IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Amit Shukla (Judicial Member)]

ITA No. 6993/Mum/2012
Assessment year 2007-08

Shinhan Bank ……………………….**Appellant**
Wockhardt Towers, 5th floor, West Wing
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051 [PAN: AAACC2144A]

Vs.

Deputy Director of Income Tax (International Taxation)
Range 2(1), Mumbai …………………….**Respondent**

CO Nos.: 113/Mum/2016 and 36/Mum/ 2020
Arising out of ITA No. 6993/Mum/2012
Assessment year 2007-08

Deputy Director of Income Tax (International Taxation)
Range 2(1), Mumbai ……………………….**Appellant**

Vs.

Shinhan Bank …………………….**Respondent**
Wockhardt Towers, 5th floor, West Wing
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051 [PAN: AAACC2144A]

Appearances by
Madhur Agarwal *for the appellant*
Milind Chavan *for the respondent*

Dates of the hearings : 09/06/2022
Date of pronouncement : 27/06/2022

O R D E R

Per Pramod Kumar, VP:

1. This appeal, as also the cross-objections, call into question the correctness of the order dated 24th September 2012 passed by the Assessing Officer under section 143(3) r.w.s. 147 and 144C(13) of the Income Tax Act, 1961, for the assessment year 2007-08.

2. We will first take up the appeal filed by the assessee.

3. In the first ground of appeal, the assessee has raised the following grievance:

> ***Ground 1- Applicable rate of tax***
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> ***The DDIT (IT)-2(1), Mumbai ('AO')/ Hon'ble Dispute Resolution Panel-II ('DRP') erred in law and on facts, in rejecting the Appellant's claim for the benefit of the non-discrimination clause of the India-Korea Double Taxation Avoidance Agreement ('DTAA') and taxing the Appellant's income @ 40% (plus surcharge and education cess) instead of rate applicable to a resident taxpayer.***
>
> ***The Appellant, therefore, prays that the benefit of Article 25 of the DTAA be granted and that its income be taxed @30% instead of 40% (plus surcharge and education cess).***

4. The assessee before us is a banking company incorporated in, and fiscally domiciled in, Korea. It is carrying on business, through its permanent establishment, in India as well. In the income tax return filed by the assessee, it was pointed out that in view of Article 25(1) of the **India Korea Double Taxation Avoidance Agreement [(1987) 165 ITR Stat 191; the then Indo Korea tax treaty, in short]**, which provides that "**nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected**" [the *corresponding provision in the present Indo Korean treaty are in Article 24(1)],* and as, in terms of Article 3(1)(g) resident includes, amongst others, "**any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State**", [the *corresponding provision in the present Indo Korean treaty are in Article 3(1)(j)(ii)]* the assessee company is also required to be treated as a national of Korea and levy of tax at the same rate as applicable for the Indian companies. It was also pointed out that in terms of the provisions of Article 25(2) of the then India Korea tax treaty, "**the taxation on a permanent establishment which an enterprise of a contracting state has in the other contracting state, shall not be less**

favourably levied in that other contracting state than the taxation levied on the enterprise of that other contracting state carrying on the same activities". It was pointed out that the levy of tax, on the profits of the assessee's permanent establishment in India, at a rate higher than the rate at which tax is levied on the Indian entites carrying out the same activities, amounted to impermissible discrimination. It was thus pointed out that on the touchstone of the principles set out in article 25(1) as also 25(2), the rate of taxation of income of the assessee company cannot be more than the rate applicable for the domestic companies engaged in the same or similar activities. The Assessing Officer was thus urged that instead of levy of tax @ 40% plus surcharge etc, the assessee company should be levied tax @ 30% plus surcharge etc, as is applicable on the domestic companies. This plea, however, was rejected by the Assessing Officer on the ground that in the light of Explanation 1 to Section 90, the provisions of a double tax avoidance agreement, the tax rate on a foreign company being higher than the tax rate on a domestic company cannot be considered to a less favourable charge or levy of tax in respect of such foreign company, and as such the provisions of Article 25(1) Article 25(2) of the then Indo Korean tax treaty do not come into play. The Assessing Officer proceeded to frame a draft assessment order accordingly. Aggrieved by the draft assessment order, the assessee raised the objections before the Dispute Resolution Panel, but without any success. The stand of the Assessing Officer was approved and reiterated. The Assessing Officer thus proceeded to levy the tax at the rate prescribed for a foreign company, i.e. a company which is not a domestic company. The assessee is not satisfied and is in appeal before us.

5. Learned counsel for the assessee invites our attention to the judgment dated 7th August 2019 passed by Hon'ble Calcutta High Court, in the case of **Bank of Tokyo Mitsubishi Ltd Vs CIT [(2019) 108 taxmann.com 242 (Cal)]** and submits that the issue is covered, in favour of the assessee, by the aforesaid decision of Hon'ble Calcutta High Court. However, when learned counsel's attention was invited to Explanation 1 to Section 90 and he was asked to address us on the implications of this amendment, he simply pointed out that the aforesaid judgment was delivered on 7th August 2019- i.e.

after the retrospective amendment was bought to the statute, and yet the issue has been decided in favour of the assessee. He left the matter at that and submitted that he has nothing further to add to what has been held by Hon'ble Calcutta High Court in the case of Bank of Tokyo Mitsubishi *(supra).* Learned Departmental Representative, on the other hand, submits that there is no discussion at all in the said decision about the Explanation 1 to Section 90, which is in effect with effect from 1st April 1962, though inserted by the Finance Act 2001, and a decision which has been rendered without dealing with this foundational aspect of the matter, cannot be binding on us. Learned Departmental Representative submits that in any case, it is a non-jurisdictional High Court and there is no dispute about the scope of Explanation to Section 90, and the learned counsel for the assessee has not even advanced any arguments on merits. It is pointed out that the learned counsel has simply cited a judicial precedent and left it at that, and, therefore, we should treat this ground as not pressed in effect. We are thus urged to confirm the stand of the authorities below and decline to interfere in the matter.

6. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position. Considering that this issue raised in the appeal it may affect several non-resident companies, we consider it appropriate to deal with this issue in some detail.

7. We find that, by Finance Act 2001, an Explanation *(now known as Explanation 1)* was inserted below Section 90, and it was with retrospective effect i.e. effective 1st April 1962. This Explanation states that "**For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India**". It is important to bear in mind that it is by virtue of Section

90(2), which specifically provides that "**Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee**", that the provisions of the related double taxation avoidance agreement override the provisions of the Income Tax Act, 1961. As a corollary to this legal framework, it is only elementary that once a rider to this override is placed in the statute itself, to that extent the provisions of the Income Tax Act, 1961 will hold the field notwithstanding the more beneficial provisions in the tax treaties. In this light, when we look at the expression "**less favourably levied**" or "**more burdensome…taxation and connected requirement**", appearing in Articles 25(2) and 25(1) respectively, in the then applicable tax treaty, we find that unless such a foreign company makes prescribed arrangements for declaration and payment within India, of the dividend payable out of its income in India, the levy of tax at a higher rate cannot be considered a less favourable levy of tax or more burdensome taxation vis-à-vis the domestic companies. Once this principle is implicit in the very scheme of legislation which provides for the treaty provisions overriding the domestic law provisions, it cannot be open to contend that the provisions of law prescribing the higher rate of taxation for the foreign companies will have to be read down by the treaty provisions. The law is clear and unambiguous. To this extent, therefore, the treaty provisions do not override the provisions of the Income Tax Act, 1961. While the amendment was made by the Finance Act 2001, it was retrospective in effect inasmuch as it was specifically inserted with effect from 1st April 1962, i.e. the point of time when the Income Tax Act 1961 itself came into existence. On the first principles, the reason for the classificatory amendment appears to be that while income earned by the domestic companies is first taxed as corporate profits, and then with respect to taxation of dividends in the hands of the shareholder or at the point of time of distribution, the foreign companies normally (i.e. unless they make arrangements for declaration and payment within India, of the dividend payable out of its income in India) gets taxed only once. As a matter of fact, the terminology used, so far as the tax rate for companies is concerned, in the finance Acts is

'domestic company' and **'a company other than a domestic company'**. Under section 2(22A), a domestic company is defined as "**an Indian company or any other company, which in respect of its income liable to tax in India makes prescribed arrangements for declaration and payment of dividends within India**", and Section 2(23A), a foreign company is defined as a company "**which is not a domestic company**" i.e. which has not made prescribed arrangements for declaration and payment of dividends in India. The basis of different tax rates being applied is thus not the situs of fiscal domicile or incorporation but simply the arrangement for making arrangements for the declaration of payment of dividends within India. Quite clearly, therefore, the claim of the assessee proceeds on an erroneous assumption about the reason for charging different tax rates. In sharp contrast, under section 6(3) of the Income-tax Act, 1961, a company is said to be resident in India if either it is an Indian company or if control and management of its affairs is situated wholly in India. Thus, a non-resident company if it distributes dividends in India will be treated as a domestic company and will then be subjected to the same rate of tax as a resident company declaring and distributing dividends in India. If a non-resident company can make arrangements for the declaration and payment of dividends, out of income earned in India, in India, that non-resident company will be subjected to the same rate of tax which is levied on the Indian companies. The taxation of the foreign companies at a higher rate therefore at a higher rate vis-à-vis the domestic companies is thus not considered to be discriminatory vis-à-vis the foreign companies. The sharp contrast in the definition of a foreign company under section 2(23A) vis-à-vis the definition of a non-resident company under section 6(3) makes it clear that so far as the charge of tax is concerned, the critical factor is the situs of the control and management of a company, but so far as the rate of tax is concerned, the critical factor is the arrangements for the declaration of dividends out of income earned in India. Clearly, thus, the mere fact that a company which has not made "arrangements for the declaration of dividends out of income earned in India" is charged at a higher rate of tax in India vis-à-vis domestic company, cannot be treated as discrimination on account of the fact that the enterprise belonged to the other Contracting State, i.e. Korea. That is what the clarificatory and retrospective insertion of Explanation 1 to Section 90 reflects. The plea of the assessee, therefore, must be rejected. In our considered view, given the specific

provisions of law- as discussed above, there is no occasion for reading down the rate of tax, as applicable for a foreign company, just because the domestic companies are being taxed at a lower rate of taxation.

8. As we hold so, however, we may add that we are alive to the fact that in **Bank of Tokyo Mitsubishi** *(supra),* Hon'ble Calcutta High Court has, though without the benefit of discussions on the fact of or scope of this retrospective insertion of Explanation to Section 90, proceeded to decide the matter in favour of the assessee by observing, inter alia, as follows

> **5. By virtue of Section 90(2) of the Act, since there is a double taxation avoidance agreement between India and Japan, the provisions of the Act shall apply to a permanent establishment of a Japanese entity in India 'to the extent they are more beneficial to that assessee.' Also, in terms of the mandate of clause 24(2) of the agreement, 'the taxation on a permanent establishment…in the other Contracting State shall not be less favourably levied…than the taxation levied on enterprises…carrying on the same activities.' By virtue of Clause 24(2) of the said agreement and the statutory recognition thereof in Section 90(2) of the Act, the permanent establishment of a Japanese entity in India could not have been charged tax at a rate higher than comparable Indian assessees carrying on the same activities.**
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> **6. In the instant case, it is evident from the order of the Commissioner as affirmed by the Tribunal by the impugned order of March 31, 1997 that in respect of assessment year 1991-92, the assessee herein was assessed as not being a domestic company. There is no dispute that an Indian company which was a domestic company would have been charged tax at a lower rate than the 65% imposed on the assessee by virtue of the assessee not being regarded as a domestic company. The disparity between the rates applicable to Indian and foreign companies is not in issue. However, since clause 24(2) of the agreement between the two countries provides that a permanent establishment of an entity of one country in the other country shall not be subjected to less favourable terms than an assessee carrying on similar activities in the other country, the assessee in this case was liable to pay tax at the same rate as Indian companies carrying on the same activities were liable to for the relevant assessment year. The effect of the legal fiction envisaged in Article 24(2) of the agreement was that for the purpose of applying the appropriate rate, the permanent establishment of the Japanese entity had to be regarded as a domestic company. That is the effect of the expression 'taxation…not be less favourably levied…than the taxation levied on**

enterprises of that other Contracting State carrying on the same activities,' in Article 24(2) of the bilateral agreement between India and Japan.

7. The stand taken in the Tribunal's order cannot be appreciated or accepted since a similar clause in the double taxation avoidance agreement between India and the Netherlands was interpreted by the Central Board for Direct Taxes and a circular issued thereupon. The Tribunal held, in the present case, that since there was no similar circular, the benefit as available to a permanent establishment of ABN Amro Bank in India could not be extended to this assessee.

8. When there is no dispute that there is a double taxation avoidance agreement in place between India and the country of origin of the assessee in the present case and when such agreement contains a lucid clause as apparent from Article 24(2) thereof quoted above and when Section 90 of the Act itself recognises such an agreement and creates a special status for the relevant permanent establishments, there was no room for either the Commissioner to wait for any dictat from the high command of the CBDT or for the Tribunal to demonstrate similar servile conduct in not appropriately interpreting and giving effect to the clear words of the agreement between the two countries.

9. The reference is concluded by answering the first question raised as follows:-

The Tribunal was incorrect in holding that the rate of tax applicable to the assessee was 65%. The Tribunal ought to have held that the rate applicable to the assessee was such rate as applicable to a domestic company carrying on similar activities. In the light of such answer, the two other questions need not be addressed since paragraph 8 of the order admitting the reference recognised that the answer to the first question would cover the entire matter.

9. Clearly, Hon'ble Calcutta High Court had no occasion to examine the impact of, or to even take note of the fact of, insertion of Explanation 1 to Section 90, which, even though inserted by the Finance Act 2001, was effective 1st April 1962. This critical development in the law was not brought to Their Lordships' notice. The assessment year involved in this case was 1991-92, i.e. an assessment year much before the insertion of Explanation 1 to Section 90, but the law, as it prevailed, in material respects, at the point of time when the matter came up for consideration before Their Lordships was exactly the same as the law at on now or for the period relevant to this appeal. Neither it was the case of the assessee that retrospectivity of the amendment was unconstitutional nor there are any observations in the judgments to read down the retrospectivity of this amendment

which is specifically legislated as a retrospective amendment. It cannot, therefore, even be a reasonable justification, for any judicial forum where this judicial precedent has a binding effect, for not following the Hon'ble Calcutta High Court's judgment in the case of **Bank of Tokyo Mitsubishi** *(supra),* on the ground that the period for consideration before Their Lordships was a pre-amendment period. Such an approach, given the amendment being admittedly retrospective in effect w.e.f. 1st April 1962, will be superfluous. Therefore, the fact that reference before Their Lordships, which was disposed of vide the judgment dated 7th August 2019 in the case of **Bank of Tokyo Mitsubishi** *(supra),* was for the assessment year 1991-92 and in respect of a coordinate bench's order dated 24th November 1997, would not really make a difference. While dealing with judicial precedents from non-jurisdictional High Courts, however, we may also usefully take of the observations of Hon'ble jurisdictional High Court in the case of **CIT v. Thane Electricity Co. Ltd. [1994] 206 ITR 727 (Bom.)]**, to the effect "**The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect**". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower forums, even outside the jurisdiction of Hon'ble non-jurisdictional High Court, on account of the persuasive effect of these decisions and on account of the concept of judicial propriety- factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of **ACIT v. Saurashtra Kutch Stock Exchange Ltd. [(2008) 173 Taxman 322/305 ITR 227 (SC)]** wherein Their Lordships have upheld the plea that **"non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record"**. The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble jurisdictional High Court, and it's a

conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all the situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from. While on this aspect of the matter, it is also useful to bear in mind the following observations made in a Full Bench decision of Hon'ble Andhra Pradesh High Court, in the case of **CIT Vs BR Constructions [(1993) 202 ITR 222 (AP-FB)]:**

> **29. It may be noticed that <u>precedent ceases to be a binding precedent</u>—**
>
> **(i) if it is reversed or overruled by a higher court,**
> **(ii) when it is affirmed or reversed on a different ground,**
> **(iii) when it is inconsistent with the earlier decisions of the same rank,**
> **(iv) <u>when it is sub silentio,</u> and**
> **(v) <u>when it is rendered per incuriam,</u>**
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> **30. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth edn., the rule of per incuriam is stated as follows :**
>
> **"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."**
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> **31. In Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court [1990] 3 SCC 682, the Supreme Court explained the expression 'per incuriam' thus :**
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> **"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."**

As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam In Salmond on Jurisprudence, Twelfth edn., at page 151, the rule is stated as follows:

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

32. In Choudry Bros.' case (supra) as noticed above, the Division Bench treated the judgment in Ch. Atchaiah's case [1979] 116 ITR 675, as per incuriam on the ground that the earlier Division Bench did not notice the significant changes, the charging section 3 has undergone by the omission of the words 'or the partners of the firm or the members of the association individually'. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the Court which decided Ch. Atchaiah's case (supra). Merely because the conclusion arrived at on construing the provisions of the charging section under the 1922 Act as well as under the 1961 Act, did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

Though a judgment rendered per incuriam can be ignored even by a lower Court, yet it appears that such a course of action was not approved by the House of Lords in Cassell & Co. Ltd v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam Lord Hailsham observed: "It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way." (p. 809)

33. It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases.

[Emphasis, by underlining, supplied by us]

10. There is no dispute that Hon'ble Calcutta High Court's decision in the case of Bank of Tokyo Mitsubishi *(supra)* deals with the legal position prevailing prior to the retrospective insertion of Explanation 1 to Section 90, and that the applicable statutory provisions not having been brought to the notice of Their Lordships.

11. The fact that the Bank of Tokyo Mitsubishi decision *(supra)* is a judgment by the Hon'ble non-jurisdictional High Court and the fact that this decision does not take into account a provision of law which was on the statute at the material point of time apart, even otherwise what really matters for the doctrine of precedents is the *ratio decidendi* and that must essentially take into account "statements of the principles of law applicable to the legal problems disclosed by the facts". As a corollary to this legal position, unless the relevant legal position has not come up for consideration in the process of decision-making, even though the said decision will undoubtedly settle the matter between the parties and their privies, it would appear that the decision may not have precedence value. Explaining this position, a three-judge bench of Hon'ble Supreme, in the case of **Mavaliayi Service Cooperative Bank Ltd Vs CIT [(2021) 12 taxmann.com 161 (SC)]**, has observed as follows:

> **25. An illuminating discussion is to be found in the dissenting judgment of Justice A.P. Sen in Dalbir Singh v. State of Punjab [1979] 3 SCR 1059. Since the dissenting judgment refers to a principle of general application, not refuted by the majority, it is worth setting out this part of the judgment as follows:**
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> **"With greatest respect, the majority decision in Rajendra Prasad case does not lay down any legal principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less "law declared" within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:**
>
> **"(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;**
> **(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and**
> **(iii) judgment based on the combined effect of (i) and (ii) above."**
>
> **For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and**

liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. [R.J. Walker & M.G. Walker: The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24] It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes [LR 1959 AC 743] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

[Emphasis, by underlining, supplied by us]

12. In the case of **Farhan A Shaikh Vs DCIT [(2021) 125 taxmann.com 253 (Bom FB)],** a full bench of Hon'ble jurisdictional High has thoroughly examined, in an extended and profound discussion on the subject, the theory of binding judicial precedents, and felicitously explained the mechanism of its implementation. While it is not possible, given our limited context and purpose, to reproduce the entire profound discussion on the theory of binding judicial precedents, we may refer to a couple of important observations made by the Hon'ble jurisdictional High Court. Their Lordships have, *inter alia*, observed that "**An issue raised not addressed or an issue that has altogether gone sub silentio cannot support a precedent**". Their Lordships have also observed as follows:

It is one thing to say that a precedent should be followed; it is another to say what it means to follow a precedent. And what is a precedent, anyway? Before we answer that question, we need to accept that before a court applies the doctrine of stare decisis to a given case, it must first determine what that previous decision purports to establish.

Salmond defines a precedent as a judicial decision, "which contains in itself a principle. The underlying principle, which thus forms its authoritative element, is often termed the ratio decidendi." According to him, it is "the

abstract ratio decidendi which alone has the force of law as regards the world at large." Professor John Chipman Gray, in his The Nature and Sources of the Law (2d ed. 1921) 261stresses that "it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter dictum."

125. Putting both the above views in perspective, Allen in his Law in the Making (2d ed. 1930) 155, observes that "any judgment of any Court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was."

[Emphasis, by underlining, supplied by us]

13. Elsewhere in the same full bench judgment, Their Lordships have put a question to themselves as to “what binds” in a judicial precedent, and observed as follows:

What Binds?

142. Then, we can adopt Arthur L. Goodhart's assertion[15] that it is not the rule of law "set forth" by the court, or the rule "enunciated", which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. Goodhart quotes from Oliphant's A Return to Stare Decisis (1927) that the predictable element in a case is "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions."

14. Viewed in the backdrop of these discussions also, and in the light of the undisputed position that retrospective insertion to Explanation to Section 90 did not come up for consideration before the Hon’ble Calcutta High Court, the Bank of Tokyo Mitsubishi judgement *(supra)* cannot be an authority for the proposition that *dehors* the insertion of Explanation (now Explanation 1) to Section 90, the levy of the income tax on the assessee company at a rate higher than the domestic companies can be regarded as less favourable charge.

15. In this backdrop, and having noted that this decision is from a non-jurisdictional High Court and without the benefit of analysis of the impact of retrospective insertion of Explanation to Section 90, in the light of specific guidance by Hon'ble jurisdictional High Court in the case of **Thane Electricity** *(supra),* of Hon'ble Andhra Pradesh High Court's Full Bench guidance in the case of **B R Constructions** *(supra),* Hon'ble Supreme guidance in the case of **Mavaliayi Service Cooperative Bank Ltd** *(supra),* and Hon'ble jurisdictional High Court's full bench judgment in the case of **Farhan A Sheikh** *(supra),* we are of the considered view is that Hon'ble Calcutta High Court's judgment in the case of **Bank of Tokyo Mitsubishi** *(supra),* strictly speaking, does not constitute a legally binding judicial precedent to forums like benches of the Tribunal outside the jurisdiction of Hon'ble Calcutta High Court. This judgment, whether for the post-amendment period or the pre-amendment period, is without the benefit of taking note of a critical judicial development, which has not been brought to the notice of the Hon'ble Court. Undoubtedly it has the highest persuasive value, but, in the rare circumstances when admittedly the applicable legal provisions have not been brought to the notice of Their Lordships, even this persuasive value cannot be of any help to the assessee.

16. As observed by the Hon'ble Supreme Court, in the case of **CIT Vs Sun Engineering Works Pvt Ltd [(1992) 198 ITR 297 (SC)]**, "**The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Court must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In** ***H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur*** **v.** ***Union of India*** **[1971] 3 SCR 9 this Court cautioned: "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be**

answered in that judgment." This decision, therefore, cannot be an authority on the implication of insertion of Explanation 1 to Section 90, because Their Lordships had no occasion to take a call on the same.

17. We must, therefore, be rather guided by the plain words of Explanation 1 to Section 90, as we do not have the benefit of Their Lordships' guidance on the scope of this Explanation being inserted in the statute, which is the core issue requiring our adjudication. Learned counsel for the assessee has no other argument in support of the plea raised in the first ground of appeal against the applicable higher rate of tax for foreign companies.

18. In view of these discussions, as also bearing in mind the entirety of the case, we hold that the applicable rate of taxation, under the Income Tax Act 1961, for the assessee company cannot be read down in the light of the provisions of a double taxation avoidance agreement, as is the specific mandate of Explanation 1 to Section 90 or even on the first principles without the benefit of this Explanation.

19. We may also add that as for the mention, in paragraph 7 of the **Bank of Tokyo Mitsubishi** decision *(supra),* of some clarification issued by the CBDT with respect to ABN Amro Bank, even if that be so, it is only elementary that Section 119(1)(a) does not visualize issuance of a circular "so as to require any income-tax authority to make a particular assessment or to dispose of a particular assessment in a particular manner", and, therefore, such a clarification will not have any bearing on cases other than ABN Amro Bank, or the legally binding force of Section 119. In any event, even going by the observations made by the Hon'ble High Court, this communication was issued prior to 24th November 1997 – much before the retrospective insertion of Explanation 1 to Section 90 took place. With the amendment in law and with this significant change in the legal position, even if there is an old circular, issued in the context of pre-amendment law, it

will not hold good any longer. Nothing, therefore, turns on the said communication either, and, in any event, even this communication has not been sighted before us.

20. In view of these discussions, and for detailed reasons set out earlier in this order, we are of the considered view that the plea of the assessee is, therefore, devoid of any sustainable merits. We reject the plea of the assessee, and decline to interfere in the matter.

21. In the result, the first ground of appeal is dismissed.

22. In the second, third and fourth grounds of appeal, which we will take up together, the assessee has raised the following grievances:

> ***Ground 2- Deductibility of Interest paid by the Appellant to its Head Office***
>
> ***The AO/DRP erred in law and on facts in disallowing interest paid by the Appellant to its head office amounting to Rs. 2,34,51,979.***
>
> ***The Appellant prays that the disallowance made in respect of interest paid by the Appellant to its head office be deleted.***
>
> ***Ground 3- Taxability of interest paid by the Appellant in hands of Head Office***
>
> ***The AO/DRP erred in law and on facts in disallowing interest paid by the Appellant to its head office amounting to Rs. 2,34,51,979 in the hands of head office.***
>
> ***The Appellant prays that interest paid by the Appellant to its head office not be taxed in the hands of the head office.***
>
> ***Ground 4- Taxability of Interest received by the Appellant from its Head Office***
>
> ***The AO/DRP erred in law and on facts in taxing the interest received by the Appellant from its head office amounting to Rs. 40,29,832/-.***

The Appellant prays that the interest received by the Appellant from its head office not be taxed in the hands of the Appellant.

23. So far as this grievance of the assessee is concerned, only a few material facts of the case need to be taken note of. While computing profits attributable to the permanent establishment in India, the assessee, inter alia, claimed a deduction of Rs 2,34,51,979 being interest paid by the Indian permanent establishment (PE, in short) to its head office, i.e General Enterprises (GE, in short), on the funds borrowed by the PE from its GE. So far as the claim for this deduction (referred to as PE-GE interest, in short) is concerned, the Assessing Officer proposed to disallow the same by observing that "**the branch and the head office constitute the same legal entity and one cannot earn income from oneself**". The matter, however, did not end here. The Assessing Officer relied upon the CBDT circular 740 which, inter alia, stated that "**Interest paid/ payable by such branch to its head office or any branch located outside India will be liable to tax in India and would be governed by the provisions of Section 115 of the Act. If the double taxation avoidance agreement with the country, where the parent company is assessed to tax provides for a lower rate of taxation, the same would be applicable**". In effect thus, the Assessing Officer's draft assessment order indicated that while no deduction of PE-GE interest payment was allowed in the computation of income attributable to the PE, the same amount, nevertheless, was brought to tax in the hands of the GE. As regards the interest income received by the permanent establishment from its head office, (referred to as GE-PE interest, in short], the stand of the assessee was that if the payment by the PE to GE is to be declined on the ground that it is a payment from self to self, which constitutes inadmissible deduction in the computation of profits attributable to the PE, by the same logic the income of the PE from its GE is to be disregarded. The GE PE interest income, on this basis, was claimed to be devoid of tax implications. This claim, however, was also declined by the Assessing Officer. The assessee was not satisfied with this approach. When grievance about the stand so taken by the Assessing Officer was raised before the Dispute Resolution Panel, the DRP noted that, in the income tax return filed by the assessee, the assessee had claimed a deduction, in the computation of income attributable to the PE, for the PE-GE interest payment but offered it to tax, being resultant income of the GE, at the concessional rate of 10% under Article 12 of the

then Indo Korean tax treaty. It was thus noted that there is no variation in the income returned by the assessee inasmuch as the deduction claimed by the PE was offset by the income of the GE, and that there is no addition made in respect of interest income in the hands of the GE. The plea regarding non-taxability of interest income was rejected on the technical ground that there is no difference in the returned and the assessed income on this aspect, and, as such, the grievance of the assessee is not maintainable. The correctness of this approach apart, the DRP also noted that the reliance of the assessee, on the special bench decision in the case of **Sumitomo Mitsui Banking Corp Vs DDIT [(2012) 136 ITD 66 SB (Mum)]**, is of no avail, as this decision has been challenged before the Hon'ble High Court. The proposed action of the Assessing Officer was thus approved by the DRP as well. Accordingly, the Assessing Officer proceeded with (a) denying deduction, in the computation of profits attributable to the PE, of PE GE interest payment; (b) bringing the PE GE interest payment to tax in the hands of the assessee; and (c) holding that interest income received from the head office, i.e. GE PE interest, needs to be taken into account in the computation of profits attributable to the PE. The assessee is aggrieved and is in appeal before us.

24. Learned counsel, at the outset, submits that the assessee does not wish to pursue the grievance against the taxability of income received by the PE from its GE (i.e. GE-PE interest), even though this issue is covered, in favour of the assessee, by the five-member bench of this Tribunal in the case of **Sumitomo Mitsui Banking Corp** *(supra)*.

25. As regards the remaining two issues, learned counsel for the assessee submits that both of these issues are covered, in favour of the assessee, by a five-member bench decision of this Tribunal, in the case of **Sumitomo Mitsui Banking Corp** *(supra)* and by the subsequent division bench decisions in the assessee's own cases for the assessment years 2004-05, 2005-06 and 2006-07 vide coordinate bench decision dated 27th June 2012. He submits that as the legal position now is by virtue of treaty provisions, and as per the scheme of treaty law elaborated upon by the Tribunal, deductions in respect of payments to head office are allowed as deductions in the computation of the profits attributable to the PE, the resultant income, on account of tax neutrality of payments

within a company, is not taxable in the hands of the assessee. We are thus allowed to hold that while the PE GE interest payment is deductible under the tax treaty provisions, the PE GE interest payments do not result in taxability of that amount in the hands of the GE which has no separate existence anyway. Learned Departmental Representative, however, points out that so far as the five-member bench in the case of Sumitomo Mitsui is concerned, which is what the coordinate bench has followed in the assessee's own case, it dealt with the provisions of the India Japan Double Taxation Avoidance Agreement- particularly its protocol [(1990) 182 ITR (Stat) 380- as amended from time to time; Indo-Japan tax treaty, in short], which is materially different from Indo Korea tax treaty that is applicable in the present case. We are then taken through the relevant observations and the difference in the wordings of Indo-Japan vis-à-vis Indo-Korean tax treaties. In substance, the learned Departmental Representative's contention is, if we can rephrase it in our words, that if we are to proceed on the basis of tax neutrality of intra GE theory, and the provisions as in protocol attached to the Indo-Japan tax treaty are missing the applicable tax treaty, the inevitable conclusion is that no deduction can be allowed, in the computation of profits attributable to the PE, for PE-GE interest payments. In short rejoinder, learned counsel relies upon the reasoning adopted in the five-member bench decision in the case of Sumitomo Mitsui Bank Corp (supra), invites our attention to a co-ordinate bench decision in the case of **BNP Paribas SA Vs ADIT [(2016) 69 taxmann.com 6 (Mum)]**- which is authored by one of us *(i.e. the Vice President),* and once again reiterates the primary arguments on merits.

26. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

27. The short reason for which the impugned disallowance is made is that the payment by an entity to itself, i.e. by its permanent establishment to the head office, and, therefore, it is an inadmissible deduction. What this approach overlooks is that this theory of tax neutrality vis-à-vis intra-company payments and incomes, whatever be its relevance or irrelevance in the cross-border situations, finds its support from judicial precedents in the cases of **Sir Kikabhai Premchand Vs CIT [(1953) 24 ITR 506 (SC)]** and **Betts**

Hartley Huett & Co Ltd Vs CIT [(1979) 116 ITR 425 (Cal)], is in the context of the computation of profits under the Income Tax Act. This theory would not, therefore, extend to the computation of profits attributable to a permanent establishment under the scheme of the tax treaties. The five-member bench decision, in the case of Sumitomo Mitsui Banking Corp *(supra)* recognizes this position and specifically states that "**the position under the domestic law, as emanating from the above judicial precedents is that one cannot make profit out of himself**", and in the lights of the corollaries to this position, declined the applicability of this theory in the treaty situation. There is no other reason assigned in this case in support of the disallowance of interest paid by the PE to the head office or the GE. For this short reason alone, therefore, the impugned interest disallowance must be deleted.

28. As the learned Departmental Representative rightly points out, the Special Bench decision in the case of Bank of Tokyo & Mitsubishi is specifically in the context of the Indo-Japan tax treaty and the decision is, as it states in so many words- such as in para 88 therein that PE GE interest is "**deductible while determining the profit attributable to the PE which is taxable in India as per the provisions of Article 7(2) & 7(3) of the Indo-Japanese treaty <u>read with paragraph 8 of the protocol</u>, which are more beneficial to the assessee**". In the operative portion of the order also there are frequent references to the protocol paragraph 8 and that protocol provision is taken as a critical factor leading to the conclusion of the bench, such as in paragraph 52 where the Special Bench has observed that "**<u>A combined reading of Article 7(2) and 7(3) of the treaty and paragraph No. 8 of the protocol</u> thus makes it clear that for the purpose of computing the profits attributable to the PE in India, ……. profit attributable to the PE in India thus is to be computed treating the same as a distinct and separate entity which is dealing wholly independently with the GE of which it is a part and deduction is to be allowed for all the expenses which are incurred for the purpose of PE, whether incurred in India or elsewhere, including the interest paid or payable by a PE to the Head Office or any other offices of the GE by way of interest on moneys lent to the PE. ………..we have no hesitation to hold that the same <u>is allowable as deduction while computing the profits of the PE in India for the</u>**

purpose of taxation in India as per articles 7(2) and 7(3) of the treaty read with paragraph No. 8 of the protocol” *[Emphasis, by underlining, supplied by us].* The question before the Special Bench was also in the specific context of the provisions of the Indo-Japan tax treaty, and the protocol clause 8- which has been relied upon so much in arriving at the conclusions is missing in many other tax treaties, including the Indo Korean tax treaty. That would not, however, really make a material difference to our conclusions in case even without the benefit of protocol provisions relied upon by the special bench, the interest paid by Indian PE of a foreign bank to its head office can be said to be tax-deductible, and the principles laid down in the said decision clearly and unambiguously support that conclusion. While allowing the deduction for PE-GE interest, a lot of emphasis is placed on the protocol clause which places certain restrictions on the payments which can be allowed as deductions but also provides for a specific carve-out for intra-GE interest transactions for the banking companies from such restrictions. That does not, in our humble understanding, belittle the fact that the theory of tax neutrality with respect to intra-company transactions is not all applicable to the treaty situations, or that when there are no specific restrictions on deductions, and, as a corollary thereto, no carve-outs either, for the intra GE transactions, from such restrictions on deductions, the outcome will be any different.

29. We find that Article 7(2), to the extent relevant for the present purposes, provides that where an enterprise of a Contracting State (i.e. Korea) carries on business in the other Contracting State (i.e. India), through a permanent establishment situated therein, there shall in each Contracting State be attributed to 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 the similar activities under the same or similar conditions and dealing wholly independent of each other. In plain words, so far as a Korean enterprise and its Indian PE are concerned, the profits of the Indian PE are to be computed as if the Indian PE is wholly independent of its head office, i.e. Korean GE. Once we treat the PE as independent of the GE, as we are required to treat by the fiction of hypothetical independence in Article 7(2) which provides for the computation of profits attributable to the PE, the very foundation of the impugned disallowance of the interest paid by the PE

to the GE ceases to hold good in law. The computations of profits attributable to the PE are to be computed on the basis of this hypothetical independence of the PE from its GE, and, to that extent, the profit neutrality theory of intra-company transactions will not come into play. As a corollary thereto, interest paid by the PE to the GE is to be allowed as a deduction, and the interest received by the PE from GE, under the scheme of the tax treaties, is to be treated as income. As we hold so, we may also note that though the assessee had initially raised a grievance against the taxability of interest received from its head office, when the appeal came up for hearing before us, this plea was abandoned even as there was a five-member bench decision, in support of the assessee, on that point. The assessee has claimed a deduction for interest paid by the PE to GE, and included in its taxable income, interest received by the PE from its GE. That is what, in our humble understanding and for the reasons set out above, the computation of profits of the PE, under the scheme of the tax treaties, envisages. In view of these discussions, and bearing in mind the entirety of the case, we hold that the disallowance of interest of Rs 2,34,51,979 is not sustainable in law. The Assessing Officer is directed to delete the same.

30. Ground nos. 2 and 3 are thus allowed, and ground no. 3 is dismissed as not pressed.

31. The next question is whether the said interest of Rs 2,34,51,979 paid by the PE to GE (i.e. PE-GE interest) can be taxed in the hands of the assessee company as income of the GE, as has been done by the Assessing Officer. The Assessing Officer has brought this interest income, paid by the permanent establishment to its head office and which is allowed as a deduction in the computation of profits attributable to the PE, to tax under Article 12 of the then India Korea tax treaty.

32. The approach so adopted by the revenue authorities, on the first principles, is simply contrary to the scheme of the tax treaties. 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 then Indo-Korea tax treaty specifically provides that when an enterprise of a treaty partner country carries out business through a permanent establishment, " there shall be in each Contracting State be attributed to 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" This fiction of hypothetical independence 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 the computation of such profits, in the tax treaties, including in the then Indo-Korean DTAA. There is nothing, therefore, to warrant or justify the application of the same principle in the 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.

33. To that extent, this approach departs from the separate accounting principle in the sense that the GE, to which PE belongs, is not seen in isolation with it's PE, and a charge, in respect of PE - GE transactions, on the PE profits is not treated as income in the hands of the GE.

34. As far as the treaty situations, as in the case of the then Indo-Korea tax treaty, are concerned, once an enterprise is found to be carrying on the related business or profession through a permanent establishment or a fixed base in the other contracting state, the scheme of taxability on the gross basis, as implicit in the taxation of dividend, interest, royalties and fees for technical services, and other incomes, under the tax treaties, comes to an end. Article 11(5) specifically provides that the provisions of Article 12(1),(2) and (3) will not come into play "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-claims in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base". There is no occasion thus to additionally bring to tax the

interest income received by the head office. In any event, the PE GE interest is allowed as a deduction, in the computation of the profit of the PE, and the same addition being made as independent income in the hands of the GE, will render the deduction meaningless.

35. The incomes, so relatable to the PE, are then taxable on the net basis as the PE income in the sense when these are earned from third parties through the PE, these receipts constitute incomes attributable to the PE, and when these receipts are by the enterprise from the PE itself, the entire income, generated by the business with the help of the inputs for which payments are made by the PE to the HO, is taxed as income attributable to the income of the PE.

36. It is also important to bear in mind the fact that a deduction, in respect of an internal charge, as is the inherent nature of intra-GE interest payment, being allowed in the computation of income attributable to the permanent establishment in the hands does not result in an income arising in the hands of the GE. It is a notional adjustment which is allowed in the computation of profit attributable to the permanent establishment. Explaining this hypothesis, Prof. Kees Van Raad, a well-known contemporary international tax scholar, in his preface to "**The Attribution of Profits to Permanent Establishments - The taxation of intra-company dealings [ISBN 90-76078-84-X; published by IBFD, Amsterdam]",** made the following observations:

> **"Since my early days of teaching international tax law, I have tried to explain to students the relationship between a PE and the general enterprise of which the PE is a part, as that of an egg and the yolk it contains. I have further explained that, with regard to income attribution to PEs, the OECD Model does not require that a general enterprise is divided into two separate parts - a head office and a PE - and that, <u>therefore, an internal charge borne by a PE will not yield income for anyone, but only produces a smaller amount of PE income to be taxed by the PE state</u> and, correspondingly, a smaller amount of foreign income in respect of which the residence state needs to provide the relief I must admit that my attempts to get these views across have met with varying levels of success- particularly students with an accounting background tend to be on the sceptical side…………..".**

[Emphasis, by underlining, supplied by us]

37. We are in considered agreement with the views so expressed by the eminent international tax scholar. 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 the computation of profit of the GE. As regards the GE-PE interest 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, 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-claims in respect of which the interest is paid is effectively connected with such permanent establishment**" 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 can be said to so arise to the GE, the taxability under article 12 will not apply, and it will remain restricted to the taxability of profits attributable to the permanent establishment under Article 7. The profits attributable to the PE have anyway been offered to tax.

38. 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. The theory of tax neutrality for intra-GE payments within an entity, even in the context of cross-border PE situations, is somewhat unique to our tax jurisprudence, but even without the benefit of this theory, the same conclusions are arrived at so far as the taxability of PE-GE interest is concerned. The situation in the present case is somewhat peculiar because of the assessees' stand of accepting the taxability in respect of interest received from the head office, i.e. GE-PE interest, the tax neutrality theory for payments within the entity is, even if partially, abandoned. With the benefit of the Sumitomo decision *(supra),* one can understand the

provisions of the tax treaty being invoked for examining the tax treatment of the interest payments by the PE, and the provisions of the domestic law being invoked for the interest receipts by the PE, but then even vis-à-vis the taxability of GE-PE interest by the PE having been accepted on the treaty principles, it may perhaps be too much to contend that the taxability of PE-GE interest receipt is required to be considered on the basis of the domestic law provisions, but even this discussion seems entirely academic in the light of our finding, as above, that an internal charge for the PE profit attribution does not amount to taxable income in the hands of the GE anyway. Be that as it may, having decided this aspect of the matter on the treaty principles so far as taxability of PE-GE interest in the hands of the GE is concerned, we need not examine that aspect any further. In our considered view, for the detailed reasons set out in this order, *dehors* this theory of tax neutrality for intra-GE transactions also, this PE-GE interest is not taxable in the hands of the assessee. 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.

39. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee that the interest of Rs 2,34,51,979 paid by the PE to the GE cannot be brought to tax in the hands of the assessee company, even though it is to be allowed as a deduction in the computation of profits attributable to the permanent establishment. The Assessing Officer is directed to grant the relief accordingly. The assessee has already offered to tax the interest income received from its head office, and there is no surviving dispute in respect of the same.

40. Ground nos. 2 and 3 are thus allowed, and ground no. 4 is dismissed.

41. By way of additional ground, the assessee has raised the following grievance:

> ***Non-applicability of provision of section 44C of the Income-tax Act, 1961 (Act)***
>
> ***Based on the facts and circumstances of the case and in law, the learned AO be directed to allow the deduction for entire expenses incurred at the head office as is attributable to the business of the Appellant in India, and not restrict the same***

by applying the provisions of section 44C of the Act, on the basis that the provisions of section 44C of the Act does not apply to the Appellant in accordance with the provisions of Article 25 - 'Non-Discrimination' of the Double Taxation Avoidance Agreement entered between the Government of India and Government of Korea.

42. Learned counsel for the assessee submits that the issue now being raised is a purely legal issue which could not inadvertently be raised earlier. It is pointed out in the light of **NTPC Vs CIT [(1999) 229 ITR 383 (SC)],** such an issue can be legitimately raised even at this stage before the Tribunal. He, however, fairly submits that as this aspect of the matter has not been examined by any of the authorities below at any stage, in all fairness, the additional ground is required to be remitted to the file of the Assessing Officer for adjudication on merits. Learned Departmental Representative fairly does not oppose the prayer so made by the learned counsel for the assesseee.

43. In view of the above discussions, as also bearing in mind the entirety of the case, we admit the additional ground of appeal but remit the matter to the file of the Assessing Officer for adjudication on merits. Ordered, accordingly.

44. The additional ground of appeal is thus admitted and allowed for statistical purposes.

45. In the result, the appeal is partly allowed in the terms indicated above.

46. We will now take up the cross objections.

47. Turning to the cross-objections filed by the Assessing Officer, learned representatives fairly submit that as the assessee is not pressing the ground no. 4, i.e. against the taxability of interest income received by the permanent establishment from its head office, the issues raised in the cross-objections are rendered academic, and do not call for any specific adjudication. The cross-objections are thus liable to be dismissed as infructuous.

48. In the result, the cross-objections are dismissed.

49. To sum up, while the appeal is partly allowed, the cross-objections are dismissed as infructuous. Pronounced in the open court today on the 27th day of June, 2022.

Sd/-
Amit Shukla
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 27th day of June, 2022

Copies to: (1) *The appellant* (2) *The respondent*
(3) *CIT* (4) *CIT(A)*
(5) *DR* (6) *Guard File*

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai