IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER,

ITA No.3416/Mum/2023
(A.Y. 2020-21)

M/s BNP Paribas 1 North Avenue, Maker Maxity, Bandra Kurla Complex, Bandra East, Mumbai – 400051	Vs.	Assistant Commissioner of Income Tax (IT), Circle 1(3)(1), Room No. 1810A, 18th Floor, Air India Building, Nariman Point, Mumbai – 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACB4868Q		
Appellant	..	Respondent

Appellant by :	Farooq Irani
Respondent by :	Ajay Kumar Sharma

Date of Hearing	12.03.2024
Date of Pronouncement	13.05.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the final assessment order dated 21.07.2023 passed u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 pursuant to the direction issued by the ld. Dispute Resolution Panel u/s 144C(5) of the Act for the assessment year 2020-21. The assessee has raised the following grounds before us:

> *"1. The Assistant Commissioner of Income-tax, National Faceless Assessment Centre-1(1)(2), Delhi (NaFAC) has erred in issuing a notice under section 143(2) of the Act, initiating scrutiny assessment proceedings in case of the Appellant for the subject AY.*

2. 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 2020-21 is also applicable to the Appellant, in accordance with the provisions of Article 26 (Non-discrimination) of the India France tax treaty.

3. The learned AO has erred in subjecting to tax, the data processing fees amounting to Rs.36,03,02,885 paid by Indian branch offices of the Appellant to its Singapore branch, as income of the Appellant.

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

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.19,22,06,830 is chargeable to tax

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

7. The learned AO has erred in adding an amount of Rs.23,88,795 to the income of the Appellant under the head 'profit and gain from business and profession

8. The learned AO has erred in granting short credit of taxes deducted at source (TDS) amounting to Rs.915.

9. 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.

2. Fact in brief is that assessee is a commercial bank having its head office in France. The assessee has 8 branches in India at Mumbai, New Delhi, Kolkata, Banglore, Pune, Ahmedabad, Chennai & Hyderabad. The assessee is involved in normal banking activities including financing of foreign trade and foreign exchange transaction. The assessee has filed return of income for the year under consideration on 15.02.2021 declaring total income of

Rs.546,63,91,110/-. The case of the assessee was subject to scrutiny assessment and the assessing officer issued draft assessment order on 29.09.2022 u/s 144C of the Income Tax Act 1961 proposing assessment with certain variations on the following issue:

(i) Issue of rate of taxation regarding the tax rates applicable to non-resident.

(i) Issue of data processing fee paid by the branch Office (BO) to the Head office (HO) regarding the treatment of data processing fee paid by Branch office to Head Office amounting to Rs. 36,03,02,885/- as fee for technical services and royalty.

(ii) The subject of taxation of the receipt of interest Income by HO, interest income of the overseas branch/HO of Rs. 19,22,06,830/-."

3. The assessee filed objection before the Dispute Resolution Panel-1, Mumbai on 28.10.2022. The DRP vide its order dated 27.06.2023 has dismissed the objection raised by the assessee and thereafter assessing officer has passed final assessment order on 21.07.2023 and assessed the total income at Rs.600,17,43,550/-. Further facts of the case are discussed while adjudicating the ground of appeal filed by the assessee.

Ground No. 1: National Faceless Assessment Centre has erred in using a notice u/s 143(2) of the Act.

4. Regarding ground no. 1 of the appeal of the assessee for issuing notice u/s 143(2) of the Act through National Faceless Assessment Centre the ld.Counsel submitted that faceless assessment cannot be applied to the Non-resident Indian. The ld. Counsel submitted that CBDT issued notification treating assessment under Central Charge and International Taxation Charge as separate classes of cases excluding them from faceless assessment. He further submitted that the case of the assessee fall in the international taxation division to be assessed by Assistant Commissioner of Income Tax (IT), Circle 1(3)(1), Mumbai and notice u/s 143(2) of the act has been incorrectly

issued by the National Faceless Assessment Centre without jurisdiction, therefore, the same is invalid. The ld. counsel after referring copy of notice issued u/s 143(2) dated 29.06.2021submitted that such notices are to be issued in the cases where the proceedings will be conducted electronically in e-assessment facility and the same is not applicable to the cases under international taxation and central charges. The ld. Counsel has also referred the following judicial pronouncements:

"i. CIT-1, Nagpur Vs. Lalitkumar Bardia (2017) 84 Taxmann.com 213 (Bombay)
ii. Sant Baba Mohan Singh Vs. CIT (1973) 90 ITR 197 (All)
iii. CIT Vs. Laxman Das Khandelwal (2019) 108 taxmann.com 183 (SC).

5. On the other hand, the ld. D.R. submitted that the cases for the assessment year 2020-21 were subject to computer added scrutiny selection and there was no human intervention involved in the selection process and subsequently notices u/s 143(2) of the Act were sent by ACIT (NaFAC) 1(1)(1) dated 29.06.2021. He further submitted that such notice to the assessee has been issued by the ACIT (NaFAC) 1(1)(1) Delhi in the capacity of prescribed authority u/s 143(2) of the Act. He also referred CBDT Notification No. 25(2021) dated 31.03.2021 which authorized AC/DCIT (NaFAC) to act as a prescribed Income Tax Authorities from 01.04.2021 and therefore ACIT (NaFAC) is the prescribed authority for the purpose of issuing notice u/s 143(2) of the Act. The ld. D.R also referred provision of Sec. 143 of the Act and submitted that though prescribed authority (NaFAC) may issue notice u/s 143(2) of the Act and order u/s 143(3) will be passed only by concerned assessing officer. The ld. D.R has also referred the decision of Hon'ble Karnataka High Court in the case of Adarsh Developers in Writ Petition No. 1109/2023 wherein the similar issue has been decided in favour of the revenue.

6. Heard both the sides and perused the material on record. On perusal of the notice dated 29.06.2021 it is evident that the said notice has been issued by the ACIT/NaFAC-1(2) Delhi in the capacity of the prescribed authorities u/s 143(2) of the Income Tax Act 1961. In this regard, we have perused the provision of Sec. 143(2) of the Act as amended by the Finance Act 2016 reproduced as under:

3-1 Sub-section 143(2), as amended by Finance Act 2016 reads as under:

> *"143(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer or the prescribed income tax authority, as the case may be, if, considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:"*

The amended sub-section 2 of Sec. 143 is applicable w.e.f 1.04.2016 which entitles "Prescribed Income Tax Authorities" (r.w Rule12E) to issue notice under sub-section 2 of Sec. 143 apart from the assessing officer (officer holding PAN jurisdiction over the case).

7. Further we have perused the CBDT Notification No. 25/2021 dated 31.03.2021 which has authorized AC/DCIT (NaFAC) to act as prescribed income tax authority w.e.f 01.04.2021. The relevant extract of the said notification is reproduced as under:

> *"S.O. 1437(E). In exercise of powers conferred under sub-section (2) of section 143 of Income-tax Act, 1961 (43 of 1961) (the Act) read with Rule 12E of the Income-tax Rules, 1962, the Central Board of Direct Taxes hereby authorises the Assistant Commissioner of Income-tax/Deputy Commissioner of Income-tax (NaFAC) having her / his headquarters at Delhi, to act as the 'Prescribed Income tax Authority' for the purpose of sub-section (2) of section 143 of the Act, in respect of returns furnished under section 139 or in response to a notice issued under sub-section (1) of section 142 of the said Act, or sub-section (1) of section 148 of the Act, for the purpose of issuance of notice under sub-section (2) of section 143 of the said Act. 2. This notification shall come into force from the 1st day of April, 2021.*
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> *[Notification No. 25/2021/F. No. 187/3/2020-ITA-I]"*

8. We have also perused the notification no. 79/2020 F. No. 187/2/2019ITA-I which is reproduced as under:

> *"S.O. 3304(E). In exercise of powers conferred under sub-section (2) of section 143 of Income-tax Act, 1961 (43 of 1961) (the Act) read with Rule 12E of the Income-tax Rules, 1962, the Central Board of Direct Taxes hereby authorises the Assistant Commissioner/Deputy Commissioner of Income-tax (National e-Assessment Centre) having his headquarters at Delhi, to act as the Prescribed Income tax Authority for the purpose of sub-section (2) of section 143 of the Act, in respect of returns furnished under section 139 or in response to a notice issued under subsection (1) of section 142 of the said Act, for the purpose of issuance of notice under sub section (2) of section 143 of the said Act."*

9. It is clear from the aforesaid notification and provision of the Act that the prescribed authority i.e NaFAC is only authorised to issue a notice under the said section in accordance with provision of the Act.

10. We have also perused the decision of Hon'ble Karnataka High Court in the Writ Petition No. 1109/2023 Adarsh Developers wherein the following question of law was considered by the Hon'ble High Court which is reproduced as under:

> *"[a] Whether the Additional Commissioner of Income Tax NaFAC-1(1)(2) could have assumed jurisdiction in respect of the petitioner's case which belongs to Central Charge for issuance of notice under Section 143(2) of the Income Tax Act, 1961; and if the aforesaid officer could not have so assumed jurisdiction, whether the proceedings must fail for want of due notice 3 326 ITR 492 [GUJ] under Section 143(2) of the Income Tax Act, 1961."*

The Hon'ble High Court has rejected the petition of the assessee holding as under:

> *"39. This Court must opine that there is a transition from a Scheme notified under the provisions of the IT Act to a Scheme under the IT Act incorporation all the essential without material changes insofar as assessments generally and assessments in the cases of Central Charges and International Taxation Charges and there is nothing in this transition, including the provisions of Section 144B or the CBDT's Order, to infer exclusion of the operation of CBDT's order dated 13.08.2020. This Court must therefore conclude that the operation of the CBDT's order dated 13.08.2020 is saved by the application of the Section 24 of the General Clauses Act, 1897."*

11. We consider that the cases referred by the ld. Counsel are entirely distinguishable from the fact of the cases of the assessee on the issue of issuing of notice u/s 143(2) by the prescribed authority i.e NaFAC with the introduction of faceless scheme by the CBDT. In the light of the above facts and finding we consider that notice issued u/s 143(2) of the Act in the case of the assessee by the prescribed authority i.e NaFAC is in accordance with the provision of the Act , therefore, we don't find any merit in this ground of appeal of the assessee and the same stand dismissed.

Ground No. 2: Issue of rate of tax applicable to domestic company and/or cooperative bank for assessment year 2020-21 is also applicable to the assessee in accordance with Article 26 of the India-France Tax Treaty:

12. During the course of appellate proceedings before us the ld. Counsel submitted that this issue has been decided against the assessee by the decision of coordinate benches of the Tribunal in the proceeding assessment years.

The ld. D.R relied on the order passed by the coordinate benches of the ITAT in the earlier assessment years.

13. Heard both the sides and perused the material on record. With the assistance of ld. representative we have perused the decision of ITAT vide ITA no.1076/Mum/2021 for A.Y.2017-2018 as under:

> *"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:*
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> > *"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."

14. It is evident that the issue is recurring in nature and it is squarely covered by the decision of the ITAT in the proceeding assessment year as discussed supra in this order, therefore, following the decision of the coordinate bench of the Tribunal as referred above this ground of appeal no. 2 of the assessee is dismissed.

Ground No. 3: Taxability of data processing fees paid by the Indian branch of the assessee to its Singapore branch:

15. During the course of appellate proceedings before us the ld. Counsel submitted that identical issue on similar fact has been adjudicated by the coordinate bench of the ITAT in favour of the assessee.

On the other hand, the ld. D.R supported the order of lower authorities.

16. Heard both the sides and perused the material on record. With the assistance of ld. Representative we have perused the decision of coordinate bench vide ITA no.1076/Mum/2021 for A.Y.2017-2018 on this issue the relevant extract of the decision is reproduced as under:

> *"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.*
> >
> > > *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 cames 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).

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.

14. Ground no 2 is thus allowed."

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."

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.

Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 2 ground of appeal."

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 precedents in assessee's own case cited supra, ground no.2 raised in assessee's appeal is allowed."

17. We consider that this issue is recurring in nature and same has been decided in favour of the assessee in the earlier assessment years as cited supra in this order, therefore, following the decision of ITAT as discussed supra the ground no. 3 of appeal of the assesse is allowed.

Ground No. 4: Levying surcharge and health and education cess:

18. The issue in the ground no. 4 of the appeal of the assessee is pertained to levy of surcharge and education cess on the tax computed @ 10% under Article 13 of India-France Treaty.

19. During the course of appellate proceeding before us the ld. Counsel submitted that in case ground no. 3 raised in assessee's appeal is decided in assessee's favour then ground no. 4 would become academic in nature.

20. Since, we have decided ground no. 3 in favour of the assessee, therefore, considering the submission of the ld. Counsel this ground of appeal is dismissed as infructuous.

Ground No. 5: Interest payable/paid by the Indian branch offices of the assessee to the head office and its other overseas branches amounting to Rs.19,22,06,820/ is chargeable to tax-:

21. During the year under consideration the Indian branch office has paid an amount of Rs.17,65,42,982/- to its head office/overseas branches as interest on subordinated debt. Further, BNP has paid an amount of Rs.15,663,858/- as interest on NOSTRO overdrafts. The assessee submitted that Article 7 (2) India-France Tax Treaty provides that profits attributable to a permanent establish (PE) should be computed on the basis of the profit which the PE might expect to make it if it were a distinct and separate enterprise and dealing wholly independently with the enterprise of which it is a PE or with enterprises with which it deals. The India-France Tax Treaty creates a

legal fiction by treating the profit (PE) as being distinct from the other parts of the same enterprises of which it is a PE. Before the assessing officer the assessee made following submission:

> *"During the course of proceedings, it was noted that the Assessee paid interest to the HO and other overseas branches. India branch has claimed deduction of such amount citing the provisions of the Article 7(3) of the DTAA. At the same time. HO and other overseas branches who had received such interest declined to recognise it as income citing the reason that the said transaction was in the nature of payment to the self The Assessee filed following submissions on this subject matter*
>
> *"During the Financial Year (FY) ended 31 March 2020, BNP paid an amount of Rs.176,542,982/- to it's head office(HO)/overseas branches as interest on sub ordinated debt. Further, BNP has paid an amount of Rs.15,663,858/- as interest on NOSTRO overdrafts*
>
> *The Assessee submits that such interest paid by the Assessee to its Head Office and other branches constitutes a 'payment to self and hence not chargeable to tax in India*
>
> *In this regard, we wish to submit that Article 7(2) of the India France Tax Treaty provides that profits attributable to a Permanent Establishment (PE) should be computed on the basis of the profits which the PE might expect to make if it were a distinct and separate enterprise and dealing wholly independently with the enterprise of which it is a PE or with other enterprises with which it deals*
>
> *The India - France Tax Treaty creates a legal fiction by treating the branch (ie the PE) as being distinct from the other parts of the same enterprise of which it is a PE while having dealings with them. The fiction has been introduced to enable quantification of the profits made by the PE on an arm's length basis so that the State in which the PE is situated can appropriately levy and collect taxes. This requirement arises from Article 7(1) of the India France Tax Treaty, according to which only so much of the profits shall be taxable in a state in which a PE situated, to the extent attributable to such a PE. The above position is also endorsed by the Organisation for Economic Co- operation and Development (OECD) Commentary 2008 with regard to the provisions of Article 7(2) as follows:*
>
> *This paragraph contains the central directive on which the attribution of profits to a permanent establishment is intended to be based. The paragraph incorporates the view that the profits to be attributed to a permanent establishment are those which that permanent establishment would have made if, instead of dealing with the rest of the enterprise, it had been dealing with an entirely separate enterprise under conditions and at prices prevailing in the ordinary market. This corresponds to the "arm's length principle discussed in the Commentary on Article 9. Normally, the profits so determined would be the same profits that one would expect to be determined by the ordinary processes of good business accountancy*

Therefore, the legal fiction is created essentially to enable the determination of profits attributable to a PE, and the same should not be extended to or have a bearing on any other provisions of a treaty or on the provisions of the Act, except specifically provided for

Further, the Hon'ble Mumbai Income Tax Appellate Tribunal (ITAT), in BNP's own case of BNP Paribas SA v. ADIT reported at ITA/3422/2009 has observed as follows:

12. The fiction of hypothetical independence of a PE vis-a-vis it's GE and other PES outside the source jurisdiction is confined to the computation of profits attributable to the permanent establishment and, in our considered view, it does not go beyond that, such as for the purpose of computing profits of the GE Article 7(2) of the India France DTAA specifically provides that when enterprise of a treaty partner country carries oul business through a permanent establishment, "there shall, in each contracting state, be attributed that permanent establishment, 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 permanent establishment" This fiction comes into play for the limited purposes of computing profits attributable to permanent establishment only and is set out under the specific provision, dealing with computation of such profits, in the tax treaties, including in the Indo French DTAA. There is nothing, therefore, to warrant or justify application of the same principle in computation of GE profits as well. Clearly, therefore, the fiction of hypothetical independence is for the limited purpose of profit attribution to the permanent establishment.

Article 12 of the India-FranceTax Treaty

The India - France Tax Treaty applies to 'persons' who are 'residents' of one or both of the Contracting States Article 3 of the India France Tax Treaty defines the term 'person to include an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States

In this connection, reliance is placed on the ruling issued by the Special Bench of Mumbai Income Tax Appellate Tribunal (ITAT) in the case of Sumitomo Mitsui Banking Corporation vs DDIT reported at [2012] 145 TTJ 649 (Mum) (SB) (SMBC Ruling) wherein it was held that

"In so far as the taxability of interest payable by PE in India in the hands of GE under the domestic law is concemed, it is relevant to note that the PE in India and the GE abroad of which the said PE is part are not independent persons under the domestic lawie. Indian Income-tax Act and they are not assessed to tax separately in India. The taxable entity is only one ie the overseas GE which is the assessee bank in the present case who is a non-resident in India and the PE in India is part of that entity which is a taxable entity in India even in respect of income attributable to the PE in India. There is thus only one person assessable to tax re GE and PE is not an independent person who is assessed to tax separately in India It is a part of the GE and its income is chargeable to tax in the hands of GE which alone is the person assessable to tax in India."

The above implies that for the purpose of section 2(31) of the Act, which defines the term 'person', on the basis of the observation made in the SMBC ruling (supra), the branch and the foreign bank are to be treated as the same taxable unit. As a result of the above discussion, under the provisions of the India - France Tax Treaty, BNP does not qualify as a separate person vis-à-vis its HO

Further, Article 12 of the India France Tax Treaty relates to the taxability of interest income. Article 12(4) of the India-France Tax Treaty defines the term "interest' to mean income from 'debt-claims' In this regard, it is submitted that two parties are required to give rise to a 'debt-claim.

In this connection, reliance is placed on the decision of the Hon'ble Kerala High Court in case of Canara Bank v Tecon Engineers [1994] 207 ITR 691, wherein it was held that:

"A 'debt' ordinarily is a sum of money due from one person to another."

As discussed in the earlier paragraphs, given that in the present case, two parties are not involved and it is merely payment to self, it is submitted that interest paid by BNP to its HO/ overseas branches does not qualify as interest for the purpose of Article 12 of the India-France Tax Treaty.

The above contention has also been upheld by the Hon'ble Mumbai ITAT in case of SMBC ruling (supra) The relevant extract of the order has been reproduced below:

….The provisions of article 7(2) are subject to the provisions of article 7(3) and if the same are read together in harmonious manner, we are of the view that it becomes clear that the profits attributed to the PE are the profits 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 condition and dealing wholly independently with the enterprise of which it is a PE. The said fiction, in our opinion, therefore, is applicable only for the purpose of determining the profits attributable to the PE and this limited application contemplated in the treaty cannot be extended and applied to compute the income of the GE.

Therefore, without prejudice to the above contention that interest received by HO/overseas branches is not covered within the definition of interest under Article 12(4) of the India France Tax Treaty, it is submitted that in absence of two separate and distinct parties, Article 12 (1) of the India France Tax Treaty does not cover the interest paid by BNP to its HQ/overseas branches.

Further, Article 12(5) of the India - France Tax Treaty reads as under:

"5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment 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

permanent establishment or fixed base. In such case, the provisions of article 7 or article 15, as the case may be, shall apply

The purpose and scope of Article 11(4) of the OECD model convention [which is akin to Article 12(5) of the India - France Tax Treaty) has been explained in paragraph 25.1 of the OECD commentary:

"25.1 A debt-claim in respect of which interest is paid will be effectively connected with a permanent establishment, and will therefore form part of its business assets, if the "economic ownership of the debt-claim is allocated to that permanent establishment under the principles developed in the Committee's report entitled Attribution of Profits to Permanent Establishments (see in particular paragraphs 72-92 of Part I of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic ownership of a debt-claim means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (eg. the right to the interest attributable to the ownership of the debt-claim and the potential exposure to gains or losses from the appreciation or depreciation of the debt-claim)."

In view of the above, where the HO/overseas branches is/ are receiving payment of interest from BNP, it cannot be regarded as a debt claim effectively connected with the PE (i.e. BNP) and hence would not be covered under Article 12(5) of the India France Tax Treaty

Accordingly, there should not be any need to evaluate Article 7 of the India-France Tax Treaty by virtue of Article 12(5) of the India France Tax Treaty. The above position was also confirmed by the Hon'ble Mumbai ITAT in the SMBC ruling(supra). The relevant extract of the observations in the order has been reproduced below:

….Keeping in view the purpose and scope of article 11(4) of the OECD Model Convention, the provisions of which are parimateria to the provisions of article 11(6) of the Indo-Japanese treaty, we are of the view that the same is not applicable to the facts of the present case inasmuch as the situation as contemplated to make it applicable does not exist in the present case. In the present case, the amount is advanced by the head office of the assessee bank to its PE in India and the same represents liability of the PE in India as reflected in the balance sheet of that PE. Interest paid by the PE on such liability, therefore, cannot be regarded as interest paid in respect of debt claims forming part of the assets of the Permanent Establishment. It also cannot be said that the economic ownership of the debt claim is allocated to that Permanent Establishment so as to say that it is effectively connected with the Permanent Establishment. It is no doubt true that article 7 makes inroads in article 11 as a result of the provisions contained in article11(6) as contended by Shri Girish Dave. However, the situation contemplated in article11(6) should be found to be in existence in a case to bring the interest to article 7 in order to treat the said income as business profit attributable to the PE indirectly by force of attraction in the present case, such situation does not exist and article 11(6), therefore, in our opinion, has no application

Further Article 12(6) of the of the India-France Tax Treaty reads as under

"Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that Contracting State Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establish mentor fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated"

As submitted above, the deeming fiction created by Article 7(2) of the India France Tax Treaty is only for the limited purpose of determination of profits attributable to PE in India and the same cannot be extended and applied to Article 12 of the Treaty or any other provision under the Act or the Treaty

Without prejudice to the same, the Assessee also places reliance on its own decision of the Hon'ble Mumbai ITAT [BNP Paribas SA (supra)] which after considering the decision of its co-ordinate bench in the case of SMBC ruling (supra) came to the following conclusion.

….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 (1) 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.

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."

Based on the above arguments, we wish to submit that the interest received by the HO/overseas branches from BNP should not be taxable under the provisions of the India-France Tax Treaty."

22. The assessing officer has not agreed with the submission of the assessee vide draft assessment order dated 29.09.2022 passed u/s 144C(1) of the Act and held that interest income of the overseas branch/HO of Rs.19,22,06,830/ would be taxable under Article 12 of the India-France Treaty@10%.

23. The assessee filed objection before the DRP against the draft assessment order passed by the assessing officer. The DRP vide order u/s 144C(5) of the Act dated 27.06.2023 has dismissed the objection filed by the assessee holding that this issue is pending before the Hon'ble High Court for the earlier assessment years. Thereafter the assessing officer passed the final assessment order on 21.07.2023 and treated the interest payment made to the head office as taxable @ 10% as per Article 12 of India-France DTAA.

24. During the course of appellate proceedings the ld. Counsel submitted that the similar issue on identical facts in the case of the assessee itself has been adjudicated in favour of the assessee by the coordinate bench of the ITAT vide ITA No. 1067/Mum/2021 & 1670/Mum/2022 dated 24.01.2023. He also submitted that this is a recurring issue and has been adjudicated in favour of the assessee in the earlier years by the ITAT. During the course of appellate proceedings before us the assesse has made following submission:-

"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 overseas branches amounting to Rs.19,22,06,830 is chargeable to

A. It is the Appellant's contention that this identical issue is squarely covered in the Appellant's favour by orders of the Hon'ble ITAT in the Appellant's own case, inter alia, for:

(i) Assessment Years 2017-18 and 2018-19 (See pages 152 to 173 esp. pages 162 to 170 of the Appellant's paper book).

(ii) Assessment Year 2016-17 (Sec. pages 134 to 151 esp. pages 145 to 150 of the Appellant's paper book).

It is the position, admitted by both by the Assessing Officer ("AO") and by the DRP, that the facts of the current Assessment Year are identical to those of the earlier Assessment Years. See:

(1) the following observations of the AO:

"The submissions of the assessee on this issue have been carefully considered There are no changes in the facts of the case from the previous years and the submissions of the assessee are also identical. In connection with this issue it is essential to highlight the directions of the DRP dated 22/03/2022 in the assessee's case for the Assessment Year 2017-18 The DRP on this issue in Para No 12 Page No. 32 of the directions dated 22/03/2022 held as under. On this issue the reliance is made on the directions of the DRP.

(ii) See the following observations of the DRP

> *"The Panel has carefully considered the facts of the case and the detailed submissions made by the assessee. It is noticed that this issue is recurring in nature. There are no changes in facts of the case as compared to AY 2017- 18. In fact, as noted above, the submissions of the assessee are also identical to those made for the AY 2017-18 Hence, it is relevant to quote the relevant portion from the order of the DRP for the AY 2017-18 as below"*
>
> *"As the facts of the case are identical to the facts as obtaining in the assessment year 2017-18, following the detailed reasoning and directions given by the DRP for AY 2017-18, Objection No. 3 of the assessee is rejected.*
>
> *In light of the facts and circumstances of the case and as per the law it is essential to maintain the principles of consistency and uniformity of taxation and assessment".*

B. The Appellant submits that as it is the admitted position that the facts and the law are the same as those considered and pronounced upon by two different Benches of the Hon'ble ITAT in the Appellant's own case, the same should be followed on the well- recognised principle of stare decisis viz. that precedents on identical facts and law should be followed and in consonance with judicial discipline.

The CIT (DR)'s contention that the earlier decisions in the Appellant's own case should not be followed deserves to be rejected for the following reasons which are without prejudice to one another.-

(a) It completely violates the principle of stare decisis and the theory of precedents and adherence to judicial discipline. In this connection, the following observations of the MadrasHigh Court in the case of CIT Vs. L.G. Ramamurthi & Ors., (110 ITR page 453) are relevant:

"No Tribunal of fact has any right or jurisdiction to come to a conclusion entirely contrary to the one reached by another Bench of the same Tribunal on the same facts. It may be that the members who constituted the Tribunal and decided on the earlier occasion were different from the members who decided the case on the present occasion. But what is relevant is not the personality of the officers presiding over the Tribunal or participating in the hearing but the Tribunal as an institution. If it is to be conceded that simply because of the change in the personnel of the officers who manned the Tribunal, it is open to the new officers to come to a conclusion totally contradictory to the conclusion which had been reached by the earlier officers manning the same Tribunal on the same set of facts, it will not only shake the confidence of the public in judicial procedure as such, but it will also totally destroy such confidence. The result of this will be conclusions based on arbitrariness and whims and fancies of the individuals presiding over the courts or the tribunals and not reached objectively on the basis of the facts placed before the authorities.

If a Bench of a Tribunal of the identical facts is allowed to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on an earlier occasion that will be destructive of the institutional integrity itself...".

The following observations of the Supreme Court in (2000) 1 SCC 644 are also relevant:

"Precedents which enunciate rules of law form the foundation of administration of justice under the Indian legal system. This is a fundamental principle which every Presiding Officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in the judicial system in India."
(b) It would completely destroy the Appeal process, as instead of availing of the normal Appeal process, by appealing to the High Court under Section 260A of the Act (which the Department already has done) the Department would seek to re-argue concluded matters, by once again re-arguing subsequent years, in the ITAT, on identical facts and law.

(c) The Department's reliance in paragraphs 19 and 19.1 of its submissions upon the decision of the Kerala High Court and the Supreme Court is totally misconceived, inter alia, because

(i) The decisions of the Tribunal in the Appellant's own case for carlier years contain no error whatsoever and are well-reasoned and cannot be faulted. It may be mentioned that the Hon'ble ITAT decided this issue in the Appellant's favour after considering detailed Written Submissions filed by the Departmental representative To allow the Department to once again re-agitate the very same issues would amount to completely violating the principle of judicial discipline and precedents and destroy the Appeal mechanism, apart from amounting to disrespect of earlier well-reasoned orders on the

allegation that they "were influenced by inaccurate representation of facts".

(ii) The Appellant takes serious objection to the following allegation made by the CIT (DR) in paragraph 17.1 of his Written Submissions, where, after reproducing the Hon'ble ITAT's decision in the Appellant's own case for Assessment Year 2017-18, the CIT (DR) has observed:

"This assertion / submission of the Ld. Counsel is completely baseless and against the express provisions of the Act and the DTAA and was meant to misguide the Hon'ble Bench".

The Appellant says that:

- *merely because the Department does not agree with valid legal submissions made by Counsel, does not give it any right to make such allegations.*

- *In any event and without prejudice to the above, the Department was fully represented before the Hon'ble ITAT and there was therefore no question of the Hon'ble Bench being "misguided" as alleged or otherwise.*

(iii) The Appellant also takes serious objection to the following allegation made by the CIT (DR) in para 19.2 of his Written Submission, where the CIT (DR) alleges:

"In view of these case laws and facts pattern of the case as discussed above it is respectfully submitted that the previous decisions of the co- ordinate benches in the earlier years were influenced by inaccurate representation of facts. Consequently, they shouldn't serve as a precedent in the present appeal".

It is submitted that:

- *there was no "inaccurate representation of facts" whatsoever. There were only legal submissions advanced on admitted facts*

- *merely because the Department does not agree with valid legal submissions made by Counsel, does not give it any right to make such allegations*

- *In any event and without prejudice to the above, the Department was fully represented before the Hon'ble ITAT and there was therefore no question of the Hon'ble Bench being "misguided" as alleged or otherwise.*

C. Strictly without prejudice to its contention that the issue is squarely covered in the Assessee's favour by detailed and well-reasoned orders of the Hon'ble ITAT in its own case on identical facts and law, the Appellant once again justifies how and why its above

Ground of Appeal deserves to be allowed, as has been done by the Hon'ble ITAT in its own case for three Assessment Years:

(i) The Appellant being a resident of France, it has, by virtue of Section 90 of the Act, an option to adopt either Indian Domestic Law or the Double Taxation Avoidance Agreement between India and France ("the DTAA") for the purposes of its assessment, depending on whichever is more favourable.

(ii) It is an admitted position that the Appellant has a Permanent Establishment ("PE") in India, within the meaning of the DTAA.

(iii) It is submitted that in view of Article 12(5) of the DTAA, the interest which the Appellant's Indian PE pays to its Head Office ("the HO") and its Overseas Branches, is taken out of Article 12 and is subject to the provisions of Article 7 of the DTAA. This is because:

- ***The interest paid to the HO/Overseas Branches is paid to them in respect of funds provided to the PE by the HO/Overseas Branches.***
- ***Such funds therefore clearly form a part of the assets of the PE***
- ***The interest so paid has admittedly been allowed to the Appellant as a deduction.***
- ***As such, it cannot be disputed that such interest has been paid in respect of a debt-claim which is effectively connected to the Appellant's PE***

(iv) The above reasoning forms the basis of the favourable decisions of the Hon'ble ITAT in the Appellant's own case and are unexceptionable and do not warrant any interference.

(v) Wherever two contracting states have intended to bring the interest payable by a branch to its HO to tax, specific provisions have been inserted in the tax treaties.

- ***For instance, Article 14(3) of the Tax Treaty between India and USA, which specifically provides that the interest paid by a branch of a Bank in India to its HO in USA should be taxed in India at the rates specified therein.***
- ***The Tax Treaty between India and France does not have any such provision corresponding to Article 14(3) of the Tax Treaty between India and USA, which specifically provides that interest received by the HO will be taxable. Hence, in the absence of specific provisions in the tax Treaty similar to India-USA Tax Treaty, the aforesaid interest cannot be brought to tax in the hands of Appellant even under the tax treaty."***

25. On the other hand, the ld. D.R vide submission dated 29.02.2024 in respect of Ground No. 5. of Grounds of Appeal taken by the Assessee submitted as under:-

> *"9. "As per Section 5(2) of the IT Act, 1961 the total income of a non-resident shall include income from whatever sources which, inter alia, is deemed to accrue or arise in India. As per Section 9(1)(v)(c) of the IT Act, 1961, the following income shall be deemed to accrue or arise in India:*
>
> > *(v) income by way of interest payable by-*
> >
> > > *(c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India;*
>
> *Thus, this section provides for a 'source rule' for taxation of interest income arising to a non-resident when interest is paid in respect of debts incurred for purposes of a business or profession carried out by that non-resident in India. The source rule does not make any distinction about the payee*
>
> *9.1 The reason for introducing this source rule is provided in the explanatory note to the Finance Bill, 1976 by which this section was introduced. The same is reproduced hereunder:*
>
> > *"38. "Source rule" regarding place of accrual of income by way of interest, royalty and fees for technical services - A non-resident taxpayer is chargeable to tax in India in respect of income from whatever source derived which is received or, is deemed to be received in India or, which accrues, or arises, or, is deemed or arises to him in India. The existing provisions in the Income-Tax Act which provide that certain Incomes will be deemed to accrue or, arise in India are couched in general language. The absence of clear-cut source rule sometimes creates uncertainty about the chargeability of certain types of income, in the case of Non-residents. In order to avoid any doubt, or, dispute in regard to the accrual of income by way of interest, royalty, and fees for the technical services in the case of Non-Residents, it is proposed to make certain provisions in the Income Tax Act, clearly specifying the circumstances in which such income shall be deemed to accrue, or, arise in India.*
> >
> > *39. Under the proposed provision, interest payable by the Government will be deemed to accrue or, arise in India. Interest paid by a person resident in India, will also be deemed to accrue, or, arise in India, except in cases where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business, or a profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India. Interest payable by a non-resident will, however, be deemed to accrue, or, arise in India only in cases where the interest is payable in respect of any debt incurred or, moneys borrowed and used for the purposes of a business or, profession carried on by the non-resident in*

India for the purposes of making or earning any income from a source in India."

9.3 Thus, it is evident that this source rule for payment of interest by non-residents applies to those instances where:

i. business or profession is carried out by a non-resident in India,

ii. the debt is incurred or borrowing is used for the purposes of that business in India, and

iii. this was done for making or earning any income from a source in India.

As mentioned above, the section does not say anything about the payee. The moment interest becomes payable by the non-resident on account of debt incurred or money sborrowed for the purpose of business in India, it becomes chargeable to tax in Indiaunder the source rule u/s 9 (1) (v) of the Act.
10. The assesse is a non-resident bank incorporated in France. It carries out its business activity in India through its branches in India. Under corporate law, the head office and branches of a company constitute the same entity. The Income Tax Act, 1961 also recognises this principle. Thus, under the Act, the business income of the non-resident banking company would be taxed applying the provisions of section 9(1)(i) of the Act, that is, by applying the business connection test. Under the Act, there cannot be income from self and neither could there be payment to self as an allowable business expense. Thus, under the Act, the assessee bank could not debit interest payments to its Head Office (HO) and other branches and claim the same as an expense, nor could it show interest received from its HO and other branches as interest income while determining the business income attributable to activities carried out in India. However, the same is allowed as per Article 7 of the India-France DTAA

11. India has entered into a Double Taxation Avoidance Agreement (DTAA) with France, which has come into effect in 1994, and the assessee is a resident person of France as per Article 4 of the DTAA. Hence, as per Article 1 of the DTAA, the tax treaty becomes applicable in the case of the assessee. However, section 90(2) of the IT Act, 1961 provides that if India has entered into a treaty for avoidance of double taxation which is applicable in the case of the assessee, then the provisions of the Act/DTAA will apply whichever are more beneficial to the assessee.

12. As per Article 7(1) of the DTAA, the business income of the assessee is taxable in India only if there exists a permanent establishment (PE) of the assessee in India within the meaning of Article 5 of the DTAA. There is no dispute that the assessee has a PE in India through its branches. Article 7(2) of the DTAA provides that the attribution of business profits to the PE will be done by treating the PE as 'if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly at arm's length with the enterprise of which it is a permanent establishment and other enterprises controlling, controlled by or subject to the same common control as that enterprise'.

Thus, once the assessee opts to be governed under the beneficial provisions of the 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 PE of the assessee in India is a separate entity than the enterprise of which it is a PE (sometimes referred to in international tax literature as the 'GE' - General Enterprise), while dealing with the enterprise, that is the GE (the assessee itself).

13. Under this separate entity approach, the PE is allowed to claim expenses as per law. However, Article 7(3) of the DTAA provides that:

> *"... 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,know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprises, 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 toward 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, know-how or other rights, or by way of commission or other charges 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."*
>
> *Thus, the DTAA specifically provides for the PE of a banking enterprise such as the assessee, to claim deduction on account of interest paid to HO and other offices and include in its profits the interest charged/received on moneys lent to HO and other offices. As already mentioned above, this was not possible under the provisions of the Act, but once the assessee opts for the beneficial provisions of the DTAA, the PE of the assessee in India has to be treated as a separate banking entity and the provisions of the DTAA become applicable.*

14. The PE of the assessee in India remains the resident of the other Contracting State, that is, France, for the purpose of the Treaty as also the Act. Under the DTAA, the PE of an enterprise of a Contracting State in the other Contracting State(India) does not become the resident of the other Contracting State (le. India). The same situation prevails under the Act, where the branches of the assessee remain a non-resident for the purposes of the Act. Thus, the moment interest becomes payable by the PE in India, which is a non-resident for the purposes of the Act, the provisions of section 9(1)(v)(c) become attracted and the source rule for interest income becomes applicable for charging of this interest as income deemed to accrue or arise in India. It has been mentioned above that this source rule is silent about the payee (HO of BNP Paribas in this case). It becomes applicable when interest is payable by a non-resident for moneys borrowed or debt incurred for purposes of business in India and for earning income in India. Thus, once this interest becomes payable, it also becomes chargeable, which is in the hands of the HO, that is, the non-resident assessee itself.

14.1. That such interest income would be chargeable in the hands of the non-resident assessee once it becomes payable by the PE was always enshrined in section 9(1)(v)(c) of the Act.

14.2 It will be pertinent to mention here that Hon'ble Supreme Court in the case of A Sanyasi Rao 219 ITR 330 had held that Section 9 is also charging section and is part of the Charging Scheme comprising of Section 4,5, and 9 of the I.T Act.

15. The issue whether the interest paid by PE of Foreign bank to H.O is deductible in the hands of PE and whether the same interest is chargeable to tax in the hands of H.O or not was decided by the Hon'ble Special Bench of the ITAT in case of Sumitomo Mitsul Banking Corporation and SB vide its decision dated 02.04.2012 held as under:

i) On the question whether the interest paid by the PE to the H.O. Is deductible, while such interest is not deductible under the Act because the payer & payee are the same person, Article 7(2) and 7(3) of the DTAA & its Protocol makes it clear that for the purpose of computing the profits attributable to the PE in India, the PE is to be treated as a distinct and separate entity which is dealing wholly independently with the general enterprise of which it is a part and deduction has to be allowed for, inter alia, interest on moneys lent by the PE of a bank to its H.O.

(ii) On the question of taxability of the interest received by the H.O. from the PE, such interest is not taxable under the Act as both are, under the Act, the same person and not separate entities & one cannot make profit out of himself. The fiction created in Article 7(2) of the DTAA treating the PE as separate and independent entity does not extend to Article 11. Also, the interest paid by the PE is not interest paid in respect of debt claims forming part of the assets of the PE so as to attract Article 11(6). The DTAA, even assuming that it does create a liability, cannot be applied u/s 90(2) as it is contrary to the Act and less favourable to the assessee.

15.1 As stated earlier it had been consistent stand of the Revenue that interest paid by the Branch office in India to its Head office is chargeable to tax in the hands of the non-resident Le. head office as per Section 9 (1) (v) (c) of the Act. However, Hon'ble Special Bench of the ITAT was of the view that under the Act both the Branch office and Head office are same person and not separate entities and one cannot make profit out of himself. Thus, it was held by the Special Bench that interest paid by Branch office to its Head office is not chargeable to tax in India under the 1.T Act itself. Therefore, question of application of DTAA did not arise in this scenario as it would be contrary to the Act and less favourable to the assessee.

16. The way the issue was analysed and held by the Hon'ble Special Bench was never the intention of the Parliament. Therefore, the Legislature deemed it necessary to clarify this position by inserting an Explanation to section 9(1)(v)(c) by way of the Finance Act, 2015 w.e.f 01.04.2016:

> *"Explanation. -For the purposes of this clause, -*
>
> *(a) it is hereby declared that in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the*

permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly;

(b) "permanent establishment" shall have the meaning assigned to it in clause (ilia) of section 92F;"

16.1 The Memorandum to the Finance Bill, 2015 mentions the following in this regard:

"Clarity regarding source rule in respect of interest received by the non-resident in certain cases

The provisions of section 5 of the Act provide for scope of total income for the purposes of its chargeability to tax. In case of a non-resident person, the chargeability of income in India is on the basis of source rule under which certain categories of income are deemed to accrue or arise in India. The existing provisions of section 9 provide for the circumstances under which income is deemed to accrue or arise in India. Section 9(1) (v) relates specifically to the interest income. The said clause provides that the income by way of interest is deemed to accrue or arise in India if it is payable by-

(a) The Government; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India.

Section 90 of the Act provides that Central Government may enter into an agreement with the Government of any country or specified territory outside India among other things for providing relief from double taxation. India has entered into Double Taxation Avoidance Agreements (DTAAs) with 92 countries Further sub-section (2) of the sald section provides that in respect of an assessee to whom such DTAA applies, the provisions of the Act shall apply to the extent they are more beneficial to him. Therefore, the taxpayer is entitled to relief from the provisions of the Act if such relief is available under the DTAA and to that extent the provisions of the Act are not applicable.

Further, income of a non-resident from business activity is taxable in India if it has a business connection in India in accordance with the provisions contained in section 9(1)(i) and only such income is taxable as is attributable to the business connection. Similarly, under the DTAA income from business

activity in the case of a non-resident shall be taxable only if such non-resident has a permanent establishment (PE) in India and only such income is taxable which is attributable to the PE. The concept of PE is almost on similar lines as business connection with variations as per different DTAAS. The DTAA further provides the manner of computation of income attributable to the PE. It is provided that for the purpose of computation of income the PE shall be deemed to be an independent enterprise with certain restrictions regarding allow ability of expenses paid to head office by the PE. Under DTAAs in case of a banking company the interest paid by a PE to its head office and other branches is allowed as deduction treating such a permanent establishment as an independent enterprise.

The CBDT, in its Circular No. 740 dated 17/4/1996 had clarified that branch of a foreign company in India is a separate entity for the purpose of taxation under the Act and accordingly TDS provisions would apply along with separate taxation of interest paid to head office or other branches of the non-resident, which would be chargeable to tax in India.

Some of the judicial rulings in this context have held that although under the provisions of the Income-tax law the payment of interest by the branch to head office is non-deductible under domestic law being payment to the self, however, such interest is deductible due to computation mechanism provided under the DTAA but it is not taxable in the hands of the Bank being income generated from self. The view expressed in the CBDT circular has not found favour in these judicial decisions. If the legal fiction created under the treaty is treated to be of limited effect, it would lead to base erosion. The interest paid by the permanent establishment to the head office or other branch etc. is an interest payment sourced in India and is liable to be taxed under the source rule in India. This position is also recognised in some of our DTAAs in particular the Indo-USA DTAA in Article 14 (3) reads as under:

> *"In the case of a banking company which is resident of the United States, the interest paid by the permanent establishment of such a company in India to the head office may be subject in India to tax in addition to the tax imposable under the other provisions of this Convention at a rate which shall not exceed the rate specified in paragraph 2(a) of Article 11 (Interest)"*

The Special Bench of the ITAT in the case of Sumitomo Mitsui Banking Corporation [136 ITD-66 TBOM] had mentioned that there are instances of other countries providing for specific provisions in their domestic law which allows for the taxability of interest paid by a permanent establishment to its head office and other branches and had pointed out absence of such a specific provision in the Income-tax Act.

Considering that there are several disputes on the issue which are pending and likely to arise in future, it is essential that necessary clarity and certainty is provided for in the Act. Accordingly, it is proposed to amend the Act to provide that, in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent

establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery would apply. Accordingly, the PE in India shall be obligated to deduct tax at source on any interest payable to either the head office or any other branch or PE, etc. of the non-resident outside India. Further, non-deduction would result in disallowance of interest claimed as expenditure by the PE and may also attract levy of interest and penalty in accordance with relevant provisions of the Act."

16.2 Thus to overcome the decision of the Hon'ble Special Bench in case of Sumitomo Mitsui & other similar judicial pronouncements, Hon'ble Parliament amended the law vide Finance Act 2015 and inserted an Explanation as reproduced in para 16 above to restate the parliamentary intent that interest payable by the P.E in India of a non-resident bank to the Head office or any other P.E of such non-resident bank outside India shall be chargeable to tax in India (same shall be deemed to accrue or arise in India) and that this interest income will be in addition to any income attributable to the P.E in India. For charging this interest income, P.E shall be deemed to be a person separate or independent of the Head office.

16.3 Thus, interest paid by the Branch office to Head office is deemed to accrue or arise in India as per Section 9 (1) (v) (c) of the Act read with its Explanation and this position is undisputed w.e.f A. Y 2016-17.

16.4 Article 12 in the India-France DTAA is a specific Article dealing with interest income. The same is reproduced below:

so charged shall ***ARTICLE 12***
INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

1 [2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the recipient is the beneficial owner of the interest, the tax not exceed 10 per cent of the gross amount of the interest.]

*3****. Notwithstanding the provisions of paragraph 2:***

(a)		*Interest arising in a Contracting State Shall be exempt from tax in that Contracting State provided it is derived and beneficially owned by:*
(i)	*The Government a political sub-division or local authority of the other Contracting State; or*	
2[(ii)	*the "Reserve Bank of India" in the case of India and the "Bangue de France" and*	

	"Agence Francaise de Development" in the case of France: or	
(iii)	*any other institution as may be agreed from time to time between the competent authorities of the Contracting states:*	
(b)		*Interest arising in a Contracting State shall be exempt from tax in that Contracting State if it is beneficially owned by a resident of the other aContracting State and is derived in connection with a loan or credit extended o endorsed by:*
(i)	*In the case of France, the Banque Francaise du Commerce Exteriur, or the Compagnie Francaise d' Assurance pour le Commerce Exterieur (COFACE);*	
(ii)	*In the case of India, the Export, Import Bank of India;*	
(iii)	*Any institution of the other Contracting State in the charge of the public financing of external trade.*	

4. The term "interest" as used in this article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment 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 permanent establishment or fixed base. In such case, the provisions of article 7 or article 15, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that Contracting State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial

owner in the absence of such relationship, the provisions of this article shall apply to the last mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

16.4.1 As per Article 12 (1) Interest arising in a Contracting State (ie. India) and paid to a resident of the other Contracting State (i.e. BNP Paribas-Head office in France) may be taxed in the Country of residence of the recipient l.e. France. However as per Article 12 (2) such interest may also be taxed in the source state in which it arises (Le. India) but at 10% of gross amount of interest.

16.5 Whether the interest income arises in India or not

To examine whether interest paid by the branch office to the head office arises in India or not we will have to look into the provisions of Article 12 (6) as reproduced above. As per the same Interest shall be deemed to arise in India:

a) *When the payer is the Contracting State itself, a political sub-division or a local authority of India.*
b) *When the payer is resident of India. c*

c) *When the payer is a P.E of the non-resident in India and such interest is borne by such P.E for the debt it had taken from the non-resident, then such interest shall be deemed to arise in India in which P.E is situated.*

16.6 From the above it is quite evident that in case of payments of interest by the P.E Branch Office of a non-resident to its head office in France, the interest is deemed to arise in India where the P.E is situated.

16.6.1 Article 12 (1) simply refers to "Interest arising in a Contracting State" it does not say interest paid by a resident of a contracting state (Source state). Therefore, interest paid by Branch Office of BNP Paribas in India to its Head Office in France is liable to tax in the source state i.e. India as per Article 12 (2) @ 10%. This position is non-debatable and undisputed w.e.f A. Y 2016-17 onwards.

16.7 Reference is also made to OECD Model Convention (2017 version) and relevant part of paragraph 5 of Article 11 (Article on Interest income) and commentary on the same is reproduced below:

"Paragraph 5 of the OECD MC 2017 is reproduced below:

> *"Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall bedeemed to arise in the State in which the permanent establishment is situated".*

Relevant part of the commentary on Para 5 of Article 11 is reproduced below.

26. This paragraph lays down the principle that the State of source of the interest is the State of which the payer of the interest is a resident. It provides, however, for an exception to this rule in the case of interest-bearing loans which have an obvious economic link with a permanent establishment owned in the other contracting State by the payer of the interest If the loan was contracted for the requirements of that establishment and the interest is borne by the latter, the paragraph determines that the source of the interest is in the contracting State in which the permanent establishment is situated, leaving aside the place of residence of the owner of the permanent establishment, even when he resides in a third State

27. In the absence of an economic link between the loan on which the interest arises and the permanent establishment, the State where the latter is situated cannot on that account be regarded as the State where the interest arises; it is not entitled to tax such interest, not even within the limits of a "taxable quota" proportional to the importance of the permanent establishment. Such a practice would be incompatible with paragraph 5. Moreover, any departure from the rule fixed in the first sentence of paragraphs is justified only where the economic link between the loan and the permanent establishment is sufficiently clear cut. In this connection, a number of possible cases may be distinguished:

a) The management of the permanent establishment has contracted a loan which It uses for the specific requirements of the permanent establishment; it shows it among its liabilities and pays the interest thereon directly to the creditor.

b) The head office of the enterprise has contracted a loan the proceeds of which are used solely for the purposes of a permanent establishment situated in another country. The interest is serviced by the head office but is ultimately borne by the permanent establishment.

c) The loan is contracted by the head office of the enterprise and its proceeds are used for several permanent establishments situated in different countries.

In cases a) and b) the conditions laid down in the second sentence of paragraph 5 are fulfilled, and the State where the permanent establishment is situated is to be regarded as the State where the interest arises.

16.7.1 From the above it is quite evident that even the OECD Model Convention 2017 treats the Head Office and its P.E in source country as two separate entities and paragraph 27 (b) of the commentary clearly brings out that when loan given by the H.O to its B.O/P. E in source country (India) is used solely for the purpose of business of B.O/P.E in source country (India), the interest arises in the country where P.E is situated (India in this case).

16.7.2 Para 29 of the Commentary on Article 7 (Business income) of OECD MC 2017 is reproduced below:

29. Some States consider that, as a matter of policy, the separate and independent enterprise fiction that is mandated by paragraph 2 should not be

restricted to the application of Articles 7, 23 A and 23 B but should also extend to the interpretation and application of other Articles of the Convention, so as to ensure that permanent establishments are, as far as possible, treated in the same way as subsidiaries. These States may therefore consider that notional charges for dealings which, pursuant to paragraph 2, are deducted in computing the profits of a permanent establishment should be treated, for the purposes of other Articles of the Convention, in the same way as payments that would be made by a subsidiary to its parent company. These States may therefore wish to include in their tax treaties provisions according to which charges for internal dealings should be recognised for the purposes of Articles 6 and 11 (it should be noted, however, that tax will be levied in accordance with such provisions only to the extent provided for under domestic law). Alternatively, these States may wish to provide that no internal dealings will be recognised in circumstances where an equivalent transaction between two separate enterprises would give rise to income covered by Article 6 or 11 (in that case, however, it will be important to ensure that an appropriate share of the expenses related to what would otherwise have been recognised as a dealing be attributed to the relevant part of the enterprise). States considering these alternatives should, however, take account of the fact that, due to special considerations applicable to internal interest charges between different parts of a financial enterprise (e.g. a bank), dealings resulting in such charges have long been recognised, even before the adoption of the present version of theArticle."

16.7.3 Last 5 lines of Para 29 as above make it clear that in case of banks and other financial enterprises hypothetical independence /separate and independent enterprise fiction for internal interest payments has been recognized by OECD even before the adoption of the 2017 version of the Article 7. Therefore, there is no requirement for providing separate provision in the DTAA's for banks for recognizing the charges for internal interest payments between the B.O and H.O.

16.8 Even without this specific provision, the international tax law understanding is that such interest is taxable in the source State under Article 12(2). Thus, in his commentary on paragraph 5 of the OECD MC, ("Klaus Vogel on Double Taxation Conventions Third Edition") Dr. Klaus Vogel has mentioned the following at M.No.89 and 90:

"89(b) Rule: Under article 11 (5), interest shall be deemed to arise in a contracting state when-

- *the payer is*
- *a resident of that State or*
- *where, irrespective of the payer's residence, the interest is paid on an indebtedness of a permanentestablishment (or fixed base) in that contracting State and is borne by such permanent establishment (or fixed base).*

90(d): The third criterion does not attach to the debtor's legal nature of residence. Instead, it attaches to the incurring of a debt for a permanent establishment (or a fixed base) and on the latter's bearing the interest. Article 11 (5) presupposes that the interest will reduce the profits to be taxed in the State of the permanent establishment and that it will thus reduce that State's

tax revenue. This loss is meant to be compensated by the arrangement in Article 11(2) which leaves taxation of the interest to that State."

16.8.1 Thus, international tax law commentators and OECD commentaries have also clearly commented that the interest borne by the PE, Irrespective of the payer's residence, is to be considered as having a source in the State in which the PE is located and is covered by Article 12(2) of the Treaties (the Interest Article).

17. The AR of the assesee has relied on the decision of the Hon'ble ITAT Bench "I" Mumbai in Assessee's own case for A.Y 2017-18 (ITA NO. 1076 /MUM/2021), decision dated 24.01.2023 and for A.Y 2016-17 (ITA No. 919/MUM/2023), decision dated 18.08.2023 and for AY 2018-19 (ITA NO. 1670/MUM/2022, decision dated 24.01.2023). The relevant part of the decision of the Hon'ble ITAT in case of assessee for A.Y 2017-18 is reproduced below:

"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 BNP Paribas ITA no. 1076/Mum /2021 ITA no 1670/Mum./2022 Page 14 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.

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 vanous 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 BNP Paribas ITA no 1076/Mum/2021 ITA no. 1670/Mum./2022 Page 15 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-a-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 (e. say France), carries on the business in the other contracting state (ie 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 BNP Paribas ITA no. 1076/Mum./2021 ITA no. 1670/Mum /2022 Page 16 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 allowedas 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, BNP Paribas ITA no. 1076/Mum/2021 ITA no. 1670/Mum/2022 Page | 17 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, BNP Paribas ITA no.1076/Mum./2021 ITA no. 1670/Mum./2022 Page | 18 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 PEhave 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."

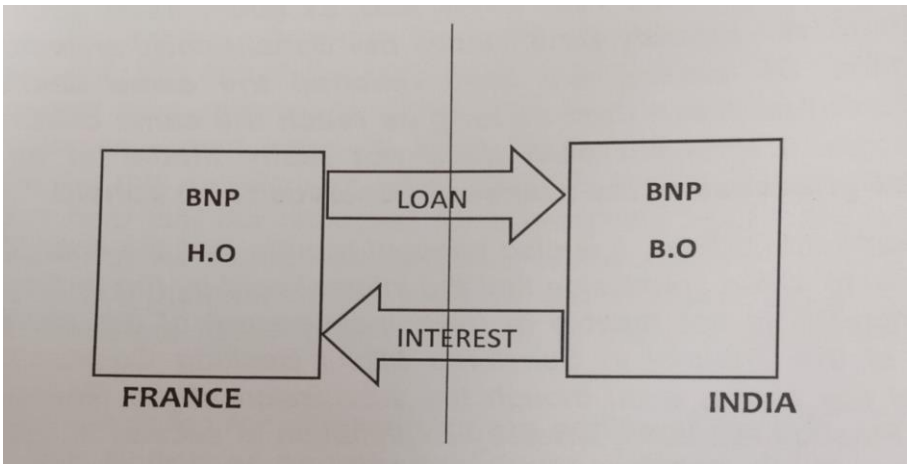
25. From the aforesaid findings, it is also relevant to note that the coordinate bench of the Tribunal came to the conclusion that the interest paid by the Indian branch/PE to the head office/GE is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui 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 BNP Paribas ITA no 1076/Mum./2021 ITA no 1670/Mum./2022 account of interest income received by the head office/overseas branches. As a result, ground no 4 raised in assessee's appeal is allowed."

17.1 As per para 19 of the order of the Hon'ble ITAT as above, the learned counsel had Submitted before the Hon'ble Bench that taxability of the interest paid by the Indian Branch Office to the Head Office is governed by provisions of Article 12 read with Article 7 of the India France DTAA and the amendment in the Act by way of insertion of Explanation to Section 9 (1) (v) (c) of the Act cannot override the provisions of the DTAA.

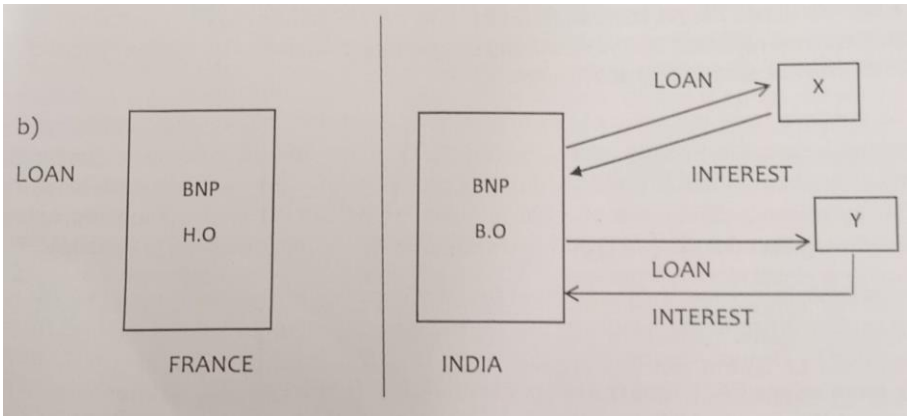
In this regards it is respectfully submitted that the taxability of the interest paid by the Indian Branch Office to the Head Office is governed by provisions of Section 9 (1) (v) (c) as amended by Finance Act 2015 read with Article 12 (1) & 12 (2) of the India-France DTAA. This is more so w.e.f A. Y 2016-17 onwards. With regard to the taxability of interest paid by Branch Office to Head Office. Article 7 does not come into picture at all. Provisions of Article 7 will apply only if as per Article 12 (5) of the DTAA, the beneficial owner of the interest (BNP Paribas Head Office), being resident of France, carries on business in the other state (ie. India) in which the interest arises, through a P.E situated therein, and the debt-claim in respect of which the interest is paid (ie. loan /debt given by Head Office to Branch Office) is effectively connected with such P.E.

In the present case debt claim is not effectively connected with the P.E or the Branch Office of BNP Paribas in India, rather debt claim is of the Head Office and is effectively connected with the Head Office only. The Loan/Debt in this case has been advanced by the Head Office to the Branch Office. Therefore, by no stretch of imagination the debt claim can be said to be effectively connected with the P.E/Branch Office

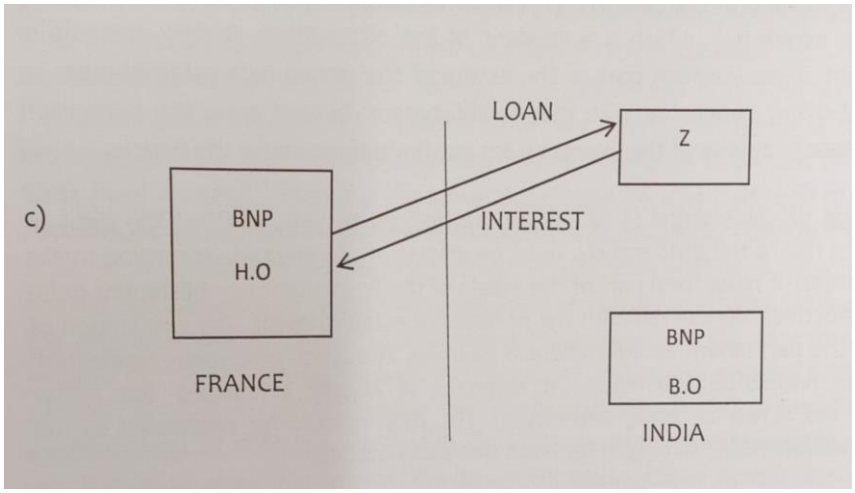
12.2 Debt claim can be stated to be effectively connected with the P.E only if debt/loan has been given by the P.E to someone else and P.E is enjoying/legally entitled to the interest income on the same. There can be following scenarios:



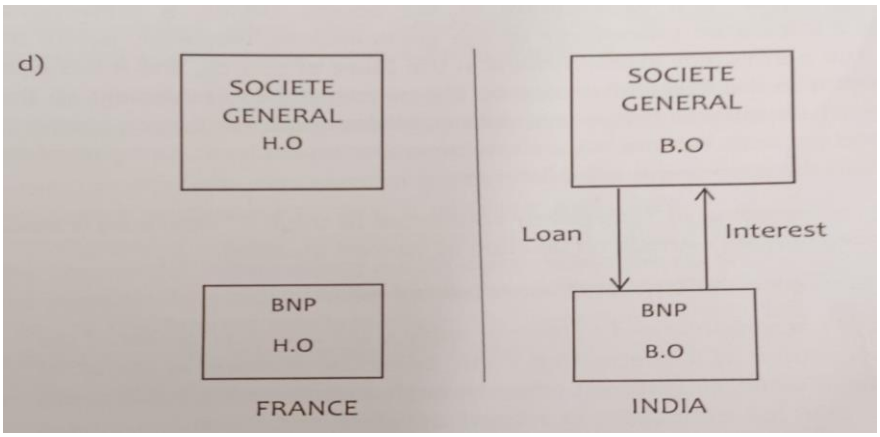
In this scenario debt/loan is effectively connected to the Head Office. Therefore, Article 12 (2) would be applicable.



In this scenario debt/loan is effectively with the P.E/Branch Office of BNP Paribas bank in India and interest received by BNP Branch Office from X and Y will be taxable in India as per Article 12 (5) read with Article 7 of the DTAA.



In this scenario debt/loan has been negotiated and given directly by the Head Office of BNP to a Company "Z" in India. Branch Office/ P.E of BNP had no role in negotiating and disbursing the loan to "2" in India. Therefore, interest payment made by "Z" to the BNP Head Office is chargeable to tax in India as per Section 9 (1) (v) read with Article 12 (2) of the DTAA at 10 per cent.



In this scenario loan is given by Branch Office/P. E of Societe General (resident of France) in India to BNP Branch Office in India. The interest received by Societe General will becovered under Article 12 (5) of the DTAA and income of Societe General will be governed by Article 12 (5) read with Article 7 of the DTAA.

17.3 The paragraph 5 of Article 12 of the DTAA merely provides that in the State of source the interest is taxable as part of the profits of the permanent establishment, there owned by the beneficiary, which is a resident of the other State, if they are paid in respect of debt claims forming part of the assets of the permanent establishment or otherwise effectively connected with that establishment. In that case, the paragraph relieves the State of source of the interest from any limitations under the Article.

17.3.1 According to Claus Vogel (3 rd Edition, pages 565 to 569, 803) "The right or property giving rise to the dividend etc. must be effectively connected. According to the OECD Commentary it must form part of the assets of the Permanent Establishment or be 'otherwise' effectively connected with the permanent establishment. The connection of the assets to the permanent establishment is decisive. The term 'effectively connected' should not be understood to mean the opposite of 'legally connected' but rather something in the sense of 'really connected. The claim should be connected to the permanent establishment not only in form but also in substance.

But it is difficult to visualize how an asset can be effectively connected with the permanent establishment otherwise than by forming part of its assets".

17.3.2 It has to be appreciated that the provisions of paragraph 1 of Article 11 presupposes that the debt claims are owned and held by the non-resident. The State of source is granted a limited and secondary right of taxation because the passive income generated from the asset arises in the said country. In such taxation it is not possible to resort to net income taxation, as in the case of a permanent establishment, because the asset has been acquired and held abroad and it is not possible to identify the expenses incurred in connection with acquisition and exploitation of the assets. Hence, a presumptive taxation is done at a stipulated percentage of the gross income. However, where the asset is owned by the permanent establishment in the State of source, and it has been acquired and exploited in the State of source by the permanent establishment so that the income is solely attributable to the permanent establishment, it will be only proper to follow Article 7(1) and tax such income in the State of source on net basis, as a part of the income attributable to the permanent establishment.

17.4 To understand the meaning of "Effectively connected to the P.E" reference is made to OECD Model Convention 2017 Article 11 (taxation of interest income).

Paragraph 4 of Article 11 of the OECD MC 2017 is reproduced below:

"The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply"

Relevant part of the commentary on Para 4 of Article 11 is reproduced below.

24. Certain States consider that dividends, interest and royalties arising from sources in their territory and payable to individuals or legal persons who are residents of other States fall outside the scope of the arrangement made to prevent them from being taxed bath in the State of source and in the State of the beneficiary's residence when the beneficiary has a permanent establishment in the former State. Paragraph 4 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". It does not stipulate that interest arising to a resident of a Contracting State from a source situated in the other State must, by a kind of legal presumption, or fiction even, be related to a permanent

establishment which that resident may have in the latter State, so that the said State would not be obliged to limit its taxation in such a case The paragraph merely provides that in the State of source the interest is taxable as part of the profits of the permanent establishment there owned by the beneficiary which is a resident in the other State, if it is paid in respect of debt-claims forming part of the assets of the permanent establishment or otherwise effectively connected with that establishment. In that case, paragraph 4 relieves the State of source of the interest from any limitation under the Article. The foregoing explanations accord with those in the Commentary on Article 7.

25. It has been suggested that the paragraph could give rise to abuses through the transfer of loans to permanent establishments set up solely for that purpose in countries that offer preferential treatment to interest income. Apart from the fact that the provisions of Article 29 (and, in particular, paragraph 8 of that Article) and the principles put forward in the section on "Improper use of the Convention" in the Commentary on Article 1 will typically prevent such abusive transactions, it must be recognised that a particular location can only constitute a permanent establishment if a business is carried on therein and, as explained below, that the requirement that a debt-claim be "effectively connected" to such a location requires more than merely recording the debt-claim in the books of the permanent establishment for accounting purposes.

25.1. A debt claim in respect of which interest is paid will be effectively connected with a permanent establishment, and will therefore form part of its business assets, if the "economic" ownership of the debt-claim is allocated to that permanent establishment under the principles developed in the Committee's report entitled Attribution of Profits to Permanent Establishments' (see in particular paragraphs 72 to 97 of Part of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic" ownership of a debt claim means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (e.g. the right to the interest attributable to the ownership of the debt-claim and the potential exposure to gains or losses from the appreciation or depreciation of the debt claim)."

17.4.1 From the above it is clear that for a debt claim to be effectively connected to a P.E, it (debt claim) must be recorded in the books of the B.O /P. E for accounting purposes, P.E/B. O should have the right to receive the interest and P.E should have economic ownership over the debt claim.

18. From the above examples it is quite clear that the Interest payment of Rs.19,22,06,830/- being made by the B.O/ P. E in India to H.O. is on the loan/debt which has been advanced/given/disbursed by the H.O. of BNP Paribas to its B.O./P.E. In India. The debt claim appears in the books of H.O. of BNP Paribas in France as the loan advanced to B.O. for carrying out its business in India & BNP H.O. is enjoying the interest income. Therefore, this debt claim is effectively connected to the H.O. of BNP Paribas and provisions of Article 12 (2) will apply for taxing the same in the source state.

18.1 The Hon'ble bench vide para 21 of its order has observed that the payment of interest by the B.O. to the H.O. was claimed as deduction by the Indian B.O. (assessee) under Article 7(3) of the DTAA. The same is an

allowable expense as per article 7(3) of the DTAA for calculating the taxable profits of the P.E. in India and has been allowed by the AO. Hon'ble bench vide para 22 of its order has further observed that para 5 of Article 12 provides that the provisions of para 1 & para 2 of Article-12 shall not apply if the beneficial owner of the interest being a resident of a contracting state (i.e say France), carries on business in the other contracting state (i.e say India) in which interest arises through a PE situated therein, and the debt claim in respect of which interest is paid is effectively connected with such P.E., and provisions of Article 7 shall apply in such a scenario.

18.2 In this regard it is submitted that it is correct that B.O. is a P.E. of BNP Paribas H.O. in India but the condition that is required to be satisfied for provisions of Article 12(5) to be applicable is that the debt claim in respect of which the interest is paid by the B.O. must be effectively connected to the B.O./P.E. itself. Payer of the interest & debt advancer/ debt claimant cannot be same entities/persons. In the present case debt claimant/ debt advancer is the H.O. of BNP Paribas and, it is respectfully submitted that provisions of para 5 of Article 12 of DTAA are not applicable. Consequently, provisions of Article 7 will also not be applicable. Interest payment made by the B.O./P.E. to its H.O. will be taxable in the sources state i.e. India under para 2 of Article 12.

18.3 Hon'ble ITAT vide para 24 of its order has observed that the revenue has extended the fiction of hypothetical Independence of B.O. & H.O. for the computation of profit of the head office, also for bringing to tax the interest received from the B.O. under the provisions of the Act & that this approach of revenue is flawed. While making this observation Hon'ble bench has relied upon the decisions of the coordinate bench ofthe tribunal in assessee's own case for the A.Y. 04-05. Paras 22 & 23 of the Hon'ble ITAT's order for A.Y. 04-05 have also been reproduced and relied upon by the Hon'ble ITAT while deciding case of the assessee for A.Y. 17-18. In this regard following observations are being made:

(a) B.O./P.E. of BNP in India will earn interest income on loans advanced to Indian companies and may be to foreign companies operating in India for their business in India. B.O. may also earn income from treasury operations in India. All these streams of income of P.E./ B.O. will be taxable in India as business income of BNP Paribas B.O./P.E. on net basis @ 40%. At the same time H.O. of BNP may have advanced loans to some Indian concern independent of its B.O./P.E. In India and interest income from the same will be taxable in the hands of BNP H.O. under Article 12(2) of the DTAA. As the H.O. and B.O. have the same PAN No. In India, this interest income of H.O. will be included in the same return as filed by the B.O. in India and it is required to be offered as income chargeable to tax @ 10% under para 2 of Article 12 of DTAA.

(b) Similarly, H.O. can advance loans to its B.O./P.E. in India besides the capital Infusion & B.O. pays the interest on the same to H.O. This interest income of H.O. is also chargeable to tax @ 10% in the source state i.e. India as per para 2 of Article 12 of the DTAA.

(c) Hon'ble bench vide para 22 of the order (for A.Y. 04-05) has also observed that when interest income arises to a H.O./G.E. (general enterprise), even if that be, the taxability under Article 12 will not apply, and it will remain

restricted to taxability of profits attributable to the P.E. under Article 7 as the H.O/G.E. is carrying out its business in India through a P.E. and Article 12(5) will be applicable instead of Article 12(1) & 12(2). With due regards to the observations of the Hon'ble bench it is most respectfully stated that para 5 of Article 12 (and subsequently Article 7) will be applicable only if debt claim on which B.O./P.E. is paying interest is effectively connected with the P.E. As has been clearly brought out above in the present case B.O./P.E. is paying interest and debt claim is effectively connected with the H.O./G.E. of BNP Paribas.

(d) The Hon'ble co-ordinate bench vide para 22 of its order (for A.Y. 04-05) has further observed that: "The Profits attributable to the P.E. have anyway been offered to tax"

However, even if it is considered that interest income of Rs.19,22,06,830/- paid by P.E./B.O. to its H.O/G.E. is profits attributable to the P.E. it appears that the same has not been offered to tax by the P.E./B.O. in its P&L A/c in the present case.

18.4 From perusal of para 25 of the Hon'ble ITAT "I" Bench for A.Y 2017-18 it is evident that the said order is based on & has followed the order of the coordinate Bench for A.Y 2004-05 in assessee's own case. It has been clearly brought out in various paras above that order of the Hon'ble Coordinate Bench of ITAT for A.Y 2004-05 cannot serve as a precedent. Therefore, it is respectfully submitted that order of the Hon'ble Coordinate Bench for A.Y 2017-18, A.Y 2018-19 and A.Y 2016-17 may not be followed while deciding the current appeal of the assessee.

18.5 In fact the Hon'ble 'I' bench Mumbai vide its order dated 4.12.2020 in the case of DZ Bank AG for A.Y 2014-15, ITA No 1815/ Mum/2018 [TS-632 ITAT-2020 (Mum)] speaking through the Vice President on the issue of effectively connected to the PE had held that:

> *"16. There cannot be, and there is no, dispute that interest income is specifically covered by article 11 which, inter alia, provides that "interest income arising in a contracting state and paid to a resident of the other contracting state may be taxed in the other contracting state and restricts the taxability of such interest income, in the cases in which recipient of the interest income is beneficial owner thereof, to 10% of the gross amount of interest. There is also no dispute that the interest revenues relating to the India operations of the DZ Bank AG have been offered to tax under article 11, and the matter has reached finality as such. In the assessment order itself, that aspect of the matter has been categorically noted by theAssessing Officer.*
>
> *18. Coming back to the taxation of interest under article 11, the exception to this scheme of taxability of interest is set out in article 11(5) above. As is so set out in this provision, unless beneficial owner of interest, resident in a contracting state, ie. the foreign enterprise, "carries on business in the other contracting state in which the interest arises, through a permanent establishment situated therein and unless "debt claim in respect of which theinterest paid is effectively connected with such permanent establishment", the exclusion clause under article 11(5) will not come into play.*

22. It is also important to bear in mind the fact that the exclusion clause under article 11(5) will be triggered only when the twin conditions that the foreign enterprise carried on business in the source jurisdiction and that the debt claim being effectively connected with the permanent establishment are satisfied. So far as the debt claim being effectively connected with the PE is concerned, that cannot come into play only merely because the PE had a supporting role in creation of the debt claim. Unless a debt claim is part of the assets of the PE or income arising therefrom can be said to be income of the PE, it cannot normally be treated as effectively connected with the PE. In any case, the Assessing Officer has not brought on record any material to establish, or even indicate, that the debt claim is effectively connected with the PE, save and except for the supporting services rendered by the Indian Representative office in connection with dealing with that debt claim but then rendition of service by the PE, in connection with a debt claim, by itself would not make the debt claim effectively connected with the PE. What essentially follows is that unless the foreign enterprise, ie. DZ Bank AG Germany, carries on business through the permanent establishment in India, even if there be any, interest income earned by the foreign enterprise, even if earning of the said income is on account of a significant contribution from the activities of such a permanent establishment, cannot be taken out of taxability under article 11(5). Clearly, therefore, the conditions laid down under article 11(5) are not satisfied on the facts of this case, and, the entire interest income, therefore, is required to be taxed under article 11. For this reason alone, the interest income cannot be brought to tax under article 7 because the condition precedent for an interest income being brought to tax under article 7, i.e. fulfilling the twin conditions set out in article 7, are not satisfied.

27. In view of the above legal analysis, once entire interest revenues earned in India in the hands of the foreign enterprise is taxed in its hands under article 11 as is the undisputed position in this case, nothing survives for taxation under article 7, and, given the fact that entire related revenues are taxed in the hands of the assessee on gross basis under article 11, directly or indirectly, nothing more than entire business receipts can be brought to tax in India. In any case, under the scheme of taxability in article 7 and by the virtue of specific provisions of article 7(7), as longas an income is taxable under any other specific provisions ofthe treaty, such as article 8 (shipping and air transport business income), article 10 (dividends), article 11(interest), article 12 (royalties and fees for technical services), article 13 (capital gains)), and unless it is excluded from the operation of such specific provisions (such as under article 10(4), article 11(5), article 12(5)], it cannot be taxed under article 7.

28. It is only a corollary of the unambiguous position that the DZ Bank AG and DZ Bank India Representative Office are only one taxable unit, that the same income cannot be taxed in the hands of the same assesse twice once under one article of the treaty Le. Article 11, and then under another article of the treaty, Le. Article 7. The scheme of taxability under article 7 and article 11, does not visualize, or permit, such incongruous situations."

18.5.1 in the present appeal interest income paid by B.O to H.O is covered under para 2 of the Article 12 of the France DTAA, same is not effectively connected to the P.E of the B.N.P Paribas in India, therefore, provisions of para 5 of Article 12 are not applicable. In fact, Hon'ble ITAT vide para 28 of its order in case of DZ bank has observed that in the said case the interest income was taxed twice by the A.O-one under Article 11(2) of the DTAA as interest income at 10% & then under article 11(5) read with article 7 of the DTAA. In the appeal matter under consideration interest income of the H.O. has not been taxed even once.

18.6 The Hon'ble ITAT 'I' Bench in the case of DZ Bank AG (mentioned supra) vide order dated 4.12.2020 had further held that general provisions do not override the specific provisions. Relevant part of the order is reproduced below:

> *13. As is glaring from a plain reading of the above provision, under article 7(7). where profits sought to be taxed under article 7 include any item of income which is dealt with separately in other articles of the Indo German tax treaty, article 7 will yield to those specific provisions in respect of that income. That treaty approach is in consonance with the well settled principle of law contained in the Latin maxim generalia specialibus non derogant, i.e. general provisions do not override the specific provisions. Quite clearly, therefore, when a particular type of income is specifically covered by a treaty provision, the taxability of that type of income is governed by the specific provisions so contained in the treaty. Of course, even in the scheme of taxability of such specific incomes under the treaty provisions, as we will see a little later, the situations are specified in which the taxability under those specific provisions cease to come into play, and the taxability can shift to the general provisions of article 7.*
>
> *14. The question then we must ask ourselves before embarking upon examining taxability of an income under article 7 is whether such an income can be taxed under any other specific provisions of the treaty, and, if so, whether there any situations in those specific provisions of the treaty which provide for taxation of the said income under article 7. There is no dispute that what has been earned by the assessee bank from Indian clients is in the nature of 'interest' income, and that article 11 has specific provisions for taxation of interest income, in the hands of a resident of one contracting state, from the other contracting state. We must, therefore, deal with the provisions of article 11, and examine the scheme of taxability of interest income in the hands of the assessee before us."*

18.7 Reference is also made to the decision of Hon'ble ITAT "I" Bench in case of Marubeni Corporation, ITA No. 10/MUM/2013 for AY 2016-17 wherein the ITAT vide its decision dated 17.06.2022 held that the interest income on loans in the form of supplier's credit given to Indian parties is taxable as per Article 11 (2) of India-Japan DTAA and that the Article 7 does not come into play unless the interest income is attributable to the P.E and that no part of interest income, by any stretch of logic, can be said to be directly or Indirectly attributable to the Indian P.E of the assessee.

18.8 Even para 6 of Article 7 of the India France DTAA clearly states that Para "6 Where profits include items of income which are dealt with separately in other articles of this convention, then the provisions of these articles shall not be affected by the provision of this article."

18.9 It is therefore clear that interest paid by the B.O. of BNP Paribas to its H.O. will be taxed in the contracting state in which it arises (i.e. India) as per para 2 of Article 12 of the DTAA. Provisions of Article 7 of the DTAA do not come into picture at all.

19. It is respectfully submitted that the Hon'ble Tribunal is not barred by principle of res-judicata from taking a different view in subsequent years & the same has been held so by various Benches of the ITAT as well as Higher courts. In this context relevant part of decision of Hon'ble Kerala High Court in case of Kalpetta Estates Ltd. 211 ITR 635, dated 30.09.1994 is reproduced below:

> *"4. We do not think that this decision would support the case of the revenue. What the Bench did was to affirm that the principles of res judicata will not apply to income-tax proceedings. Nevertheless, the Tribunal may place reliance on an earlier decision to support its conclusion. It could not, therefore, be said that the decision in the assesses case before us, relating to the prior years, would operate as res judicata. The Tribunal is entitled to take a different view of the matter, if new materials were placed or on a closer and more intelligent analysis. It is evident from the various decisions placed before us that a different aspect of the matter has been presented for consideration, as laid down in thedecisions mentioned earlier. The Tribunal was therefore entitled to have a fresh look at the matter based on the line of thinking disclosed by these decisions."*

19.1 Similarly Hon'ble Supreme Court in case of Shri Umed V/s Raj Singh and others 1975 AIR 43 vide its decision dated 28.08.1974 had held that:

> *"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter (2) "a judge ought to be wise enough to know that he is fallible and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead; and courageous enough to acknowledge his errors"*

19.2 In view of these case laws and fact pattern of the case as discussed above it is respectfully submitted that the previous decisions of the co-ordinate benches in the earlier years shouldn't serve as a precedent in the present appeal.

20. In view of the facts and legal position stated above It is clear that the interest of Rs.19,22,06,830/- paid by Indian P.E/branch to Head office is taxable in the hands of the Head office in India @ 10% under Article 12(2) of the India-France DTAA."

26. Heard both the sides and perused the material on record. We consider that the similar issue on identical fact has been adjudicated by the coordinate bench of the ITAT in favour of the assessee vide ITA No. 1076/mum/2021. The relevant extract of the decision is reproduced as under:

> *"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."

27. The Ld. DR has referred the Explanation to section 9(1)(v)(c) inserted by way of the Finance Act, 2015 w.e.f 01.04.2016 and Indo-USA DTAA and was of the view that Debt claim can be stated to be effectively connected with the P.E only if debt/loan has been given by the P.E. We consider no merit in the general submission of the assessee for the following reasons:-

i. in corresponding to the the Explanation to section 9(1)(v)(c) inserted by way of the Finance Act, 2015 w.e.f 01.04.2016 no change has been made in the India-France DTAA.

ii. The provision of Sec.90(2) of the Act provide that the assessee can opt for the taxability of its income as per the Double Taxation Avoidance Agreement between India and France (DTAA) or the Act which is more beneficial and in the case of the assessee.

iii. even though the interest paid by the branches (PE) to the head office are taxable as per the provision of Sec. 9(1)(v)(c) of the Act, however, because of beneficial provision of DTAA i.e Article 12(5) such interest received by the overseas head office is not taxable under the provision of DTAA.

iv. The debt claim means a right to receive a repayment of money from another person arising in the course of carrying on a business including deposits with a financial institutions, accounts receivable, promissory notes, bills of exchange or bonds. Here the assessee has a right to receive a repayment from the PE branch as the debt has been given by the assessee and it could not be established by the Ld. DR how the PE can pay interest on the debt/loan given by the P.E itself.

28. As per the revenue interest received by the head office is taxable under the provision of Sec.9(1)(v)(c) of the Act, however we consider that in terms of provision of Sec. 90(2) the provision of the Act or the DTAA whichever is more beneficial to the assessee shall be applicable.

29. We have perused the provisions of Article 12 of the India-France DTAA which are reproduced as under:

"1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

[2. However, such interest may also be taxed in the Contracting State in which it arises, 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 per cent of the gross amount of the interest]

3. Notwithstanding the provisions of paragraph 2:

(a) interest arising in a Contracting State shall be exempt from tax in that Contracting State provided it is derived and beneficially owned by

(i) the Government, a political sub-division or local authority of the other Contracting State, or

[(ii) the "Reserve Bank of India" in the case of India and the "Banque de France" and "Agence Francaise de Development" in the case of France, or]

(iii) any other institution as may be agreed from time to time between the competent authorities of the Contracting States

(b interest arising in a Contracting State shall be exempt from tax in that Contracting State if it is beneficially owned by a resident of the other Contracting State and is derived in connection with a loan or credit extended or endorsed by

(i) in the case of France, the Banque Francaise du Commerce Exterieur, or the Compagnic Francaise d'Assurance pour le Commerce Exterieur (COFACE).

(ii) in the case of India, the Export-Import Bank of India,

(iii) any institution of the other Contracting State in charge of the public financing of external trade.

4. The term "interest" as used in this article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds

or debentures, including premiums and prizes attaching to such securities, bonds or debentures Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

5. ***The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment 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 permanent establishment or fixed base. In such case, the provisions of article 7 or article 15, as the case may be, shall apply***

6. *Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that Contracting State Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.*

7. *Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply to the last mentioned amount, In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention*

1. *Substituted by Notification No SO 650(E), dated 10-7-2000, w.r.e.f 1-4-1997."*

30. As per Article 12(1) of the DTAA interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in the contracting states in which it arises and the tax so charged shall not exceed 10% of the gross amount of the interest. However, the provision of Article 12(5) provides that provision of Article 12(1) and Article 12(2) shall not apply if the beneficial owner of the interest carrying on business in the other contracting state through a permanent establishment and the debt claim in respect of

which the interest is paid is effectively connected with such permanent establishment or fixed base. In such cases, provision of Article 7 or Article 15 as the case may be shall apply. **Since, the assesse being a head office of the banking company and having branches in the form of permanent establishment in India, in such cases the provision of Article 7 is to be applied. The relevant extract of the provision of Article 7 is reproduced as under:**

> *"1. The profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to that permanent establishment.*
>
> *2. Subject to the provisions of paragraph 3, where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed that permanent establishment the profits 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 permanent establishment. In any case where the correct amount of profits attributable to a permanent establishment is incapable of determination or the determination thereof presents exceptional difficulties, the profits attributable to the permanent establishment may be estimated on the basis of an apportionment of the total profits of the enterprise to its various parts, provided, however, that the result shall be in accordance with the principles contained in this Article*
>
> *3. (a) In determining the profits of a permanent establishment, there shall be allowed as deduction expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that Contracting State. Provided that where the law of the Contracting State in which the permanent establishment is situated imposes a restriction on the amount of the executive and general administrative expenses which may be allowed, and that restriction is relaxed or overridden by any Convention, Agreement or Protocol signed after 1-1-1990 between that Contracting State and a third State which is a member of the OECD, the competent authority of that Contracting State shall notify the competent authority of the other Contracting State of the terms of the corresponding paragraph in the Convention, Agreement or Protocol with that third State immediately after the entry*

into force of that Convention, Agreement or Protocol and, if the competent authority of the other Contracting State so requests, the provisions of that paragraph shall apply under this Convention from that entry into force

(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.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. For the purpose of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

31. It is clear from the provision of Article 7 that the profit of an enterprise shall be taxable only in that contracting state unless the enterprise carries on business in the other contracting state through permanent establishment situated therein. Further Article 7(3) provides deduction of expenses to the permanent establishment and para 7(3)(b) provide that in the case of banking enterprises if the head office provide any money on interest then to determine the profit of a permanent establishment interest on such money paid to the head office can be reduced from the income attributable to the permanent

establishment. The provision of Article 12 and 7 of the India-France DTAA demonstrate that interest payment made by the permanent establishment to the head office are not taxable in the hands of the head office as provided in Article 12(5) of the treaty and it also provide that in such cases income of the permanent establishment only to be taxed as per provision of Article 7 of DTAA.

As per the provision of Sec.90(2) of the Act the assessee can opt for the taxability of its income as per the Double Taxation Avoidance Agreement between India and France (DTAA) or the Act which is more beneficial, accordingly even though the interest paid by the branches (PE) to the head office are taxable as per the provision of Sec. 9(1)(5)(c) of the Act, however, because of beneficial provision of DTAA i.e Article 12(5) as discussed supra will lead to the conclusion that such interest received by the overseas head office is not taxable under the provision of DTAA. It is clear from the provision of DTAA that interest income of the non-resident (head office) shall be taxable under Article 12 of the DTAA only when such head office shall not having any PE in India wherein branch (PE) is established in India then the provision of Article 7 only shall apply and Article 7 deal with taxability of only profit attributable to the PE branches of such overseas head office. Further, the debt regarding claim mean the some money due from one person to another. Since, in the case of the assessee branch has borrowed from the overseas head office, therefore, debt claim of the head office is connected to the PE branch in India, therefore, in the present case interest received by head office from its branches in India is not taxable in the hands of the head office in view of the provision of DTAA as discussed above.

Ground No.7: Pertaining to addition of Rs.23,88,795/- under the head profit and gain from business and provision:

32. During the course of appellate proceedings before us the ld. Counsel submitted that assessee recorded an amount of Rs.68,72,330/- in its books of account as rental income. The said amount consists of Rs.43,40,289/- which has already been offered to tax in the A.Y. under consideration and Rs.25,38,041/- which has already offered to tax in the return of income filed for the A.Y.2019-20. The relevant part of the submission along with annexures made before the assessing officer on 31.01.2022 is reproduced as under:

> *"During the financial year (FY) relevant to the subject AY i.e. FY 2019-20, BNP recorded an amount of Rs.68,72,330 in its books of account as 'rental income. The said amount consists of Rs.43,40,289 (which has been offered to tax during the subject AY) and Rs.25,32,041 (which has been already offered to tax in the return of income filed by BNP for the AY 2019-20) Further, an amount of Rs.1,43.249 has been recorded in the books of BNP as 'rental income' during FY 2020-21 but has been offered to tax under the head 'income from house property during the subject AY. Accordingly, while an amount of Rs.44,83.538 (comprising of Rs.43.40,289 recorded in books in FY 2019-20 and Rs.1,43,249 recorded in books in FY 2020-21) has been considered for taxation under the head income from house property', an amount of Rs.68,72,330 has been reduced from the net profits for the purpose of computing income under the head 'profits and gains from business or profession since an amount of Rs.25,32,041 has already been considered for computing income from house property in AY 2019-20 and hence, only the balance amount (Rs.43,40,289) has been considered for the purpose of determining income under the head income from house property for the subject AY In this regard, please note that while an amount of Rs.122,12,499 is reduced while computing income under the head profits and gains from business and profession (refer Point No. A(3a) of 'Schedule BP- Computation of income from business and profession' i.e income credited to profit and loss account but considered under other heads of income income from house property), a higher amount of Rs.147.44,540 is considered as annual lettable value for the purposes of computing income under the head Income from house property (refer point 1(a) of 'Schedule HP - Details of Income from House Property) Accordingly, an amount of Rs.25,32,041 (144,44,540- 122,12,499) has already been considered while computing income from house property during AY 2019-20. In this regard, copy of the acknowledgment along with the return of income filed by BNP for AY 2019-20 is enclosed as Annexure 20."*

33. After hearing both the sides and perusal of the material on record, we find that the submission of the assessee has not been considered by the assessing officer, therefore, we restore this issue to the file of the assessing officer for deciding afresh after verification of

the submission and detail filed by the assessee. Accordingly, this ground of appeal is allowed for statistical purpose

Ground No.8: Short credit of taxes deducted at sources (TDS) amounting to Rs.915/-:

34. This issue is not discussed before us therefore this ground of appeal stand dismissed.

Ground No.9: Initiating penalty proceedings u/s 270 of the Act:

35. This ground of appeal is premature at this stage therefore the same is dismissed.

36. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 13.05.2024

Sd/-	Sd/-
(Kavitha Rajagopal) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 13.05.2024
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.