computation provisions as regards such banking companies. The change brought out by Section 115JB was therefore not retrospective.

21. The reasoning and the conclusion of the ITAT on this issue appears to suffer from no legal infirmity. Consequently, the Court declines to frame any question on this issue as well.

22. The appeals are accordingly dismissed in the above terms.



S. MURALIDHAR, J



VIBHU BAKHRU, J

APRIL 08, 2016

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