

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Ms. Sushma Chowla, Vice President

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 2920/Del/2008 : Asstt. Year : 2001-02

Standard Chartered Grindlays Bank-Tax Department, H-2, Connaught Circus, New Delhi-110001	Vs	Asstt. Director of Income Tax (International Taxation), Circle- 2(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAHCS3380Q		

ITA No. 2995/Del/2008 : Asstt. Year : 2001-02

Deputy Director of Income Tax (International Taxation), Circle-2(2), New Delhi	Vs	Standard Chartered Grindlays Bank, H-2, Connaught Circus, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AAHCS3380Q		

**Assessee by : Sh. Shashi M. Kapila, Adv.
Revenue by : Sh. Satpal Gulati, CIT DR**

Date of Hearing: 27.08.2020	Date of Pronouncement: 26.10.2020
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by assessee the and the revenue against the orders of the Id. CIT(A)-XXIX, New Delhi dated 11.07.2008.

2. In ITA No. 2920/Del/2008, following grounds have been raised by the assessee:

"1. The Ld. CIT(A) had erred in law and on facts in sustaining an ad hoc & surmiseful addition of 20% of NRI expenses amounting to Rs. 16,92,655/- on the grounds that these are in the nature of 'head office' expenses and ignoring the ITAT order dt. 18.8.2006 which has held that NRI expenses are fully allowable and no portion of these are head office expenses.

2. The Ld. CIT(A) was not justified in law in ignoring the order of a superior judicial forum in the appellant's own case for earlier years wherein it was held that the NRI expenses are fully allowable and no part of them are in the nature of Head office expenses.

3. The learned Ld. CIT(A) has erred in law and on facts in upholding an excessively high pitched estimate of as much as 94% of the gross receipts amounting to Rs.3,04,60,516/- as expenses attributable to earning income on foreign currency syndicated term loans under Sec. 115A(3) of the Income Tax Act, 1961.

4. (i) The learned Ld. CIT(A) has erred in law and on facts in making an ad hoc addition of Rs.15,00,000/- on account of expenses incurred on earning foreign currency syndicated term loans.

(ii) On page 14, para 6.1 of the CIT(A)'s Order, when dealing with the expenses on foreign currency syndicated terms loans, the CIT(A) has erroneously quoted an extract of the AO's order with respect to deduction under sec.36(1)(viii), which is not relevant to the ground of appeal being discussed. Hence this AO's quotation in this para should be expunged as it is quoted out of context.

5. The learned Ld. CIT(A) has erred in law and on facts in disallowing the entrance fee expenditure of Rs.30,000/- on payments made to clubs on the grounds that it is capital expenditure.

6. The Ld. CIT(A) has erred in law and on facts in making an estimated disallowance of managerial and administrative expenses of Rs. 2,50,000/- for earning dividend income by treating this as tax free income, whereas dividend income is strictly not a tax free item of income as it is subject to dividend distribution tax in the hands of the company which pays the dividends.

7. Without prejudice to above and in the alternative, it is respectfully submitted that –

(a) Section 10(33) exempts dividends referred to in section 115-O. Section 115-O refers to any amount declared, distributed or paid by a domestic company. Thus, what is exempt in the hands of recipient is the amount declared, distributed or paid by a domestic company and not the sum, which is income in the hands of the assessee;

(b) No part of the expenses incurred for the purposes of business of the Appellant can be said to be attributable to earning of dividend income in view of various decisions as under –

- ✓ CIT v/s. Indian Bank Ltd. - 56 ITR 77(SC)
- ✓ Rajasthan State Warehousing Corp. v/s. CIT - 242 ITR 450(SC)
- ✓ CIT v/s. Maharashtra Sugar Mills - 82 ITR 452(SC)
- ✓ CIT v/s. Industrial Investment Trust Co. Ltd. - 67 ITR 436(Bom)

8. The Ld. CIT(A) has erred in law and on facts in disallowing the sum of Rs.30,15,52,101/- as relating to access and user of technology related services for its credit cards business in India, on which full taxes were duly deducted at source and paid to the Indian Government @ 15% in accordance with Article 12 of the Indo-Australia Double Taxation Avoidance Agreement (DTAA) read with section 195(1) of the Income Tax Act, 1961.

9. The Ld. CIT(A) has erred in law and on facts by denying deduction of fees paid for access and user of technology related services for the credit cards business of India, as such fees were incurred wholly, necessarily and exclusively for the Appellant's business in India, hence this is a permissible deduction under section 40(a)(i) read with section 37(1) of the Income Tax Act, 1961 and Article 7 of the Indo-Australia DTAA and CBDT Circular No.649 dated 31.3.1993.

10. The Order of the Ld. CIT(A) suffers from an error apparent: on the face of the records on the following ground:

- The CIT(A) has allowed us the tax deductibility of CBS costs, and Operations & Technology costs for the following periods: 1.4.1999 to 31.3.2000 & 1.4.2000 to 31.7.2000. This was in accordance with the provisions of sec. 40(a)(i) as withholding tax was paid on such payments in May 2000.
- However when granting relief in figures, the CIT(A) has correctly taken the CBS costs & Ops /Tech costs for the period 1.4.1999 to 31.3.2000.
- But for the period 1.4.2000 to 31.7.2000 he has erroneously bunched up the costs of CBS.+ Operations Technology + Credit Cards Support Costs and treated the entire amount as Credit Cards Support Costs costs. This would be ex-facie evident from CIT(A)'s order itself as well as the records.
- Therefore although the relief is computed by him of Rs.379,366,666/- actually there is a further relief available per his order of:

CBS costs for 1.4.2000 to 31.7.2000- Rs.91,601,740 + Operations / Technology costs for 1.4.2000 to 31.7.2000 of Rs.1,94,31,463.

This totals to Rs.111,033,203.

- *Therefore the total relief on tax deductibility of access and user of CBS & Operations Technology fees this item would be Rs.379,366,666 for period 1.4.1999 to 31.3.2000 + Rs.111,033,203 for 1.4.2000 to 31.7.2000 = Rs.490,499,869/-.*
- *In addition Midanz costs are operations and technology costs allowed by CIT(A), hence these too are allowable- Rs.26,72,100/-.*
- *As this is a clear error & mistake apparent from the CIT(A)'s Order itself as well as the records, this should be rectified and additional relief may properly be granted to us.*

11. It is prayed that the AO be directed to give proper credit for TDS as per records.

12. It is prayed that the interest u/s.234B & 234C may properly be computed consequent to this appeal.

13. Pursuant to this order the learned Assessing Officer be directed to re-compute the allowance in respect, of provision for bad and doubtful debts u/s 36(1)(vii-a) @ 5% of adjusted total income as determined by him in the Assessment Order.

14. Pursuant to this order the learned Assessing Officer be directed to re-compute the allowance in respect of the allowable Head Office expenses u/s 44C @ 5% of the "adjusted total income" as determined by him in the Assessment Order."

NRI Expenses:

3. The assessee is a non-resident banking company which carries on the business of banking and other related activities through its branches in India in accordance with the provisions of Banking Regulation Act, 1949. During the year, Indian Permanent Establishment (in short PE) of the assessee bank in India incurred NRI expenses for soliciting and mobilization of deposits in foreign currency from Non Resident Indian (NRIs) to

be placed in India. As these expenses were related wholly and exclusively to the Indian PE of the assessee's business, it had claimed the expense as deduction in the computation of Business Income of the PE earned in India.

4. The Assessing Officer rejected this claim for deduction of expenses holding that this expenditure was not reflected in the assessee's Indian books of accounts that this expenditure was in the nature of 'head office expenses' in respect of which deduction under section 44C has already been allowed. The AO placed reliance on the judgment of the Calcutta High Court in the case of UCO Bank Vs. CIT, 200 ITR.

5. The Id. CIT (A) directed to re-compute the disallowance @80% of NRI deposit mobilization expenses u/s 37(1) of the Income Tax Act, 1961 and 20% of NRI expenses u/s 44C.

6. This issue has been adjudicated by the ITAT Delhi Bench in the case of the assessee for the assessment years 1993-94 to 1998-99 in ITA No. 4988/Del/2003 dated 24.10.2008 and ITA No. 1106/Del/2017 dated 30.11.2017. The relevant portion of the order of the ITAT is as under:

"6. We have considered the rival submissions. The Tribunal while considering similar claim in earlier year held as under (ITA Nos.1850/Del/1997, 2376, 2818 & 2819/Del/99, order dated 18th August, 2006). We have carefully considered the rival submissions: The xxxxxx abroad were brought to India in foreign currency xxxx and kept in India for the Indian business of the assessee bank. The benefits reaped by the India branch or Permanent Establishment in India have been accounted for as Indian income. We, therefore, see no reason as to why the deduction of expenditure should not allowed. These expenses incurred for procurement of business cannot be understood as Head Office expenses and the learned Assessing Officer, therefore, erred in treating

them as Head Office expenses within the meaning of section 44C of the Act. We, therefore, direct "the learned Assessing Officer to allow the assessee deduction of actual expenditure basis and for that purpose if necessary the learned Assessing Officer may withdraw corresponding deduction allowed, if any under the provisions of section 44C."

Though the allowability of expenses in relation to raising deposits from NRI abroad is not subject to further discussion, however, what is to be found is that when the expenses were incurred and deposits were raised, what was the deposit raised and whether it was brought into India in respect of Indian business or not is not forthcoming from the material on record. On examination of balance-sheet of the assessee we do not find that the deposits raised at Dubai were brought into India and were utilized in respect of business carried on in India. We, therefore, remand the matter back to the file of the Assessing Officer. The assessee shall furnish details as to what were the deposits raised and how the same were brought into India in respect of business carried on in India. The Assessing Officer shall also examine the details of expenses and the basis of allocation of such expenses for considering allowability of the same. The matter is accordingly restored back to the file of the Assessing Officer for re-examination. If it is found that the deposits raised abroad from NRI were accounted by the Indian branches and are treated as deposits from NRI on which even the interest is payable by Indian branches, the same may be allowed as expenses subject to satisfaction as regards allocation of the same. The assessee shall file necessary details in this regard."

As the issue before us in the instant case is exactly identical of the earlier years wherein the Hon'ble Tribunal has already taken a view in this regard. Therefore respectfully following the same we allow the appeal of the assessee in terms of above. Thus, the ground of appeal of the assessee is allowed for statistical purposes."

7. Subsequent to the directions of the ITAT, it was brought to our notice that the revenue has allowed the complete expenses including the 20% expenses disallowed in the earlier years.

Hence, this issue is no more *res integra*. The appeal of the assessee on this ground is allowed.

Disallowance of Expenses:

8. Brief facts of the case are that the assessee has shown an amount of Rs. 3,24,04,804/- as interest income from foreign currency loans to its Indian customers, taxable u/s 115A(3). The AO held that under section 115A(3), no deduction is permissible for the income covered under the said provision and the corresponding expenditure is to be disallowed. Based on the gross receipts and expenditure shown in the P&L account for the year of Rs.14,82,24,25,000/- and Rs.13,94,24,89,000/- respectively, the AO held that the assessee had incurred expenses in the ratio of 94% of the gross receipts. Therefore, the AO estimated the expenditure relatable to income of Rs.3,24,04,804/- at Rs. 3,04,60,516/-.

9. The Id. CIT (A) confirmed the addition on the grounds that in absence of any details, the AO is correct in estimating the disallowance.

10. Before us, it was submitted that the bank earned interest of Rs.3.24 crores on FCNR – B Rules and this interest duly offered at the rate of 20% in accordance with the provisions of Section 115A(1) of the Income Tax Act, 1961.

11. This issue has been adjudicated by the ITAT Delhi in the case of the assessee for the assessment years 1993-94 to 1995-96 and 1996-97 to 1998-99. The relevant portion of the order of the ITAT is as under:

"42. The issue for our adjudication relates to the disallowances to be worked out for indirect expenses incurred by the assessee in relation to such impugned income of interest. On perusal of AO order we observed that he has made the disallowance on proportionate basis between the total operating expenses viz a viz gross receipt of the assessee. In our considered view the method adopted by the AO suffers from several infirmities as detailed below:-

i) The lower authorities have worked out the ratio between the total expenses viz a viz total receipt and that ratio has been applied to the impugned interest income on the same gross revenue.

ii) The product of foreign currency loan was in operation only for four months effective from December 96 to March 97 for the year under consideration.

iii) There are certain costs which are fixed in nature and therefore all such costs cannot be attributed to this product.

43. In view of above, we direct the AO to adopt the following method for working out the disallowance of indirect expenses incurred in relation to such impugned interest income.

i) Work out the ratio between the total revenue viz a viz the gross income earned by the assessee on foreign currency loan.

ii) Based on the above ratio the indirect expenses will be determined for four months for the purpose of disallowance u/s 115A of the Act.

44. We further find that there is no dispute with regard to the expenses already disallowed by the assessee in its income tax return. In view of the above we direct the lower authorities to make the disallowances u/s 115A of the Act in the light of above discussion. Thus the ground of appeal of the assessee is allowed for statistical purpose."

12. Since, the facts remain unaltered and in the absence of any tangible change, we, following the earlier order of the ITAT we hereby direct the AO to compute the disallowance as per the formula mentioned at sub-para (43) above. In the result, the appeal of the assessee on this ground is allowed for statistical purpose.

Disallowance of Expenses on Tax Free interest are foreign currency Syndicated Term Loan :

Disallowance of Expenses out of Dividend Income

The grounds are being adjudicated together.

13. The AO disallowed Rs.81.31 lakhs on account of expenses incurred on earning foreign currency syndicated term loan of Rs.86.50 lakhs which is tax free. The Id. CIT (A) confirmed the addition to the tune of Rs.15 lakhs on the grounds that estimation of disallowance of expenditure of 17.34% on the exempt income.

14. With regard to dividend, the AO disallowed an amount of Rs.16,60,280/- out of the dividend income earned of Rs.17,66,255/-. The Id. CIT (A) confirmed the addition to the extent of Rs.2,50,000/- on estimate basis.

15. Before us, the Id. AR relied on the order of the Hon'ble Supreme Court in the case of Walfort Shares & Stock Brokers Pvt. Ltd. 326 ITR 1. The Id. DR relied on the order of the Id. CIT (A).

16. The relevant portion of the judgment of the Hon'ble Supreme court is as under:

"Section 14A of the Income-tax Act, 1961, clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to exempt income and partly to taxable income. In the absence of section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income. The mandate of section 14A is clear : it desires to curb the practice of claiming deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail of the tax incentive by way of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for Insertion of section 14A is that certain incomes are not includible while computing the total income because these are exempt under certain provisions of the Act.

The basic principle of taxation is to tax the net income, i.e., gross Income minus expenditure. On the same analogy, exemption is also in respect of net income. The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A.

17. We find that the AO has disallowed the amount invoking the provisions of Section 14A. While there is no dispute regarding the disallowance of expenditure incurred in relation to exempt income under both the heads, the Act prescribes proper procedure of computing such disallowance u/s 14A(2). We find that the revenue has not invoked the procedure as specified under the said section wherein the AO has to record his dissatisfaction as to the correctness of the claim with regard to the accounts of the assessee. Owing to the procedural tumble, we hereby delete the disallowance made by the Assessing Officer.

Disallowance of Club Expenditure:

18. The Id. CIT (A) confirmed the amount of Rs.30,000/- paid on account of entrance fee of a club. The club membership fee is taken for promoting business of the bank and for better customer relationship. No asset of enduring in nature has been created. Hence, following the order of the ITAT in ITA No.1106/Del/2006 for the assessment 1996-97 dealing with expenses of club membership fee and keeping in view the fact that no new asset has come into existence, we hereby delete the addition confirmed by the Id. CIT (A).

Disallowance of Fee for Technical Services:

19. The AO has rejected the claim of deduction of Rs. 68,10,18,767/- u/s 37(1) of the Act for following reasons:

(a) that the payments totaling to Rs. 68,10,18,767/- were not made by Indian PE of appellant but by the HO of appellant in Melbourne

(b) that the payments totaling to Rs. 68,10,18,767/- were not debited in books of account of appellant for the year.

(c) that payment made on behalf of appellant suffered withholding taxes @ 15% whereas claim of deduction of these payments resulted in reduction of tax liability of appellant @ 48% which incurred revenue loss of 33% on such claim.

20. The Id. CIT (A) was confirmed the addition to the tune of Rs.30,15,52,101/- and granted the relief of Rs.37,94,66,666/-. The revenue is in appeal against the relief granted and the

assessee's in appeal against the addition confirmed by the Id. CIT (A).

21. For the sake of ready reference and for detailed facts, the order of the Id. CIT (A) is reproduced as under:

"10.3.2 The AR stated that the appellant had made payments totaling to Rs. 68,10,18,767/- to Australia and New Zealand and Banking Group (in short ANZ) through HO of appellant in Melbourne Australia, after deduction of withholding tax in the year under consideration in lieu of technical services rendered by ANZ to PE of appellant in India under three agreements. It was argued that copies of original challan evidencing payments of withholding tax alongwith interest u/s 201(1 A) were attached to the return of income for the year and details of payments were disclosed in tax audit report for A.Y. 2000-01 and A.Y. 2001-02. It was contended by the AR that the expenditure was incurred wholly and exclusively for the purpose of the business of Indian PE of appellant and was claimed as allowable deduction by way of notes attached and forming part of the computation of income filed alongwith return of income for the year under consideration, accordingly, the claim of deduction of expenditure was allowable deduction u/s 37(1) read with proviso to section 40(a)(i) of the Act. It was further contended that genuineness of the expenditure was supported by the copies of agreement, invoices of expenditure and report of external auditor. I have examined the above claim of appellant with reference to notes attached to the computation of income for the year filed alongwith return of income and have noted that the claim of appellant is factually correct. The appellant had made claim of deduction in return of income by filing a detailed note and necessary evidence alongwith tax auditor report. For shake of clarity relevant note is reproduced as under: "NOTES ATTACHED TO AND FORMING PART OF THE

COMPUTATION OF INCOME FOR THE YEAR ENDED 31 MARCH 2001.

1) The name of ANZ Grindlays Bank Limited has been changed to Standard Chartered Grindlays Bank Limited effective 23 September 2000.

2) (i) During the Financial Year 1.4.99 to 31.3.2000 the Bank had made the following payments for obtaining technical sendees for its Indian operations from ANZ Banking Group for access and use of:

(a) Commercial Banking System for its Indian operations - Rs.

304,353,333 Original challans evidencing payment of withholding tax of Rs. 4,56,53,000 alongwith interest u/s 201(1A) of Rs. 44,99,000 is attached as Annexure A-I.

(b) Operations and Technology services for its Indian Operations- Rs.75,113,333 Original challans evidencing payment of withholding tax of Rs. 1,12,67,000 alongwith interest u/s 201(1A) of Rs. 11,36,000 is attached as Annexure A-2

(c) Cards technology services for its Indian operakons- Rs.134,033,333 Original challans evidencing payment of withholding tax of Rs. 2,01,05,000 alongwith interest u/s 201(1A) of Rs.14,88,000/- is attached as Annexure A-3

The Bank had duly deducted taxes at source on the payments in to the paid in accordance with Article 11 of Indo-Australian Double Tax Treaty and paid interest u/s 201(1A) and made payment Government on 31st May 2000. Since such taxes have been the current accounting period, the above expenses are deductible as business expenditure from the Profits and Gains of Business in accordance with Proviso to section 40(a)(i).

(i) Original challans evidencing payment of withholding taxes are attached.

(ii) Report of External Auditors - KPMG certifying the payments made for availing of technical services are attached.

(ii) For the period 1.4.2000 to 31.7.2000 the Bank continued to avail of the technical services from ANZ Banking Group Ltd. Of:

- (a) Commercial Banking system (CBS) for its Indian operations*
- (b) Operations and Technology services for its Indian operations*
- (c) Cards Technology services for its Indian operations*

For which payment of Rs. 16,48,46,668/- was made during the year.

The Bank has duly paid withholding taxes to the Indian Govt., in accordance with Article 11 of the Indo-Australian Double Tax Treaty within prescribed time. Since the taxes were paid in this financial year the above sum is deductible as business expenditure from Profits and Gains of business in accordance with the Proviso to sec. 40(a)(i). The details are as follows -

(i) Withholding tax paid in the month of April 2000 is Rs.68,38,000/- alongwith interest u/s 201(1A) of Rs.103,000/- - Annexure IV.

(ii) Withholding tax paid on June 6, 2000 is Rs. 67,98,000/- - Annexure V.

(iii) Withholding tax paid on July 6, 2000 is Rs.70,81,000/- - Annexure VI.

(iv) Withholding tax paid on August 6, 2000 is Rs. 40,10,000/- - Annexure VII.

(v) Original challans evidencing payments of withholding taxes are attached.

Report of External Auditors - KPMG Certifying the above payments made for availing of the said 'technical services' are attached."

(extracted from notes attached to and forming part of computation of income filed alongwith return of income for the year)

In view of above undisputed facts. I am not inclined to agree with the view of the AO that appellant had not made claim of deduction of expenditure of Rs.68,10,18,767/- before him.

10.3.3 In order to examine the claim that the expenditure was incurred for the purpose of the business of appellant, I have carefully examined all the three agreements between HO of the appellant and ANZ Australia titled "Agreement for access to and use of the Commercial Banking System (CBS)", "operation and technology support services and licence memorandum" and "credit cards support services memorandum". The agreement for access to and use of the commercial banking system (CBS) provide for use of the system by PE of appellant in India. For shake of clarity relevant part of the agreement is reproduced as under:

"1. ACCESS TO ANDN USE OF THE CBS SYSTEM

1.1 The 1st Party provided the 2nd Party access and user of the CBS together with all associated documentation during the period 1st April 1999 upto 31st March 2000. The 2nd Party Bank had access to, and made use of, the CBS system for this banking operations in India. Towards this purpose, the 1st Party had supplied the requisite number of copies of the CBS system to the 2nd Party.

1.2 The right of the 2nd party Bank to use the CBS System for its operations in India was exclusive, and non-transferable.

1.3 The entire ownership rights in the CBS System has at all points of time vested with the 1st Party. The 2nd Party had only access to, and use of this system during the term of the Agreement between the parties."

(extracted from CBS agreement between HO of appellant and ANZ dated 1.4.1999)

The operations and technology support and services and licence agreement also stipulates operation and support services in India.

"THE PARTIES AGREED UPON THE FOLLOWING:

1. OPERATIONS & TECHNOLOGY SUPPORT SERVICES AND SOFTWARE LICENCES AND MAINTENANCE PROVIDED BY THE 1st PARTY TO THE 2nd PARTY FOR ITS BANKING OPERATIONS IN INDIA:

The 1st Party provided the following operations and technology support services including software licences to the 2nd Party, for its business in India during the extended period of 4 months.

Maintenance Based Systems: The 1st Party has developed and maintained various Mainframe based Computer systems at Melbourne such as:

- IT Service Delivery*
- IT Software Solutions (other than CBS Fail & Fix)*
- Payment Services*
- Telecommunications*
- Operations & Technology International Costs*
- BTS (ANZLINK, Chequeout)*
- MIDANZ Support and Enhancements*
- ANZIT Recon Support*
- Projects : Y2K*
- Projects : Business Planning & Reorganizing*
- Projects : TEP*
- Projects : Telephone Banking*
- Projects : MARS*

The 1st Party granted the 2nd Party the operations and technology support services comprising of access to and use of the Mainframe based systems. This included access to Global Server and Desktop support, Cards mainframe, Swift mainframe, CDM/CTA (Credit Cards

Assessment and collections modules), AS400 Support, Unix Support, and for Y2K and other projects."

(extracted from "operation and technology support service and licence memorandum between HO of appellant and ANZ dated 1.4.1999)

Whereas 'credit cards support service memorandum' does not stipulate that ANZ would provide credit cards support service to PE of appellant in India. For shake of clarity relevant part of agreement is reproduced as under:

"THE REASONS FOR THE AGREEMENT:

- A. The 1st Party provided support services to the 2nd Party for its Credit Cards related to business operations. These included technical, managerial and consultancy services including providing of services of technical or other personnel in relation to the same.*
- B. The 2nd Party required and utilized the support services provided by the 1st Party for its Credit Cards business operations, including technical, managerial and consultancy services.*
- C. This Memorandum records and details the support services provided to the 2nd Party by the 1st Party, during the 12 months' period 1.4.99 to 31.3.2000".*

(extracted from credit cards support service memorandum between FIO of appellant and ANZ dated 1.4.1999)

It is evident from above extract relevant part of the agreement that unlike other two agreement credit cards support service agreement does not stipulate providing credit card support services to PE of appellant in India.

10.3.4 It is evident from scrutiny of above referred to three agreements that payment of Rs. 7,51,13,333/- under the agreement

for operation and technology support and service and payment of Rs. 30,43,53,333/- under commercial banking system agreement were incurred for purpose of the business of PE of appellant in India whereas the claim of appellant that payment of Rs. 13,40,53,333/-, Rs. 26,72,100/- and Rs. 16,48,46,668/- were incurred on credit card support service to PE of appellant in India was not proved before me as the relevant agreement does not stipulate credit card support service in India. The AR did not file any other evidence to prove if credit card services were actually rendered in India for the PE of appellant. In light of these findings it is held that payment totaling to Rs. 301552101 was not incurred for the purpose of business of the appellant and was not deductible u/s 37(1) of the Act. For aforesaid reasons, I am of considered view that out of total expenditure of Rs. 68,10,18,767/- payments of Rs. 7,51,13,333/- for operation and technology support in India and Rs. 30,43,53,333/- for CBS technical services in India were incurred wholly and exclusively for the purpose of the business of the PE of appellant in India and were allowable deduction u/s 37(1) of the Act and balance amount of payment of Rs. 30,15,52,101/- was not proved to be incurred for the purpose of the business of appellant in India and the same cannot be claimed as allowable deduction u/s 37(1) of the Act. It is pertinent to mention here that appellant had filed evidence of payments of Rs. 7,51,13,333/- and Rs. 30,43,53,333/- in form of invoice challans of withholding taxes and external auditor report accordingly, genuineness of expenditure totalling to Rs. 37,94,66,666/- (Rs. 7,51,13,333/- + Rs. 30,43,53,333/-) was also proved.

10.3.5 The AR had contended that above referred to payments were in the technical fee and the same did not fall under the head 'head office' expenditure as stipulated u/s 44C of the Act. In support of the claim appellant placed reliance on

Board's Circular no. 649 as reported in (1993 200 ITR (Stat) 0230B). I have examined the claim of the appellant with the nature of services and have reached to following conclusion:

(a) It is evident from copies of the invoices that appellant had made the payment of Rs. 30,43,53,333/- for access and use of CBS system for banking operation of appellant's PE in India and for receiving software maintenance and other technical support services by PE of appellant for use of CBS system in India. It is further noted that payment of Rs. 7,51,13,333/- was incurred in receiving operation and technology support for use of IT services delivery, ANZIB:MIDANZ support and maintenance ANZ software and ANZ IT Recon support etc.

(b) It is evident from the nature of services rendered by ANZ to the PE of the appellant in India that expenditure of Rs. 30,43,53,333/- and Rs. 7,51,13,333/- incurred by appellant was in the nature of technical service.

(c) I have carefully gone through the contents of Circular no. 649 as relied by the appellant and have noted that para 2 of the circular clearly stipulates that technical fees are not covered under the head office executive and general administrative expenditure as specified in section 44C of the Act.

In light of above facts and circumstances, I am of firm view that payments of Rs. 30,43,53,333/- and Rs. 7,51,13,333/- were not covered u/s 44C and same were allowable expenditure u/s 37(1) of the Act.

10.3.6 It is pertinent to mention here that difference in withholding tax rate and tax rate charged on the income of appellant could not be a ground for making disallowance u/s 37(1) and AO had misplaced himself in applying such proposition which is not stipulated u/s 37(1)

of the Act. I have further noted that a part of the expenditure claimed as deduction in the year pertained to the earlier year on which the appellant had deducted and paid TDS in the year under consideration accordingly the proviso to section 40(a)(i) is attracted and the claim of appellant was allowable u/s 37(1) read with proviso to section 40(a)(i).

10.3.7 After having considered aforesaid findings and circumstances, I am of the considered view that appellant had proved that expenditure of Rs. 7,51,13,333/- and Rs. 30,43,53,333/- was genuine revenue expenditure which were incurred wholly and exclusively for the purpose of the business of the PE of appellant in India and appellant had discharged its onus u/s 37(1) of the Act. Accordingly, AO was not justified in making disallowance of Rs. 30,43,53,333/- and Rs. 7,51,13,333/-. I have also held that appellant had not discharged its onus to prove that balance expenditure of Rs. 30,15,52,101/- incurred for the purpose of the business of the appellant in India. Accordingly, disallowance of Rs. 68,10,18,767/- made by the AO is restricted to Rs. 30,15,52,101/- and appellant gets relief Rs. 37,94,66,666/- (Rs. 30,43,53,333 + Rs. 7,51,13,333/-). This ground of appeal is partially allowed."

22. We find that the Id. CIT (A) has disallowed an amount of Rs.30.15 lakhs as the expenses not incurred for the business of the assessee and was not deductible u/s 37(1) on the ground that the credit cards support services memorandum has not stipulate that ANZ would provide credit cards support services to PE of the assessee in India.

23. Before us during the arguments, the Id. AR relied on,

1. Tax Audit Report – To prove the expenses were incurred for the assessee's business in India
2. Payment of taxes pertaining to these expenses

3. Certificate by the Auditors regarding the expenditure
4. Memorandum of agreement – showing tax deducted at source
5. Agreement between the assessee and ANZ Grindlays.

24. On the other hand, the Id. DR relied on the order of the Id. CIT (A) and argued that the agreement do not mention specifically that the amounts have paid for the assessee's exclusive use in India.

25. Heard the arguments of both the parties and perused the material available on record.

26. The Memorandum of agreement with regard to payment of taxes as under:

MEMORANDUM

THIS MEMORANDUM RECORDS THE TERMS OF THE AGREEMENT FOR
CREDIT CARDS TECHNICAL AND MANAGERIAL SUPPORT SERVICES

BETWEEN: AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED [ANZ], the registered office of which is located at Level 6, 100 Queen Street, Melbourne, Victoria, 3000, Australia hereinafter referred to as the '1st Party'.

AND

ANZ GRINDLAYS BANK LIMITED [ANZGB] the registered office of which is located at Level 2, 100 Queen Street, Victoria 3000, Melbourne, Australia hereinafter referred to as the '2nd Party'.

WHICH WAS IN OPERATION DURING THE EXTENDED PERIOD 1ST APRIL 2000 TO 31ST JULY 2000.

THE REASONS FOR THE AGREEMENT:

A. That the parties had entered into an Agreement for a period of 12 months which expired on 31st March 2000, whereby the 2nd Party had availed of technical, managerial and consultancy services provided by the 1st Party for its Credit Cards business operations.

B. That upon the expiry of the above-mentioned period of 12 months, the parties had agreed to further extend the use of Credit Cards related support services for a further period of 4 months w.e.f. 1st April 2000 to 31st July 2000.

C. This Memorandum records and details the support services provided to the 2nd Party by the 1st Party during the extended four month period from 1st April 2000 to 31st July 2000.

1. CREDIT CARDS SUPPORT SERVICES PROVIDED BY THE 1ST PARTY TO THE 2ND PARTY:

The 1st Party had provided the following support services to the 2nd Party for its Credit Cards business operations:

1.1 Risk Management & Compliance-

The risk management compliance services which included monthly credit portfolio reviews, advice on fraud & collection matters, advice regarding portfolio improvement strategies, advice regarding the establishment of external debt collection agents, development of an operations manual, technological support for international cards operations, scorecard & policy development, design documentation of collection system.

1.2 International Cards Operations:-

The international cards operations services comprised the providing of consultancy for delivery of card operation services, support to resolve operational issues, consistency of processes, cost reduction, coordination of projects, the proposed centralized processing of charge-backs and voucher processing.

1.3 International Cards Marketing:-

The international cards marketing services comprised of product development and marketing initiatives, analysis & planning, promotion and operational support, study and feasibility of new markets, strategic management and business development.

1.4 Management Analysis:-

Management analysis services included strategic and financial analysis, management of the production of monthly performance reports, analysis of key Management Information System, preparation of business plan, operating plan and forecast, providing assistance with accounting advice, budgeting and forecasting support, assistance with service transfer pricing information requirements and Global Software Support Management.

1.5 Partnership 'Business System Management':

Partnership Business System management services comprised of providing operations and technological support for the Credit Cards business which included implementation of Cards Software Support System, CDM/CTA/TRIAD implementation, application, project support and interlink release. Further, software support included:

1.5.1: Vision Plus Development, is a software support related to the Cards business.

1.5.2: Information Technology (IT) Software Solutions services included Y2k work for Vision Software and related IT solutions.

1.5.3: Information Technology (IT) service delivery included services - processing core software platforms for Vision Plus, interlink support, which involved mainframe processing and project resources.

1.5.4: Mainframes Based Systems: The 2nd Party had access to and use of the operations and technology support services through the Mainframe systems situated at Melbourne. This included access to Global Server and Desktop support, Cards mainframe, Swift mainframe, CDM/CTA (Credit Cards Assessment and collections modules), AS400 Support, Unix Support, and technical support services for Y2K and other projects.

2. CONSIDERATION

The 1st Party has raised challan for the credit cards support services including technical and managerial services provided by it to the 2nd Party. These challan alongwith details of payments made by the 2nd Party thereunder, are annexed herewith in the Schedule attached to this Memorandum.

2.2 The 2nd Party has deducted taxes at source in accordance with Art. 12 of the Indo-Australian Double Tax Avoidance Treaty @ 15% on the abovementioned amount,

and remitted taxes to the Indian Government, as per the tax laws prevailing in the country.

2.3 The telegraphic transfer buying rate of State Bank of India on the specified date on which tax is required to be deducted at source was used as the exchange rate for conversion of Australian Dollars into Indian Rupees.

27. We have gone through the notes attached to and forming part of the computation of income for the year ended 31 March 2001 which is as under:

1) The name of ANZ Grind lays Bank Limited has been changed to Standard Chartered Grind lays Bank Limited effective 23 September 2000.

2) (i) During the Financial year 1.4.99 to 31.3.2000 the Bank had made the following payments for obtaining technical services for its Indian operations from ANZ Banking Group for access and use of :

(a) Commercial Banking System for its Indian operations- Rs.304,353,333 Original challans evidencing payment of withholding tax of Rs.4,56,53,000 along with interest under section 201(1A) of Rs.44,99,000 is attached as Annexure A-1.

(b) Operation and Technology services for its Indian Operations- Rs.75,113,333 Original challans evidencing payment of withholding tax of Rs.1,12,67,000 along with interest under section 201(1A) of Rs.11,36,000 is attached as Annexure A-2.

(c) Cards technology services for its Indian operations- Rs.134,033,333 Original challans evidencing payment of withholding tax of Rs.2,01,05,000 along with interest under section 201 (1A) of Rs.14,88,000 is attached as Annexure A-3.

The Bank had duly deducted taxes at source on the payments in accordance with Article 11 of Indo-Australian Double Tax Treaty and paid interest under sec. 201(1A) and made payment to the Government on 31st May 2000. Since such taxes have been paid in the current accounting period, the above expenses are deductible as business expenditure from the Profits and Gains of Business in accordance with Proviso to Section 40(a)(i).

(i) Original challans evidencing payment of withholding taxes are attached.

(ii) Report of External Auditors - KPMG certifying the payments made for availing of technical services are attached.

(ii) For the period 1.4.2000 to 31.7.2000 the Bank continued to avail of the technical services from ANZ Banking Group Ltd. of:

(a) Commercial Banking System (CBS) for its Indian operations

(b) Operation and Technology services for its Indian operations

(c) Cards Technology services for its Indian operations

For which payment of Rs. 16,48,46,668 was made during the year.

The Bank has duly paid withholding taxes to the Indian Govt. in accordance with Article 11 of the Indo-Australian Double Tax Treaty within prescribed time. Since the taxes were paid in this financial year the above sum is deductible as business expenditure from Profits and Gains of business in accordance with the Proviso to sec.40(a)(i).

The details are as follows-

(i) Withholding tax paid in the month of April 2000 is Rs.68,38,000 alongwith interest u/s.201 (1A) of Rs.103,000- Annexure IV.

(ii) Withholding tax paid on June 6, 2000 is Rs.67,98,000 - Annexure V.

(iii) Withholding tax paid on July 6, 2000 is Rs. 70,81,000 - Annexure VI.

(iv) Withholding tax paid on August 5, 2000 is Rs.40,10,000 - Annexure VII.

(v) Original challans evidencing payments of withholding taxes are attached.

(vi) Report of External Auditors- KPMG Certifying the above payments made for availing of the said 'technical services' are attached.

3) The reversal of excess provisions in respect of the following are not taxable, since the said provisions were added back to the taxable income in the year of creation of such provisions. Accordingly, the same are not taxable on reversal /write back during the year:

(a) Excess provision for bad & doubtful debts written back Rs.124,787,880

- (b) Reversal of interest tax provision Rs. 17,000,000
- (c) Reversal of excess general provision for standard assets
Rs. 11,014,750
- (d) Reversal of excess provision for other operating losses
Rs. 94,442,913

4) (i) In March/April 1992, the Bank purchased from Mr. L.R. Gupta & family (LRG) 9% NHPC (Tax free) bonds of Face Value Rs.16.16 crores (in three transactions of FV Rs.4.50 crore, Rs.2.58 crore & Rs.9.06 crore). The interest warrants were not delivered except for the coupon date 31/3/92 in respect of FV Rs.4.50 crore & Rs.9.06 crore bonds. All the bonds were maturing on 11 December 1997.

(ii) In June/ July 1992, the bonds were submitted for registration to NHPC. While the bonds with FV of Rs.4.5 crore and Rs.2.58 crore were registered in the Bank's name, the bonds of FV Rs.9.06 crore were not registered due to suspected involvement of a Notified Party under the Special Court (TORTS) Act, 1992.

(iii) Having exhausted all avenues, the Bank filed three civil suits in Delhi High Court for recovery of interest warrants on all bonds and in Company Law Board for registration of bonds of FV Rs.9.06 crore. The suit filed with CLB was later transferred to Special Court in Mumbai.

(iv) In September 1992, LRG encashed interest warrants of Rs.0.73 crore in relation to interest on bonds of FV Rs.16.16 crores. The Bank, therefore, brought a Court injunction to prevent further encashment of interest.

28. The audit report to management of Australia and New Zealand Banking Group Limited reported as under:***Scope***

We have audited the schedule charges of Operations and Technology Support Services (Operation and Technology), **Credit Cards Support Services (Credit Cards)** and Access and Use of the Commercial Banking System (CBS) for the Indian Branch of ANZ Grindlays Bank Limited (the Schedule) in respect of the services provided by the Australia and New Zealand Banking Group (the Company) for the period from 1 April 1999 to 31 March 2000. The Company's management are responsible for the Schedule and have determined that the accounting policies used are appropriate to the needs of management. We have conducted an independent audit of the Schedule in order to express an opinion to management on its preparation and presentation. No opinion is expressed as to whether the accounting policies used are appropriate to the needs of management.

Our audit has been conducted in accordance with Australian Auditing Standards. Our procedures included examination, on a test basis, of evidence supporting the amounts and other disclosures in the Schedule. These procedures have been undertaken to form an opinion whether, in all material respects, the attached Schedule is prepared in accordance with generally accepted accounting principles, the charges relate to production support, recovery from system failures, troubleshooting, problem investigation, user assistance and right to use the

system, and have been incurred on behalf of the Indian branch of ANZ Grindlays Bank Limited.

The audit opinion expressed in this report has been formed on the above basis.

Audit opinion

In our opinion, the attached Schedule presents fairly, in accordance with the generally accepted accounting principles, charges which relate to production support, recovery from system failures, troubleshooting, problem investigation, user assistance, right to use the system software and services provided in respect of Credit Cards, CBS and other Operation and Technology support, and have been incurred on behalf of the Indian branch of ANZ Grindlays Bank Limited for the period from 1 April 1999 to 31 March 2000.

Schedule of Charges for the Access and Use of the Commercial Banking System Allocated to the ANZ Grindlays Bank Limited - India Branch

For the year ended 31 March 2000

A\$

Charges for

- providing the access to and use of the CBS system for Indian banking operation for the year 1 April 1999 to 31 March 2000	6,800,000
- providing software maintenance and other technical support services for the use of the CBS system	4,063,000
TOTAL	<u>10,863,000</u>

The local currency allocation amount to INR302,567,139

Schedule of Operations and Technology Charges Allocated to the ANZ Grindlays Bank Limited -India Branch

For the year ended 31 March 2000

	A\$
Charges for	
- providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes'	77,000
-providing Operation and Technology support and access to and use of 'IT Service Delivery: AS400, Unix, etc'	976,000
- support services in the nature of 'IT Software Solutions (other than CBS Fail & Fix)'	102,000
- providing access to and use of 'Payment Services'	90,000
- providing 'Telecommunications and International' communication services	864,000
- providing the services of the central operation technology & information technology planning team	62,000
-providing access to and use of 'BTS: ANZLINK'	135,000
-providing the use of' ANZIB: MIDANZ Support & Maintenance'	31,000
- providing support to various ANZ software 'ANZIT Recon Support'	2,000
- Projects: Y2K	75,000
-providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes-Project TEP'	21,000
- providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes-Project Telephone Banking (excluding Capex)'	125,000
-providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes-Project MARS (excluding Capex)'	150,000
TOTAL	<u>2,710,000</u>

The local currency allocation amount to INR75,481,630

Schedule of Cards Charges Allocated to the ANZ Grindlays Bank Limited - India Branch

For the year ended 31 March 2000

A\$

Charges for

-IT Service Delivery: Mainframes	1,051,000
-providing consultancy and support services in connection with 'International Cards Operations'	938,000
- International Cards Marketing	1,157,000
- providing operations and technological support in connection to 'Partnership Relationship'	159,000
-providing support services related to 'Vision Plus Project Development,' a credit cards software	535,000
- IT Software Solutions	800,000
-providing processing services through 'IT Service Delivery,' in connection with the above mentioned softwares	238,000
TOTAL	<u>4,878,000</u>

The local currency allocation amount to INR135,866,934

Independent audit report to management of Australia and New Zealand Banking Group Limited

Scope

We have audited the schedule of charges of Operations and Technology Support Services (Operation and Technology), **Credit Cards** Support Services (Credit Cards) and Access to and Use of The Commercial Banking System (CBS) for the Indian Branch of ANZ Grindlays Bank Limited (the Schedule) in respect of the services provided by the Australia and New Zealand Banking Group (the Company) for the period from 1 April 2000 to 31 July 2000. The Company's management are responsible for the Schedule and have determined that the accounting policies used are appropriate to the needs of management. We have conducted an independent audit of the Schedule in order to express an opinion to management on its preparation and presentation. No opinion is expressed as to whether the accounting policies used are appropriate to the needs of management.

Our audit has been conducted in accordance with Australian Auditing Standards. Our procedures included examination, on a test basis, of evidence supporting the amounts and other disclosures in the Schedule. These procedures have been undertaken to form an opinion whether, in all material respects, the attached Schedule is prepared in accordance with generally accepted accounting principles, the charges relate to production support, recovery from system failures, troubleshooting, problem investigation, user assistance and right to use the

system, and have been incurred on behalf of the Indian branch of ANZ Grindlays Bank Limited.

The audit opinion expressed in this report has been formed on the above basis.

Audit opinion

In our opinion, the attached Schedule presents fairly, in accordance with the generally accepted accounting principles, charges which relate to production support, recovery from system failures, troubleshooting, problem investigation, user assistance, right to use the system software and services provided in respect of Credit Cards, CBS and other Operation and Technology support, and have been incurred on behalf of the Indian branch of ANZ Grindlays Bank Limited for the period from 1 April 2000 to 31 July 2000.

Michelle Somerville

Partner

Place: Melbourne

Date:

Schedule of Charges for the Access and Use of the Commercial Banking System Allocated to the ANZ Grindlays Bank Limited - India Branch

For the four months ended 31 July 2000

A\$

Charges for

- providing the access to and use of the CBS system for Indian banking operations for the four months to 31 July 2000 1,962,000

- providing software maintenance and other technical support services for the use of the CBS system 1,551,000

TOTAL 3,512,000

The local currency allocation amount to INR91,601,740.

Schedule of Operations and Technology Charges Allocated to the ANZ Grindlays Bank Limited -India Branch

For the four months ended 31 July 2000

	A\$
Charges for	
- providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes'	(8,000)
-providing Operation and Technology support and access to and use of 'IT Service Delivery: AS400, Unix, etc'	454,000
- support services in the nature of 'IT Software Solutions (other than CBS Fail & Fix)'	26,000
- providing access to and use of 'Payment Services'	40,000
- providing 'Telecommunications and International' communication services	143,000
- providing the services of the central operation technology & information technology planning team	41,000
-providing access to and use of 'BTS: ANZLINK'	68,0000
-providing the use of' ANZIB: MIDANZ Support & Maintenance'	0
- providing support to various ANZ software 'ANZIT Recon Support'	1,000
- Projects: Y2K	31,000
-providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes-Project TEP'	(126,000)
- providing Operation and Technology support and access to and use of 'IT Service Delivery: Mainframes-Project Telephone Banking (excluding Capex)'	75,000
TOTAL	<u>745,000</u>

The local currency allocation amount to INR19,431,463.

Schedule of Cards Charges Allocated to the ANZ Grindlays Bank Limited -India Branch

For the four months ended 31 July 2000

A\$

Charges for

-IT Service Delivery: Mainframes	386,000
-providing consultancy and support services in connection with 'International Cards Operations'	344,000
- International Cards Marketing	464,000
- providing operations and technological support in connection to 'Partnership Relationship'	24,000
-providing support services related to 'Vision Plus Project Development,' a credit cards software	270,000
- IT Software Solutions	456,000
-providing processing services through 'IT Service Delivery,' in connection with the above mentioned softwares	158,000
TOTAL	<u>2,102,000</u>

The local currency allocation amount to INR54,825,415.

29. On going through the above, we find that the expenses have been incurred for Indian Banking business.

30. Thus, on going through the Memorandum of agreement, tax report, notes to account and the details of the tax payment under Article 12 of the Indo-Australian Treaty and on going through the challans enclosed at 77 to 84 of the paper book, we hereby hold that the fees for access and user technology related to services for Credit

Cards Services is meant for the business of the assessee's in India and such expenses are allowable to be claimed by the assessee u/s 37(1).

31. The appeal of the assessee on this ground is allowed.

32. The similar issue is also involved in the appeal of the revenue. With regard to the appeal of the revenue for the similar expenses which have been deleted by the Id. CIT (A), we concur with the reasoning given by the Id. CIT (A) which has been duly mentioned above. Hence, the appeal of the revenue on this ground [Ground No. 1(d)] is hereby dismissed.

33. Ground No. 10 of the assessee deals with rectification of the computational errors for which we direct the revenue to dispose off the rectification application.

34. The consequential benefits of the order giving effect to the order of the ITAT be allowed to the assessee.

ITA No. 2995/Del/2008 (Revenue's Appeal)

35. In ITA No. 2995/Del/2008, following grounds have been raised by the revenue:

"1. On the facts and in circumstances of the case the learned CIT(A) has erred

(a) In deleting the expenses of Rs. 84,63,275/- incurred by various units outside India for mobilization of NRI deposits for the purpose of Assessee's business in India.

(b) In deleting the addition of Rs. 10,00,00,000/- on account of commission earned in by foreign branches of ANZ Grindlays Bank on their credit card

business overseas, where transactions were completed in India.

(c) In disallowing the expenditure of Rs. 69,93,427/- on the payments made to clubs.

(d) In restricting the disallowance to Rs. 30,15,52,101/- out of Rs. 68,10,18,767/- made after rejecting the deduction claimed u/s 37(1) of the IT Act, 1961 and without considering the facts that the amount has not been debited in books of accounts."

36. Ground No. 1(a): Disallowance of NRI expenses is dealt in the ground no. 1 of the assessee's appeal. Hence, we hereby hold that the ratio of the adjudication applies to the ground of the revenue.

37. Ground No. 1(b): Commission payment

The AO made estimated addition of Rs.10 crores on account of the commission earned on Credit Cards issued by the foreign branches and used in India. The relevant portion of the order of the Assessing Officer is as under:

"For the last five A.Ys., the assessee has been asked to give the details of commission received by the branches of ANZ Grindlays Bank abroad on the International Credit Cards issued by them, where the card holders had completed their transactions in India and the settlement of these transactions was done, using these cards in India. Whatever income arises in/from India to ANZ Grindlays Bank is to be taxed as income of its permanent establishment. The assessee however, did not furnish any details on this point as it has argued all along that the commission earned on the Credit Cards issued by foreign branches and used in India, is not taxable in the hands of Grindlays Bank in India. Since A. Y. 1996-97, it has been estimated that the commission income on this account was Rs. 10 crores, as the assessee gave no specific information. Accordingly, in this year also, the said income is estimated at Rs. 10 crores and the same is added to the returned income, for the reasons cited in detail in A.Y. 1998-99."

38. The Id. CIT (A) deleted the addition holding that the question of attributing income to the PE, under the DTAA, it has to be said that as per Article 7, only such income can be brought to tax as can be attributed to its assets and activities in India. In India its income has been earned as commission received by it for honoring the transaction in India on behalf of the foreign branch. This commission is earned from its activity as an Acquiring bank and has to be taxed in the country where the PE is situated. The income earned by the foreign bank from its client outside India on the credit given by it there and recovered there, cannot be said to have arisen in India. But the commission received from the merchant in India can be said to have arisen in India, as mentioned by the Assessing Officer, and this has been retained by the Acquiring bank, while making the acquiring bank would have been received by the foreign bank, But since the Indian branch, being a PE played a role, this income will be taxed in India in the hands of the Indian branch, being attributable to its activities in India. But, this in fact is the income which has already been included by the Indian branch in its 'Commission Income' in its P&L Account and offered for tax in India. Hence, no other income can be brought to tax in India. Thus, while the Assessing Officer is right that the income arising in India from transactions in India by using credit cards of foreign branches should be taxed in India, this income can only be the commission income received by the Indian branch and such commission income already stands included in the hands of the Indian branch acting as an Acquiring bank. The income to the foreign branch from the credit given to its card holders outside India cannot be taxed in the hands of the Indian branch since it has not arisen in India

and also it cannot be attributed to the assets and activities of the Indian branch, as is required by Article 7 of the DTAA.

39. The matter also stands covered by the order of the ITAT in ITA No. 1345/Del/2006 for the assessment year 1997-98. The relevant portion of the order is as under:

"At the outset, we find that the issue is already covered in favour of assessee in its own case in ITA No. 4988/Del/2003 for the AY 1996-97. The relevant extract of the order is reproduced below:-

"We have considered the rival submissions. We are in agreement with the finding of the Learned CIT(A). Where the-foreign branch has issued credit card and even if the transaction takes place in India, the credit is given to the customer outside India and the debt has also arisen outside India. The merchant shipment in India may receive the payment but the merchant shipments do not incur any debt. They merely receive charges for the goods sold or services rendered. However, the charges are received by the foreign branch for providing credit to their card holders outside India. The amount payable by the card holders who have acquired the credit card from branches outside India incur the debt outside India. Therefore, the fees in respect of such transaction are not taxable in India. We, therefore, uphold the deletion of addition of Rs. 10 crores."

40. Respectfully following the order of the above order in the own case of the assessee, we dismiss the ground of appeal filed by the Revenue.

41. Ground No. 1(c) deals with the club expenses. The club expenses have been allowed as allowable business expenses by the ITAT from the assessment years 1992-93 to 1998-99. Since, the AO could not bring anything on record contrary to the

established facts of the earlier years, we hereby decline to interfere with the order of the Ld. CIT(A).

42. Ground No. 1(d) stand dealt along with Ground No3 of the appeal of the assessee. With regard to the appeal of the revenue for the similar expenses which have been deleted by the Id. CIT (A), we concur with the reasoning given by the Id. CIT (A) which has been duly mentioned above while dealing with the similar grounds. Hence, the appeal of the revenue on this ground is hereby dismissed.

43. In the result, the appeal of the assessee is allowed and the appeal of the revenue is dismissed
Order Pronounced in the Open Court on 26/10/2020.

Sd/-

(Sushma Chowla)
Vice President

Dated: 26/10/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR