

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Shri M.Balaganesh, AM]

I.T.A Nos. 36 & 1885/Kol/2017

Assessment Year : 2012-13 & 2013-14

M/s Royal Bank of Scotland N.V. -vs- DCIT (IT), Circle-2(1), Kolkata
[PAN: AACCA 6818 K]

(Appellant)

(Respondent)

For the Assessee : Shri R. N. Bajoria, AR

For the Department : Shri G. Mallikarjuna, CIT DR

Date of Hearing : 07.09.2018

Date of Pronouncement : 14.09.2018

ORDER

Per M.Balaganesh, AM

1. These two appeals arise out of the final assessment order passed by the Learned Deputy Commissioner of Income Tax (International Taxation), Circle -2(1), Kolkata [in short the Id AO] under section [u/s in short] 143(3) read with section 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) dated 30.06.2017 pursuant to the Directions issued by the Honourable Dispute Resolution Panel [in short the Id DRP] dated 09.05.2017 and 29.08.2016 respectively for the Assessment Years [in short Asst Year] 2012-13 and 2013-14 respectively. As identical issues are involved in both these appeals they are taken up together and disposed off by this common order for the sake of convenience.

2. RATE OF TAX

Ground Nos. 4(a) to 4(e) for assessment year 2012-13

Ground Nos. 3(a) to 3(c) for assessment year 2013-14

The brief facts of this issue are that the assessee is a non-resident foreign company and therefore the prescribed rate of tax applicable to it as per the relevant Finance Act would be 40% along with surcharge and education cess as applicable. The assessee pleaded that it is liable to tax only at the rate of 30% along with surcharge and education cess as applicable. We find that this issue is decided against the assessee by the order of this tribunal in assessee's own case for the Asst Years 2005-06 to 2008-09 vide order dated 13.4.2016 . Accordingly, the Ground Nos. 4 (a) to 4(e) raised by the assessee for Asst Year 2012-13 and Ground Nos. 3(a) to 3(c) for Asst Year 2013-14 are dismissed.

3. ADDITION TOWARDS INTEREST INCOME ON NPA

Ground Nos. 1(a) to 1(d) for assessment year 2012-13

Ground Nos. 1(a) to 1 (d) for assessment year 2013-14

The facts of assessment year 2012-13 are taken up for adjudication and the decision rendered thereon would apply with equal force for assessment year 2013-14 also except with variance in figure. The issue to be decided in the appeal of the assessee is as to whether the Id DRP was justified in upholding the addition of Rs 25,94,566/- on account of interest income in relation to advances classified as Non-Performing Advances (NPA) in the facts and circumstances of the case.

3.1. The brief facts of this issue are that the assessee is a bank incorporated in Netherlands with limited liability with branches in India. In India, the assessee is registered as a scheduled bank in terms of Schedule II of the Reserve Bank of India Act, 1934. The main activities of the assessee in India comprise of accepting deposits, giving loans, discounting / collection of bills, issue of letters of credit / guarantees, executing forward transaction in foreign currencies for importers / exporters , money market lending / borrowings, investment in securities , etc in terms of the prevailing

rules and regulations governing such transactions. The ld AO observed that assessee bank had not recognized the interest income in respect of advances, which were overdue for more than 3 months, in the profit and loss account in accordance with the RBI guidelines applicable to the banks.

3.2. The assessee replied that since the amount has been classified as NPA as per RBI Prudential Norms for Income Recognition, the interest income on such advances had to be recognized only on receipt basis. Since there was no receipt of interest on these NPA accounts during the year, no interest income need to be recognized on accrual basis as per RBI prudential norms for income recognition. The ld AO show caused the assessee stating that unless the advances were overdue for more than 6 months as required under Rule 6EA of the IT Rules, it cannot be classified as a sticky advance or doubtful debts as stipulated in section 43D of the Act and accordingly sought to add back the interest income on accrual basis in the assessment. The assessee replied that assessee had classified its advances into NPA as per the RBI prudential norms laid down in this regard which is mandatory in nature. As per the said prudential norms, if an account is overdue for more than 3 months (reduced from 6 months to 3 months), then the interest income thereon should not be recognized as income unless it is actually received. It was submitted that as per Accounting Standard - 9 (AS 9) issued by ICAI, where there is an uncertainty about the collection of income / revenue, recognition of such income / revenue is to be postponed to the extent of uncertainty involved, which is also in accordance with the theory of taxing only the real income, which is a settled law as per various judicial precedents. The assessee argued that the application of section 43D of the Act was specifically intended to clarify the income recognition by the banks to be in sync with the RBI guidelines and was never intended to be a static norm. Thus, purposive interpretation should be followed keeping in mind the legislative object. The assessee also referred to Para (xii) of CBDT's Instruction No. 17/2008 dated 26.11.2008 which directed the assessing authorities to bear in mind that the bank has to

follow system of accounting and prepare accounts as mandated inter alia by RBI guidelines. Without prejudice to the above, Rule 6EA of the Rules, which deviates from current RBI guidelines, is in conflict with the parent provisions of section 43D of the Act and it is well settled that the Rules, being a subordinate legislation cannot override the express mandate of the parent statutory provision. Reliance in this regard was placed on the decision of the *Hon'ble Supreme Court in the case of CIT vs Sirpur Paper Mills reported in 237 ITR 41 (SC)*.

3.3. Without prejudice to the above, it was submitted that Rule 6EA is practically difficult to be implemented, since the categories of advances prescribed therein do not exist anymore as the classification of advances have changed and RBI now follows the international norm of classification (viz./ standard, sub-standard, doubtful and loss assets). The Id AO relied on the judgement of the Hon'ble Supreme Court in the case of Southern Technologies Ltd vs CIT reported in (2010) 320 ITR 577 (SC). The assessee stated that the said decision is distinguishable from the facts of the assessee bank in as much as the same pertained to claim of deduction in respect of 'Provision for NPA' in the hands of a Non-Banking Finance Company (NBFC) u/s 36(1)(vii)(a) of the Act which is available only to banks. Even the said decision did not contemplate recognition of interest income in respect of NPA accounts on accrual basis. The assessee also submitted that the said accounts remained overdue for more than 180 days as on 31.3.2010 (i.e the next financial year) and hence it had become NPA even as per Rule 6EA of the Rules in the subsequent financial year and hence the said adjustment is only a timing difference and there is no loss to the revenue. The assessee also submitted that Rule 6EA was in conformity with the RBI guidelines at the time of its introduction. However, subsequently, the RBI guidelines have been tightened without any corresponding amendment in Rule 6EA thereby presently leading to a disconnect between Rule 6EA and RBI guidelines.

3.4. The Id AO however not convinced with the aforesaid explanations proceeded to add the interest income on NPA accounts on accrual basis, which was also confirmed by the Id DRP. Aggrieved, the assessee is in appeal before us.

3.5. The Id AR reiterated the submissions made before the lower authorities and placed reliance on the decision of the *Hon'ble Delhi High Court in the case of CIT vs Vasisth Chay Vyapar Ltd reported in 330 ITR 440 (Del)* on the impugned issue, among others. He argued that this issue is covered in favour of the assessee by the order of this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 477 & 496/Kol/2015 dated 14.10.2016. In response to this, the Id DR argued that the provisions of Rule 6EA states non-recognition of interest income only if the loan account is overdue for more than 3 months. He argued that the recognition of income as contemplated by RBI prudential norms are not binding on the provisions of the Income Tax Act and placed reliance on the decision of the *Hon'ble Supreme Court in the case of Southern Technologies Ltd vs CIT reported in 320 ITR 577 (SC)* in support of his proposition. The assessee had not proved the factum of uncertainty in collection of the said advances and argued that it is also claiming provision for NPA which includes interest element also as a deduction. Hence on one hand, it is not offering the interest income and on the other hand, it is claiming deduction towards the interest component added to the party's loan account balance. He placed reliance on the decision of *Hon'ble Delhi High Court in the case of Housing and Urban Development Corporation Limited vs Additional CIT in ITA No.s 440, 442, 444 to 446 / 2016 dated 3.7.2017* wherein the decision of Vasisth Chay Vyapar Ltd (330 ITR 440 –Del HC) was also considered and decision held in favour of the revenue. He further stated that against the tribunal order passed for the earlier year, the Hon'ble Calcutta High Court had admitted the appeal of the revenue and hence the matter had not attained finality. In defence, the Id AR argued that the fact of uncertainty of collection of these dues from the parties were never in dispute and the same is raised for the first time only by the Id DR. Hence there is no question of recognizing any interest income on accrual basis in respect of such sticky loans.

3.6. We have heard rival submissions and perused the material available on record. We find that this issue is decided in favour of the assessee in its own case for assessment year 2011-12 in I.T.A. Nos. 503 & 505/Kol/2016 dated 05.09.2018 wherein it was held as under:

3.6 We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. It is not in dispute before the lower authorities that the loan accounts had become sticky and doubtful of recovery. The only contention of the revenue is that section 43D of the Act read with Rule 6EA of the Rules permits accounting of interest income on receipt basis only if the loan account had become overdue for more than six months, whereas in the instant case, it is more than three months but less than six months as on 31.3.2011. The loan account becoming overdue and becoming sticky was never disputed. The next issue is whether the prudential norms of RBI for income recognition would override the provisions of the IT Act. This issue has been addressed by the Hon'ble Supreme Court in the case of Southern Technologies Ltd supra in the context of allowability of deduction towards 'Provision for NPA'. We find that the same decision clearly stated that the interest income on NPA accounts should not be recognized on accrual basis which is in line with RBI prudential norms for income recognition. This fine distinction has been duly considered in the decision of the Hon'ble Delhi High Court in the case of CIT vs Vasisth Chay Vyapar Ltd supra. When the account becoming NPA is not disputed by the revenue, the recognition of income is to be done only on receipt basis which is in consonance with the real income theory. In these circumstances and respectfully following the decisions of Hon'ble Delhi High Court in 330 ITR 440 and various other decisions referred to by the ld AR and in view of this issue being already decided in favour of the assessee by this tribunal in its own case supra, we hold that the interest income on NPA accounts should not be assessed on mercantile basis and the same is to be taxed only on receipt basis. Accordingly, the ground nos. 2(a) to 2(d) raised by the assessee are allowed."

Respectfully following the same, the grounds raised by the assessee in this regard for assessment years 2012-13 and 2013-14 are allowed.

4. DISALLOWANCE OF PAYMENT MADE TO EMPLOYEES IN RELATION TO UNFUNDED PENSION (AKIN TO SALARY)

Ground Nos. 3(a) to 3(d) for assessment year 2012-13

Ground Nos. 2(a) to 2(d) for assessment year 2013-14

The brief facts of this issue are that the Id AO observed that the assessee during the year had claimed the payment made to its employees against the provision made for unfunded pension amounting to Rs 5.38 crores. In this regard, the assessee filed the submissions stating as under:-

- *“The Bank has established a superannuation fund for the purpose of providing pension to its eligible employees. The fund has been approved by the Commissioner of Income-tax under rule 2(1) of the part B of the Fourth Schedule. The bank has been regularly contributing to the fund for the base pension, based on actuarial valuation and have been claiming a deduction of the same on payment basis under Section 36(1)(iv) read with Section 43B(b) of the Act.*
- *Apart from the approved superannuation fund, to compensate for the increased cost of living of the employees, the Bank also provides annual increment on the Base pension which is .towards unfunded pension liability and directly paid to the employees. Such provision in relation to the unfunded pension liability is disallowed in the tax computation and is claimed as deduction on actual payment the employees (which is done after deduction of the applicable TDS thereon).*
- *During the year under consideration, the Bank has made payments to the employees amounting to Rs 5.38 crore towards such unfunded pension liability. the payment has been incurred wholly and exclusively for the purposes of the business of the Bank, the same has been claimed as deduction by the Bank under Section 37(1) of the Act.*
- *In the course of the assessment proceedings, your good self has asked the Bank as to why the said amount should be allowed as deduction in view of the provisions of section 36(1) of the Act. In this regard, we submit as under:*
- *In this regard the assessee mentioned the provisions of section 37(1) of the Act, whereby any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purpose of business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". In this regard, the assessee relied on the following decisions:*

- *CIT v. High Land Produce Co. Ltd. [1986] 158ITR 419 (SC)*
- *Liberty Cinema V. Commissioner of Income-tax [1964] 52 ITR 153, 161 / (Cal.),*
- *Decom Marketing (P.) Ltd. v. CIT (164 CTR 230).*
- *RDB Industries Ltd vs DCIT 120 ITJ 107 (Kol).*
- *CIT v. Punjab Financial Corporation Ltd., [2007] 295 ITR 510 (Punj. & Har.)*
- *Khimji Visram & Sons (Gujrat) (P.) Ltd. v. CIT [1995] 79 Taxman 112 (Guj)*
- *CIT v. Akkem Laboratories (P.) Ltd., [2009] 314 ITR 329 (Pat)*
- *CIT vs Hindustan Motors Ltd 175 ITR 411 (Cal);*
- *CIT vs. Karamchand Premchand Pvt. Ltd. 200 ITR 281 (Gui),*
- *CIT v Punjab Financial Corporation Ltd., 295 ITR 510 (P&H);*

- *Decom Marketing Pvt. Ltd vs CIT 251 ITR 398 (Guj);*
 - *CIT vs Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd. 128 ITR 70 (Guj), and*
 - *Mylan Laboratories Ltd. vs ACIT (ITA No. 1616/Hyd/2010 dated 16 January, 2015).*
- *Further, we understand that your goodself wishes to place reliance on the decision of the Calcutta High Court in the case of Brooke Bond India Limited vs. Joint Commissioner of Income-tax [2011] 337 ITR 482, while seeking to disallow the payment of Rs. 4.09 crore to employees towards unfunded pension. In this regard, we submit that the aforesaid decision is not applicable to the Bank's case for the following reasons:*
- *In the case of the Bank the deduction for pension has been made in respect of amounts which have been actually paid to the employees of the Bank and which has been gone out irretrievably and on which the Bank has no control. However, in the case of Brooke Bond, the deduction for pension was claimed merely on basis of a provision created based on a Board Resolution which could have reversed at a later date.*
 - *The Brooke Bond judgment only covers disallowance of provision made in respect of such liability based on actuarial valuation and the Hon'ble Court have not looked into the question of deduction of such pension payment made directly to employees. The Bank's relies on jurisdiction High Court ruling in the case of CIT vs. Hindustan Motors Ltd 175 ITR 411 (Cal) wherein it was held that payment of pension to employee is a deductible expenditure under Section 37(1) on ground of commercial expediency.*
 - *The intention of Section 36(1)(iv) read with Section 40A(9) of the Act is to restrict the tax avoidance by the employer by creating trust wherein the utilization of contribution made to trust is left to the discretion of the trustee and wherein the amounts flows back to the employer in the form of the deposits or investment. Thus, the Bank submits that the provisions which are introduced to curb a particular mischief should be construed in a manner that they do not create jeopardy beyond the mischief which is sought to be remedied. As per the intent, the above restriction should apply to contribution to superannuation trust/funds which are not approved by CIT. As mentioned above, in the Banks' case, the deduction for unfunded pension has been made in respect of amounts which have been actually paid to the employees of the Bank (and not as contribution to a fund/trust) and on which the Bank has not control.*
 - *In rendering the decision in the case of Brooke Bonde, the Hon'ble Kolkata High Court has not taken into consideration the decision of the Supreme Court in the case of High Land Produce and the decision of the jurisdictional High Court in the case of Liberty Cinema.*
- In light of the above, we submit that the decision in the case of Brooke Bonde is not applicable to the Bank case and the Bank has rightly claimed the deduction of the unfunded pension under section 37 of the Act.*

Given the above, the Bank submits that the payment of Rs. 4.09 crores towards unfunded pension should be allowed in full."

4.1. The Id AO in the draft assessment order placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Brooke Bond India Ltd vs JCIT & Anr. reported in 337 ITR 482 (Cal) and observed that the said decision would be applicable to the facts of the instant case. Moreover, the assessee in the instant case had not provided the details in respect of the classes of employees eligible to avail it. When certain details were furnished by the assessee before the Id DRP, the matter was remanded to the Id AO. The Id AO in his remand report commented as under:-

“The list does not indicate the class of employees, their place in the hierarchy, whether these were terminal benefits or short term benefits, etc. The submission is devoid of the Boards resolution, terms and conditions of payment of benefits and business expediency of such payments inter alia.

It is therefore could not be perceived from the additional evidence filed, as to how it negates the proposal of the AO to disallow payment of unfunded pension to the employees. On the basis of the facts and circumstances of the case, the additional evidence filed does not hold merit to overturn the AO's proposal.”

4.2. The Id DRP observed that this remand report was sent to assessee for its rebuttal and no submissions were made later on. Accordingly, the Id DRP upheld the action of the Id AO in disallowing the said expenditure in the sum of Rs 5.38 crores. Accordingly, the same was sought to be disallowed in the final assessment order by the Id AO. Aggrieved, the assessee is in appeal before us.

4.3. We have heard the rival submissions. We find that this issue is covered in favour of the assessee by the order of this Tribunal in assessee's own case for assessment year 2011-12 in I.T.A. Nos. 503&505/Kol/2016 dated 05.09.2018 wherein it was held as under:

“5.3. We have heard the rival submissions. The Id AR submitted that the very basis on which the claim of expenditure was disallowed by the Id AO as well as by the Id DRP was stated to be non-furnishing of details of employees by the assessee to whom the

payments were made. In this regard, he drew the attention of the Bench to pages 247 to 250 of the paper book containing the list of employees, their designation, employee code details and the amounts paid to 276 employees in total. He also drew our attention to page 416 of the paper book wherein these payments were duly approved by the competent authority in the assessee company including the Head of Human Resources in charge of Indian operations of the assessee bank. We find that though the assessee had nomenclatured the subject mentioned payments of Rs 4.09 crores as 'unfunded pension', it is effectively paid to employees of the assessee bank and no contribution was made whatsoever to any fund with respect to the said pension payments. It is more of a exgratia or extra payment of salary made to the employees of the bank based on some criterion, which has been duly subjected to deduction of tax at source and the same has been duly included in their respective Form No. 16. This fact is not in dispute before us. In other words, the payments made by the assessee bank to the various employees had been treated effectively as salary and other allowances including perquisites and the employees in turn had paid taxes for the same by offering it to tax in their returns, wherever applicable. Hence it is effectively a payment made as a welfare measure for the benefit of the employees of the assessee bank, which is squarely allowable as deduction u/s 37 of the Act. It is well settled that nomenclature or the form of a transaction should have to be ignored for the purpose of allowability of the same as deduction for income tax purposes and substance of the transaction is to be looked into. The real substance is that payment has been made as a welfare measure to employees of the assessee bank which makes it eligible for deduction u/s 37 of the Act. The payments were made to employees pursuant to Employer – Employee Relationship. Even the TDS obligations associated with the said payments have been duly complied with by the assessee, which is not disputed by the revenue before us. Even the sample Form No. 16 were duly submitted by the assessee before the ld AO which are enclosed in page 246 of the paper book. It was specifically submitted before the ld AO that the payment made under this particular scheme covered all eligible employees ranking from clerical staff, assistant manager, manager, vice president etc. We find that the genuinity of the said payments are not disputed by the revenue before us. We find that the case law relied upon by the ld AO in his assessment order and by the ld DR i.e Brooke Bond India Ltd supra, refers to payments made to fund. In the instant case, there was no contribution made by the assessee bank to any of the funds. The payments were directly made to the employees of the bank and subjected to deduction of tax at source. The moment the payments are made to those employees, the assessee had lost complete control over those funds and it had not come back to the assessee in any manner whatsoever either by creation of any fund managed by it or otherwise. From the approval letter of the competent authority of the assessee bank, we find that these payments were made only to meet the increased cost of living of the employees and hence it is effectively a payment made as a welfare measure. Hence the provisions of section 40A(9) of the Act as heavily relied upon by the ld DR is not at all applicable to the facts of the instant case. In view of these observations, we have no hesitation in directing the ld AO to grant deduction of the sum of Rs 4.09 crores in the instant case to the assessee. Accordingly, the Ground Nos. 4(a) to 4(c) raised by the assessee are allowed.”

Respectfully following the same, grounds raised by the assessee in this regard for assessment years 2012-13 and 2013-14 are allowed.

5. DISALLOWANCE OF CENVAT CREDIT WRITTEN OFF

Ground No. 5(a) to 5(b) for assessment year 2012-13

The brief facts of this issue are that the assessee claimed deduction on account of write off of unavailed service tax credit amounting to Rs 46 crores. The assessee submitted that as per the provisions of service tax laws prevailing in the financial year under consideration, the bank was required to discharge its service tax liability in respect of fees earned by it from the various services provided in the course of its banking activities. Such service tax liability can be discharged either by payment in cash to the Government authorities or through utilization of CENVAT credit available with the Bank. The bank incurs various expenses in the routine course of its business, which are essential for undertaking its banking activities. The vendors invoice the bank for such expenses along with the service tax applicable thereon. The expenses component (excluding service tax) is debited by the bank to its profit and loss account and the service tax component is recognized as CENVAT credit in the balance sheet in accordance with the service tax laws. In other words, the bank follows 'Exclusive Approach' for treatment of service tax. A set off principle is prescribed under the CENVAT credit rules, wherein such CENVAT credit can be set off only against payment of output service tax liabilities. No mechanism of refund has been prescribed in case of CENVAT credit balances is in excess of the output tax liabilities. As the quantum of output tax liabilities is purely driven by business considerations, event of set-off is totally dependent on future business prospects.

5.1. The assessee explained the rationale for write off of CENVAT credit as under:-

- As on 31st March, 2011, the Consumer Business Division of the Bank had an unutilized CENVAT credit of Rs. 510.9 million available with its books.

Pursuant to an internal review of the Bank's future business prospects in line with RBS Group Global Strategy, the Bank revisited the utilized CENVAT credit relating to Consumer Business Division. It was observed that the reduced business consumer Business Division would adversely impact the taxable fee income generated by the said division. This was reflected in reduced fee income trend for Consumer Business division observed year on year.

- Consequently, the service tax liability to be discharged by the Consumer Business Division would also be impacted and would result in accumulation of unutilized CENVAT Credit balance. As such, the CENVAT credit amount was in excess of service tax liability for future years. Given that the service tax laws do not prescribe fund mechanism for unclaimed CENVAT Credit, the Bank took a considered decision, to write off an amount of Rs. 460 million during Financial Year ('FY') 2010-11.
- Accordingly, the Bank had written off the un-availed service tax input credit amounting to Rs. 460 million and intimated about the same to the service tax authorities vide letter dated 24 February 2012. A copy of said intimation was already submitted with your goodself vide our submission dated 09 September 2013. Pursuant to the same, the available CENVAT Credit balance as of 31st March 2011 was reduced to such extent and the Bank surrendered its right to claim/set-off such CENVAT credit balances in future years.

5.2. The assessee submitted that the aforesaid write off met the test of 'Expenditure' incurred or laid out wholly and exclusively for the purpose of business as laid down u/s 37(1) of the Act. It was also submitted that such write off of un-availed input service tax credit pertains to various revenue expenses incurred and claimed by the bank for the purpose of its business. Accordingly, even the unavailed portion of the input service tax credit is to be characterized as a revenue expense allowable as a deduction to the bank, as the same was incurred wholly and exclusively for the purpose of business of the

bank. The assessee also submitted that the said write off was in accordance with the Guidance Note on Accounting Treatment for MODVAT / CENVAT issued by the Institute of Chartered Accountants of India (ICAI) wherein it was reflected as under:-

“REVIEW OF BALANCES IN MODVAT/CENVAT CREDIT RECEIVABLE ACCOUNTS

30. Balances in MODVAT/CENVAT Credit Receivable Accounts, pertaining to both inputs and capital goods, should be revived at the end of the year and if it is found that the balances of the MODVAT/CENVAT credit are not likely to be used in the normal course of business within a reasonable time, then, notwithstanding the right to carry forward such excess credit in the Excise Rules, the non-useable excess credit should be adjusted in the accounts.”

5.3. The assessee submitted that the said write off was in accordance with the Accounting Standard prescribed and notified by Central Board of Direct Taxes as under:-

- *As per the provisions of Section 145 of the Act, Accounting Standards prescribed by the CBDT are to be followed in computing the business income of an assessee. Accounting Standard-1 prescribed by the CBDT vide notification No. SO 69 (E) dated 25th January, 1996 provides that accounting policies adopted by an assessee should be such that it represents a true and fair view of the state of affairs of the business in the financial statements prepared and presented on the basis of such accounting policies. As per the principles of prudence, the assessee is required to recognize all known liabilities and losses immediately in its financial statement.*
- *Accordingly, in light of the Bank’s future business prospects and having regard to the principle of prudence, the bank had written off CENVAT credit amounting to Rs. 460 million during the year under consideration.”*

5.4. The assessee further submitted that closure of business was not necessary to claim deduction of the CENVAT credit written off as under:-

- *“In the course of the earlier hearing, your goodself had contended that the judicial precedents relied upon by the Bank in the earlier submissions namely Mohan Spinning Mills vs. ACIT (2012) 27 taxmann.com 332) (Chd.) and the decision of the Ahmedabad Tribunal in the case of M/s Rangoli Industries Pvt. Ltd. (2013) (ITA No. 1936/Ahd/2010) (now upheld by the Hon’ble Gujrat High Court), are applicable only in the case of closure of business and accordingly, the said decisions are not applicable in the present case. In this regard, we submit that though in the facts of the above decisions, there was closure of one*

unit/surrender of license, your goodself would appreciate that the principle emanating from these decisions is that the write off of CENVAT credit should be allowed as deduction where it is fairly certain that the said credit would not be available for claiming as credit against the future service tax liability of the assessee.

- *In this regard, the bank submits that as part of its global strategy, it had decided to downsize its retail business which would consequently result in substantial reduction in the expected output service tax liability against which such CENVAT credit is required to be utilized.*
- *Accordingly, we submit that the decision of write off of CENVAT credit & surrender the right to claim such credit is arising out of business expediency or commercial expediency which the bank as a prudent businessman had taken having regard to the bank's future business prospect. In this regard, we submit as under:*
- *'Business Expediency' is a broad term. Further, the best person to judge the business expediency is the businessman himself. The Hon'ble Courts have also consistently held that the necessity or otherwise of the commercial expediency is to be decided from the point of view of the businessman and not by the subjective standard of reasonableness of the revenue.*
- *The assessee has relied on the following case laws:*
 - *S.A Builders Limited vs. CIT(2007) 288 ITR 1 (SC)*
 - *CIT vs. Panipat Woollen & General Mills Co. Ltd.[1976] 103 ITR 66(SC)*
 - *CIT vs. Chandulal Keshavlal & Co(1960) 38 ITR 601*

Thus, it is submitted that the write off of excess CENVAT credit need not always be on account of closure of the business but the write off could also trigger inter alia on account of expected reduction in the output service tax liability (against which the input service tax credit would have been adjusted) which may be on account of various reasons inter alia including reduction or downsizing in the business of the assessee due to market conditions, economic conditions, Government Policies, etc. Further, putting a restrictive interpretation on the event triggering the write off for the purposes of allowing deduction under the Act (i.e. deduction of write off only in the year of actual closure of business) is not justified and would be against the Guidance note issued by the ICAI on Accounting Treatment for MODVAT/CENVAT, which permits assessee to carry out such a write off."

5.5. The assessee also placed reliance on the following decisions in support of its contentions:-

- *"CIT vs Samtel India Limited (ITA No. 130 of 2000) (Date of Order 26th September, 2013) (Delhi High Court)*
- *Girdhar Fibers Pvt. Ltd. vs. ACIT (ITA No. 2027/Ahd/2009) (Ahmedabad Tribunal)*
- *NCS Distilleries Pvt. Ltd. vs. ITO (ITA No. 699/Hyd/2012) (Hyderabad ITAT)*

5.6. This claim was made by the assessee already in assessment year 2011-12 but the same was disallowed by the Ld. AO on the ground that such credit claim was surrendered by the assessee to the Service Tax Department vide written intimation dated 24.02.2012 only and hence it does not relate to assessment year 2011-12. Hence going by the contentions of the ld. AO himself, the assessee claimed the very same sum as deduction in assessment year 2012-13.

5.7. The ld AO however completely disregarded the various contentions of the assessee by observing that the assessee could not show any cogent reason for such immediate write off, except for the fact that it is entitled to do so. This action of the ld AO was upheld by the ld DRP. Aggrieved, the assessee is in appeal before us.

5.8. We have heard rival submissions. The ld. AR fairly conceded before us that this sum of Rs. 46 crores was allowed as deduction by this Tribunal in assessment year 2011-12 in I.T.A. Nos. 503 & 505/Kol/2016 dated 16.05.2018 and hence the same should be disallowed in assessment year 2012-13 in order to avoid double deduction. We are in agreement with this fair representation by the ld. AR and accordingly uphold the disallowance made in the sum of Rs. 46 crores for assessment year 2012-13 in order to avoid double deduction to the assessee. Accordingly, ground nos. 5(a) to 5(b) raised by the assessee for assessment year 2012-13 are dismissed.

6. ADDITION TOWARDS INTEREST ON INCOME TAX REFUND

Ground Nos. 2(a) to 2(c) for assessment year 2012-13

Ground Nos. 4(a) and 4(b) for assessment year 2013-14

The brief facts of this issue is that the return of income for assessment year 2010-11 was processed u/s 143(1) of the Act by the Central Processing Centre (CPC) on 04.02.2011 and e-mail communication sent to the assessee in that regard on 14.09.2011.

In the said intimation u/s 143(1) of the Act a total sum of Rs. 165,18,57,498/- (which included interest u/s 244A of the Act) was determined as refund due to the assessee and that the same was sought to be adjusted against the outstanding demands payable by the assessee for assessment years 2004-05, 2005-06 and 2007-08. The assessee pleaded before the Id. AO that no such demands were outstanding for the respective years, in support of which it placed necessary evidences of tax calculation before the Id. AO. The Id. AO also admitted that such demands had erroneously arisen due to systemic error in the CPC. In other words, the fact of non-existence of demands was accepted by the Id. AO. The short issue that arises for our consideration is with regard to taxability of interest on income tax refund which was determined in the intimation u/s 143(1) which was not granted to the assessee and which was erroneously adjusted against the outstanding demands which never existed. In these circumstances, the assessee did not choose to offer the interest on income tax refund in its return of income for assessment year 2012-13. The Id. AO did not agree to this contention of the assessee and held that since the assessee is following mercantile system of accounting, the said interest on income tax refund in the sum of Rs. 9,35,01,366/- determined for assessment year 2010-11 u/s 244A of the Act ought to have been offered to tax by the assessee under the head income from other sources. Since the sum was not offered an addition was made to that effect in the assessment. Aggrieved the assessee is in appeal before us.

6.1 Similarly for assessment year 2013-14, the assessee in the return of income offered interest on income tax refund received u/s 244A of the Act amounting to Rs. 27,34,90,629/-. The assessee in its written submissions dated 25.07.2016 contended that the said interest u/s 244A of the Act is not taxable in India in the light of protocol to India-Netherlands Double Taxation Avoidance Agreement (DTAA) on Article 10, 11 and 12 which states that India has entered into DTAA with an OECD member country after India-Netherlands DTAA came into force i.e. after 21.01.1989, which inter alia restricts the scope of taxability of interest, then the scope of such treaty shall also apply

under India-Netherlands DTAA. The Id. AO however did not agree to this contention of the assessee and brought the interest on income tax refund offered in the return of income by the assessee to tax.

6.2. We have heard rival submissions. The Id. AR vehemently prayed for setting aside of this entire issue for both the assessment years to the file of Id. AO for de novo adjudication with liberty to the assessee to raise fresh grounds in the light of protocol to India-Netherlands DTAA read with India-Italy DTAA vis-à-vis the most favoured nation clause agreed in the protocol to India-Netherlands DTAA. This was put to Id. DR. The Id. DR fairly considered for de novo adjudication of this issue by the Id. AO. Hence we deem it fit and appropriate, in the interest of justice and fair play, to remand this entire issue to the Id. AO for both assessment years 2012-13 and 2013-14 for de novo adjudication of the issue and decide the same afresh in accordance with law. The assessee is at liberty to furnish additional evidences and raise fresh grounds, contentions with regard to this issue for both the assessment years under appeal before us. Accordingly, the grounds raised by the assessee in this regard are allowed for statistical purposes.

7. Ground no. 6(a) and 6(b) for assessment year 2012-13 are with regard to chargeability of interest u/s 234C of the Act, which are consequential in nature and does not require any specific adjudication.

8. Ground nos. 7(a) and 7(b) for assessment year 2012-13 raised by the assessee are with regard to initiation of penalty u/s 271(1)(c) of the Act, the adjudication of which would be premature at this stage in view of aforesaid decisions on various grounds on merits.

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9. Ground no. 8 for assessment year 2012-13 and ground no. 5 for assessment year 2013-14 raised by the assessee are general in nature and does not require any specific adjudication.

10. In the result, the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the Court on 14.09.2018

Sd/-
[S.S.Godara]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 14.09.2018
SB, Sr. PS

Copy of the order forwarded to:

1. DCIT(IT), Circle-2(1), Kolkata, 2nd Floor, Aaykar Bhawan Poorva, Room No. 210, 110, Shantipally, Kasba, Kolkata-700107.
2. M/s Royal Bank of Scotland N.V., Unit 3, 4 & 5, Azimgunj House, 17, Camac Street, Kolkata-700017.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches