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

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2191/MUM/2022
(Assessment Year: 2013-14)
&
ITA No. 2190/MUM/2022
(Assessment Year: 2014-15)

Income Tax Officer (IT) 2(2)(2), Mumbai, Room No. 1620, 16th Floor, Air India Building, Nariman Point, Mumbai - 400021	.....	**Appellant**
	Vs	
The Hongkong & Shanghai Banking Corporation Ltd., Honkong Bank Building India Area Management, 5th Floor, 52/60, Mahatama Gandhi Road, Fort, Mumbai - 400001 [PAN: AACCK4722C]	.....	**Respondent**

Appearance

For the Appellant/Department	:	Shri Anil Sant
For the Respondent/Assessee	:	Shri Porus Kaka Shri Divesh Chawla

Date

Conclusion of hearing	:	04.07.2023
Pronouncement of order	:	20.07.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. These are 2 appeals pertaining to Assessment Years 2013-14 and 2014-15 preferred by the Revenue against the two separate orders passed by the Ld. Commissioner of Income Tax (Appeals)-56, Mumbai [hereinafter referred to as 'the CIT(A)']. Since the appeals

involve identical issues the same were heard together and are being disposed by way of a common order.

ITA No. 2191/MUM/2022 (Assessment Year: 2013-14)

2. We would first take up appeal for the Assessment Year 2013-14 which has been preferred by the Revenue challenging the order, dated 14/06/2022, passed by the CIT(A) for the Assessment Year 2013-14, whereby the Ld. CIT(A) had allowed the appeal of the Assessee against the order, dated 31/03/2021, passed under Section 201(1)/201(1A) read with Section 195 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. The Revenue has raised following grounds of appeal:

> *"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was erred in treating the assessee not in default for not making TDS u/s 195 of the Income Tax Act, 1961 with respect to payment of Rs. 2,78,35,307/- made by assessee to various bank of HSBC Group during F.Y. 2013-14 as Nostro account maintenance charges, therefore, reduced the demand of Rs. 3,68,84,547/- raised by assessing officer in its order passed u/s 201(1) and 201(1A) of the Income-tax Act, 1961 to Nil.*
>
> *2. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored."*

4. During the year under consideration the Assessee, a non-resident banking organization incorporated/registered in Hong Kong, was engaged in the business of banking in India through its branch in India in accordance with the Banking Regulation Act, 1949 and Reserve Bank of India Guidelines.

5. The Assessing Officer received the information that deduction of

INR 278,35,306/- claimed by the Assessee in respect of Nostro Account Maintenance Charges paid by the Assessee outside India have been disallowed by the Assessing Officer under Section 40(a)(i) of the Act while framing assessment for the Assessment Year 2013-14 since the Assessee had failed to deduct tax at source as per Section 195 of the Act. Therefore, proceedings under Section 201(1) and Section 201(1A) of the Act were initiated against the Assessee by the Assessing Officer.

6. During the course of the proceedings, the Assessee filed letter, dated 27/01/2021, submitting that the Assessee maintained Nostro Accounts with banks outside India as well as with branch offices of the Assessee outside India. The Nostro Accounts Maintenance Charges were levied by such overseas banks/branches on the Assessee were with respect to the Nostro Accounts maintained outside India. As a common practice, the Nostro Accounts Maintenance Charges were directly debited by the overseas bank/branches to such Nostro Account and therefore, there was no remittance made by the Assessee on account of the same. The overseas bank/branches were providing services, if any, outside India which were, in any case, not in the nature of managerial, technical or consultancy services. The Nostro Account Maintenance Charges were also not in the nature of interest as defined in Section 2(28A) of the Act and therefore, the Assessee was not under obligation to deduct tax under Section 195 of the Act.

7. However, the Assessing Officer was not convinced. The Assessing Officer concluded that Nostro Accounts Maintenance Charges fell within the definition of term ‘interest’ as defined in Section 2(28A) of the Act. The Assessing Officer treated the Assessee as being an

'assessee in default' and vide order dated 31/03/2021, raised a demand of INR 1,72,50,730/- under Section 201(1) of the Act, being the amount of tax which should have been withheld by the Assessee computed after grossing-up the Nostro Account Maintenance Charges of INR 2,78,35,307/-, under Section 201(1) of the Act and a demand of INR 1,96,33,817/- under Section 201(1A) of the Act, being interest computed at the rate of 1% per month on the tax worked out under Section 201(1) of the Act.

8. Being aggrieved, the Assessee preferred appeal before CIT(A). Before the CIT(A) the Assessee made following submissions (as reproduced in paragraph 3 of the order impugned):

> *"3. Submissions of the Appellant: The Assessee has filed following submissions:*
>
> *Nostro account maintenance charges are not in the nature of interest.*
>
> *As per section 2(28A) of the Act, "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.*
>
> *As mentioned above, the Appellant maintains nostro accounts with overseas banks outside India. The charges levied by the said banks to the Appellant are with respect to the account maintenance support provided by said banks. The Appellant has not borrowed money/debt incurred from such overseas banks. Accordingly, in the absence of money borrowed/debt incurred, payment of nostro account maintenance charges would not be classified as interest' under section 2(28A) of the Act.*
>
> *Nostro account maintenance charges do not accrue or arise in India*

At the outset, the Appellant submits that these charges are directly debited by overseas banks to such nostro account outside India. In this sense, there is no remittance of funds by the Appellant of such account maintenance charges. Further, the Appellant submits that:

- *The bank providing the account maintenance support is based outside India.*
- *The account (nostro account) with respect to which such services are provided is outside India.*
- *The charges for the same are paid by Appellant outside India.*

The transaction charges represent the normal business income of these banks, which accrue/arises outside India. Accordingly, the said amount does not accrue in India and is not taxable in the hands of overseas banks as per the provisions of the Act.

Further, attention is invited to CBDT instruction dated 27.9.1988 (enclosed as Annexure 1) where the CBDT has clarified that no tax is required to be withheld on SWIFT charges since the amount is directly debited overseas.

Even otherwise, in case where tax treaty provisions are applicable, such charges being in the nature of business income are not taxable in India in the absence of permanent establishment in India of the relevant overseas bank as per Article 5 read with Article 7 of the relevant tax treaty.

In view of the above, the Appellant submits that such charges are not liable to tax in India and, as such, there is no question of deduction of tax at source under section 195 of the Act.

In this regard, the Appellant would like to place reliance on the decision of the Mumbai Tribunal in case of Oman International Bank SAOG vs Dy. Director of Income-tax (International Taxation) [ITA No. 6800/Mum/2010] wherein it is held as under:

> *"...the transaction charges paid on Nostro Account were in the nature of bank charges for maintaining the accounts with*

> *banks outside India. These charges were recovered directly by way of debits to the concerned accounts of the assessee with these banks and the same represented business income of those banks which accrued/arisen outside India. As held by the Tribunal, no tax therefore was required to be deducted at source from the transaction charges paid on Nostro account and the disallowance made by the A.O. u/s 40(a)(i) of the Act was not sustainable."*

Further, we would like to highlight that the AO had disallowed the nostro account maintenance charges paid to overseas banks under section 40(a)(i) of the Act for non- deduction of tax in AY 2006-07 to AY 2015-16 in the hands of Appellant. The CIT(A) deleted the disallowance in AY 2006-07 to AY 2015-16 and held that the Appellant is not required to deduct tax on nostro account maintenance charges paid to overseas banks since the said charges are not taxable in India. The relevant extract of the order of CIT(A) for AY 2006-07 (enclosed as Annexure 2) is as under:

> *I have considered the AO's order as well as appellant's submission as extracted above. On the basis of the submissions made by the Appellant, I find that the amount of payment made by the appellant in the nature of nostro maintenance account is not taxable in India, and accordingly if the same is not taxable in India then the question of withholding tax on the same doesn't arise. Considering the facts in the instant case, the AO should have allowed nostro account maintenance charges as claimed by the Appellant. Hence, the addition made by the AO of Rs. 1,44,21,997 on account of nostro maintenance charges is deleted.*

The relevant extract of recent CIT(A) order (passed by your Honor) for AY 2015-16 (enclosed as Annexure 3) is as under:

> *The matter is considered and decided in favour of appellant in appellate order of CIT(Appeals) (AY 2006-07 to AY 2014-15). Facts and circumstances remaining identical, on account of same reasons, same decision applies. Accordingly, the AO is directed to delete the addition. The ground is allowed.*

Given the above, the issue is squarely covered by case of Mumbai Tribunal as well as CIT(A) orders in Appellant's own case.

Accordingly, the Appellant submits that it is not required to deduct

tax on nostro account maintenance charges under section 195 of the Act and hence the Appellant should not be considered as 'assessee in default' towards the same."

9. After taking into consideration the submission made by the Assessee, the CIT(A) allowed the appeal and deleted the demand of for INR 1,72,50,730/- and INR 1,96,33,817/- raised under Section 201(1) and 201(1A) of the Act vide order dated 31/03/2021.

10. Being aggrieved, the Revenue has preferred the present appeal.

11. We have considered the rival submission and perused the material on record.

11.1. The CIT(A) has deleted the demand raised upon the Assessee under Section 201(1)/(1A) of the Act by holding as under:

"4. Decision: I have considered the submission of the Appellant as well as the order under appeal. Various grounds of appeals raised are adjudicated below. 4.1 Grounds no. 1 & 2: These grounds pertain to AO's action of holding Appellant as assessee in default in respect of Nostro Account Maintenance charges paid / payable to foreign banks and subsequent raising of TDS demand, by holding that the charges are liable to tax in India and consequently, liable for tax deduction u/s 195 of the Act.

In the submission, Appellant has submitted that it has not borrowed money/ debt incurred from overseas banks. As such, payment of Nostro Account Maintenance charges would not be classified as interest u/s 2(28A) of the Act. It is also claimed that these charges do not accrue or arise in India. Reference is also made to CBDT Instruction dated 27.09.1988 whereby it is clarified that no tax is required to be withheld on SWIFT charges since the amount is directly debited overseas. It is accordingly submitted that the charges are not liable to tax in India and as such there is no question of TDS u/s 195. <u>The Appellant has placed reliance on decision of the Hon'ble Mumbai Tribunal in the case of Oman</u>

International Bank SAOG vs DDIT(IT) [ITA No. 6800/Mum/2010] as well as various orders of the CIT(A) deleting the disallowance made u/s 40(a)(i) for AY 2006-07 to 2015-16.

4.1.1 I have considered the submission. I find that the Appellant has raised ground disputing disallowance of the nostro account maintenance charges of Rs. 2,78,35,306/- under section 40(a)(i) of the Act on the ground that tax has not been deducted thereon under section 195 of the Act in its appeal against assessment order u/s 143(3) r.w.s. 144C for AY 2013-14. In appeal order dated 22.03.2019, the said disallowance has been deleted by my predecessor.

In view of the above and considering the submission of the Appellant, I hold that the action of the ITO(IT) Wd 2(2)(2), Mumbai in holding the Appellant as assessee in default for not making TDS on Nostro Account maintenance charges, is not sustainable. Ground Nos 1 & 2 are accordingly allowed." (Exphasis Supplied]

11.2. We note that the decision of the CIT(A) is in line with the decision of the Mumbai Bench of the Tribunal in the case of Oman International Bank SAOG Vs. Deputy Director of Income Tax (International Taxation) [ITA No. 6800/Mum/2010, dated 27/12/2013], wherein it has been held as under:

"15. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that a similar issue was involved in assessee's own case for the earlier years and the same has been decided by the Tribunal consistently in favour of the assessee in the said years including the immediately preceding year i.e. A.Y. 2004-05 which was decided vide order dated 13th September, 2013 passed in ITA No. 1609/Mum/2008. As noted by the Tribunal in its orders, the transaction charges paid on Nostro Account were in the nature of bank charges for maintaining the accounts with banks outside India. These charges were recovered directly by way of debits to the concerned accounts of the assessee

with these banks and the same represented business income of those banks which accrued/arisen outside India. As held by the Tribunal, no tax therefore was required to be deducted at source from the transaction charges paid on Nostro account and the disallowance made by the A.O. u/s 40(a)(i) of the Act was not sustainable. Respectfully following the orders of the Tribunal on the similar issue involved in earlier years, we uphold the impugned order of the ld. CIT(A) deleting the disallowance made by the A.O. on account of transaction charges u/s 40(a)(i) of the Act and dismiss ground No. 3 of Revenue's appeal."(Emphasis Supplied)

11.3. Thus, the Tribunal has, in identical facts and circumstances, decided the issue in favour of the Assessee while holding that Nostro Account Maintenance Charges are in the nature of bank charges levied on transaction and the same are not subject to tax deduction at source under Section 195 of the Act. Therefore, the provisions of Section 40(a)(i) of the Act cannot be attracted in case of the deemed remittance of Nostro Account Maintenance Charges without deduction of tax at source. In the case before us also the CIT(A) has concluded that the Assessee was not under obligation to withhold tax from Nostro Account Maintenance Charges in terms of Section 195 of the Act and therefore, could not be treated as an 'assessee in default'. Accordingly, demand raised by the Assessing Officer on the Assessee under Section 201(1) and 201(1A) of the Act was deleted by the CIT(A). In our view, the order passed by the CIT(A) does not suffer from any infirmity to this extent.

11.4. Further, we do not find merit in the contention advanced by Ld. Departmental Representative that Nostro Account Maintenance Charges are in the nature of 'interest' as defined under Section 2(28A) of the Act. On perusal of the aforesaid definition we find that term 'interest' is defined as under:

> ` *interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.'*

11.5. The service fee and other charges included in the above definition of 'interest' are those charged in respect of (i) moneys borrowed, or (ii) debt incurred or (iii) in respect of any credit facility *(which has not been utilized)*. In the case before us, the Assessing Officer has not brought on record any material to establish that the Assessee has borrowed money or incurred debt or availed any credit facility, and the Nostro Account Maintenance Charges have been charged in respect of the same.

12. In view of the above, we are not inclined to interfere with the order passed by the CIT(A) deleting demand of INR 1,72,50,730/- and INR 1,96,33,817/- raised by the Assessing Officer under Section 201(1) and 201(1A) of the Act, respectively. Ground No. 1 & 2 raised by the Revenue are, therefore, dismissed.

ITA No. 2190/MUM/2022 (Assessment Year: 2014-15)

13. We would now take up appeal for the Assessment Year 2014-15 which has been preferred by the Revenue challenging the order, dated 14/06/2022, passed by the CIT(A) for the Assessment Year 2014-15, whereby the Ld. CIT(A) had allowed the appeal of the Assessee against the order, dated 31/03/2021, passed under Section 201(1)/201(1A) read with Section 195 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

14. Both the sides had agreed that our findings/adjudication in respect of issues raised in appeals for the Assessment Year 2013-14 shall apply mutatis mutandis to the grounds/issues raised in the appeals pertaining to the Assessment Years 2014-15 also. Accordingly, adopting the reasoning given herein above in paragraph 11 to 11.5 above while dismissing Ground No. 1 & 2 raised by the Revenue in appeal for the Assessment Year 2013-14, we decline to interfere with the order passed by the CIT(A) deleting demand of INR 1,21,85,197/- and INR 1,10,13,991/- raised by the Assessing Officer under Section 201(1) and 201(1A) of the Act, respectively. Ground No. 1 & 2 raised by the Revenue in appeal for the Assessment Year 2014-15 are, therefore, dismissed.

3. In result, both the appeals preferred by the Revenue are dismissed

Order pronounced on 20.07.2023.

Sd/-	***Sd/-***
(S. Rifaur Rahman)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 20.07.2023
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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