

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL (IT) NO.1417 OF 2017**

Pr.Commissioner of Income-Tax-8 ... Appellant  
V/s.

RBS Financial Services (India)  
Pvt. Ltd. ... Respondent

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Mr.Suresh Kumar with Mr.Sham Walve, Advocate for the Appellant.

Mr.P.J.Pardiwalla with Mr.Niraj Sheth i/by Mr.A.K.Jasani, Advocate for the Respondent.

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**CORAM : UJJAL BHUYAN &  
MILIND N. JADHAV, JJ.**

**DATE : JANUARY 20, 2020**

**P.C.:-**

1. Heard Mr.Suresh Kumar, learned standing counsel, Revenue for the appellant and Mr.P.J.Pardiwalla, learned senior counsel for the respondent/assessee.

2. This appeal has been preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (briefly "the Act" hereinafter) assailing the legality and correctness of order dated 2<sup>nd</sup> January, 2017 passed by the Income Tax Appellate Tribunal (ITAT), Mumbai in ITA No.5997/Mum/2013 for the assessment year 2008-09.

3. The appeal has been preferred on the following questions, projected as substantial questions of law:-

“(i) Whether on facts and circumstances of the case and in law, the ITAT was correct in directing the Assessing Officer to follow the ratio of decision in case of M/s Credit Lyonnais (ITA No.1935/Mum/2007 dated 30.09.2013) and M/s Calyon Bank (ITA No.4474/M/2009 dated 21.03.2014) when the facts of those cases are not similar to facts of the assessee and hence cannot be considered as a valid comparable under Rule 10B of I.T.Rules, 1962 so as to adopt the rates as adopted in those cases?

(ii) Whether on the facts and circumstances of the case and in law, the ITAT was correct in directing the Assessing Officer to decide the issue by applying rate of 20% in violation of provision of section 92(3) of the I.T.Act, 1961 when the assessee itself had considered the rate of 50%?”

4. In the course of the assessment proceeding the Transfer Pricing Officer passed an order dated 30<sup>th</sup> September, 2011 under Section 92CA (3) of the Act determining the arms length price of the syndication fee at 100%. He held that the entire amount of Rs.22,63,47,950/- was received by the assessee.

5. In the assessment order dated 25<sup>th</sup> January, 2012 which followed, the same was incorporated whereafter

an addition of Rs.22,63,47,950/- was made to the income of the assessee.

6. On appeal before the first appellate authority, Commissioner of Income Tax (Appeals) by his order dated 25<sup>th</sup> July, 2013 upheld the findings of the Assessing Officer and dismissed the appeal.

7. Assessee thereafter preferred further appeal before the Tribunal. Tribunal by the impugned order dated 2<sup>nd</sup> January, 2017 remanded the matter back to the file of the Assessing Officer to decide the issue afresh by considering the decisions relied upon by the Tribunal for allocation of non-syndication fee between the assessee and associated enterprise after giving opportunity of being heard to the assessee.

8. While passing the said order, Tribunal relied upon a decision of the Coordinated Bench of the Tribunal in the case of **M/s Credit Lyonnais Vs. ADIT decided on 30<sup>th</sup> September, 2012** where it was held as under:-

'8.8 Having held that para 4 of the Protocol does not apply to the case of the assessee, now, the question arises as to whether the adjustment made by the authorities below is justified. For making the adjustment, the

authorities below have taken into consideration, the income towards interest as well as the fee charged by the foreign branch from the clients. It is pertinent to note that when the loan is provided by the syndicate and the assessee has not contributed to the loan amount then as regards the income of interest, the same cannot be attributed to the assessee for providing the services of the financial analysis of the borrowers, market condition and regulatory environment in India. Since the assessee has provided certain services for that arms length charges can be determined as per the provisions of transfer pricing regulation. The TPO as well as CIT(A) has not brought out any comparable for determination of the arms length price but took the total income comprising interest as well as other fees charged by the foreign branches for allocation/ attribution to the assessee. In this case, the ALP has not been determined by taking into consideration uncontrolled similar transaction. In our view, the interest cannot be taken into account for attribution of income towards service charges/fees and, therefore, in the facts and circumstances of the case only the fee charged by the foreign branches can be taken into consideration for making adjustment under transfer pricing provisions. Accordingly, we direct the AO/TPO to make adjustment in respect of the services performed by the assessee for foreign currency loan arranged for its existing clients by taking into account only the fee and other charges received by the foreign branches from the borrowers in question. Since none of the parties have come out with the suitable comparables, therefore, we find that the estimation made by the CIT(A) at the rate of 20% is just and proper, however, the same would be only in respect of the fee and

charges other than interest received by the foreign branches. Thus, these grounds of the assessee are partly allowed.”

9. Further reference was made to another decision of a Coordinated Bench of the Tribunal in the case of **Calyon Bank Vs. DDIT decided on 21<sup>st</sup> March, 2014** wherein the decision in M/s Credit Lyonnais was relied upon.

10. Following the above decisions, Tribunal restored the issue to the file of the Assessing Officer for a fresh decision in accordance with law.

11. In the facts and circumstances of the case, we do not find any error or infirmity in the view taken by the Tribunal in remanding the matter back to the file of the Assessing Officer for a fresh decision in accordance with law.

12. On thorough consideration, we are of the opinion that the proposed questions of law does not arise out of the impugned order of the Tribunal.

13. In above view, Appeal is dismissed, but without any order as to costs.

**(MILIND N. JADHAV, J.)**

**(UJJAL BHUYAN, J.)**

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