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EY Tax Alert

Supreme Court rules on quantum limitation for non-resident's HO expenses exclusively incurred for Indian operations

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Executive summary

This Tax Alert summarizes a recent decision of the Supreme Court[1] (SC) (two-judge bench) in the case of DCIT (IT) v. M/s American Express Bank Ltd.[2] (Taxpayer), wherein the SC examined whether head office (HO) expenditure incurred by a non-resident (NR) taxpayer exclusively for its Indian branch is subject to the statutory ceiling prescribed under Section (S.) 44C of the Income-tax Act, 1961[3] (ITA).

The Taxpayer contended that ceiling limit of 5% of "Adjusted Total Income" (ATI) under S.44C applies only to common or shared HO expenditure allocable on proportionate basis to Indian operations, and not to expenses incurred wholly and exclusively for Indian operations. On the other hand, the Tax Authority argued that once an expense qualifies as HO expenditure of an NR taxpayer, the statutory ceiling applies mandatorily, irrespective of whether the expenditure is common or exclusive. The Taxpayer's position was supported by earlier Bombay High Court (HC) ruling in the case of CIT v. Emirates Commercial Bank Ltd.[4] (Emirates Commercial Bank ruling).

[1] The Apex Court of India
[2] **[2025] 181 taxmann.com 433 (SC)**
[3] Income-tax Act 1961 r.w. Income-tax Rules, 1962
[4] [2003] (262 ITR 55) (Bom)

Overruling the Emirates Commercial Bank ruling, the SC ruled in favor of the Tax Authority and held that S.44C applies equally to both common and exclusive HO expenditure. Applying the principle of strict interpretation and mischief rule, the SC held that the language of S.44C is clear, plain and unambiguous, and does not carve out any exception for expenditure incurred exclusively for Indian branches. The SC rejected the distinction sought to be made by the Taxpayer between "common" and "exclusive" HO expenditure, holding that exclusivity is merely a species of attribution and therefore, falls within the scope of S.44C. It also held that the Taxpayer's view was contrary to the legislative intent of introducing quantum limitation on HO expenses to address the concerns of administrative difficulty of verification of HO expenses and inflated claims by some foreign entities. It also held that the earlier two judge bench SC ruling[5] which dismissed Tax Authority's appeal against Emirates Commercial Bank ruling did not lay down the principle of law that exclusive expenditure cannot be brought within the ambit of quantum limitation.

However, the SC rejected the Tax Authority's broader interpretation of definition of HO expenditure and held that S.44C is confined to HO expenditure in the nature of Executive General and Administrative (EGA) expenditure as specifically enumerated in the definition and does not extend to all expenditure that may generally be characterized as EGA in nature. Accordingly, the SC remanded the matter back to the Income Tax Appellate Tribunal (Tribunal) for fresh factual examination whether the disputed expenditure satisfy the tripartite tests of (a) incurred outside India (b) falling within broad genus of EGA and (c) also falling within specific nature enumerated in the definition.

Background

- Non-resident (NR) taxpayers carrying on business activities in India through a branch or project office or any form of business connection in India or permanent establishment (PE) as per Double Taxation Avoidance Agreement (DTAA or treaty) are generally subject to same computation rules for computing business income as residents (except if they opt for or are covered by presumptive taxation provisions[6]). However, in terms of domestic tax law provisions of ITL[7] 1961 or applicable treaty, the computation is restricted to income or expense which is attributable to operations in India.
- One of the items of expense allowable as deduction is HO expenditure by way of EGA expenditure incurred outside India which is attributable to business or profession of the taxpayer in India. But Tax Authority found it extremely difficult to scrutinize and verify such claims, particularly in the absence of HO's account books which are kept outside India. The Tax Authority also found that foreign companies operating through branches in India sometimes tried to reduce the incidence of tax in India by inflating their claims in respect of HO expenses.
- To address these concerns the Finance Act, 1976 introduced a special provision by way of Section (S.) 44C w.e.f. 1 June 1976 which put a quantum limitation on the deductibility of HO expenses. S.44C provides for definition of HO expenses and quantum limitation for deduction of HO expenses up to ceiling limit of 5% of the ATI[8] . Thus, the deduction for HO expenses is available up to lower of attributable expenditure to Indian operations or 5% of ATI. It overrides other provisions relating to computation of business income.
- The HO expenditure is defined to mean EGA expenditure incurred by the taxpayer outside India, including expenditure incurred in respect of –

  a) rent, rates, taxes, repairs or insurance of any premises outside India used for the purposes of the business or profession;

  b) salary, wages, annuity, pension, fees, bonus, commission, gratuity, perquisites or profits in lieu of or in addition to salary, whether paid or allowed to any employee or other person employed in, or managing the affairs of, any office outside India;

  c) travelling by any employee or other person employed in, or managing the affairs of, any office outside India; and

  d) such other matters connected with EGA as may be prescribed by rules[9]
- However, different types of controversies arose on interpretation of the quantum limitation. In the case of Rupenjuli Tea Co. Ltd. v. CIT[10] (Rupenjuli ruling), the Calcutta HC held that the quantum restriction does not apply where the entire business operations of NR taxpayer are located in India and the HO outside India merely performed statutory functions. This was followed by Delhi HC in the case of DIT v. Ravva Oil (Singapore) (P.) Ltd[11] (Ravya Oil ruling) where facts were similar. In the case of CIT v. Deutsche Bank A.G.[12] (Deutsche Bank ruling), the Bombay HC held that where one of the quantum limits provided in the section cannot be applied, the computation fails and hence, the quantum limitation cannot apply[13].
- The controversy in the present case was whether the quantum limitation applies even for HO expenses where the NR taxpayer is able to clearly

[5] Civil Appeal No. 1527 of 2006
[6] Under presumptive taxation, income is normatively computed at specified percentage of specified receipts to avoid the controversies of itemized deductions.
[7] Income-tax Act 1961 r.w. Income-tax Rules, 1962
[8] Adjusted total income refers to the total income computed in accordance with the ITL, subject to certain specified adjustments.
[9] No such matters have been prescribed by rules so far.
[10] [1990](186 ITR 301)(Cal)
[11] [2008] (300 ITR 53) (Delhi)
[12] [2006] (284 ITR 463) (Bom)
[13] The case pertained to tax year 1983-84 during which extant provision had an additional upper limit of average HO expenditure incurred during tax years 1973-74, 1974-75 and 1975-76 but this limb could not be applied to taxpayer since it first started its operations in India in 1980.

identify and substantiate that the expenditure is incurred wholly and exclusively for the Indian operations. The Bombay HC in the case of Emirates Commercial Bank ruling[14], held that the restriction applies only to expenses of a common or shared nature and where the expenditure is incurred exclusively for the Indian branch office, such expenses fall outside the scope of the restriction and are allowable in full.

- The Tax Authority did not file appeal before the SC against Rupenjuli ruling but filed appeals against Deutsche Bank[15], Ravya Oil[16] and Emirates Commercial Bank[17] rulings. A two-judge bench of the SC dismissed the appeals through a common order dated 26 August 2008. The dismissal was primarily on the ground that by not filing appeal against Rupenjuli ruling[18], the Tax Authority had impliedly accepted the ratio of that ruling and hence, it cannot be permitted to take a different view in other taxpayers' cases without just cause[19].
- The controversy in Emirates Commercial Bank ruling again travelled to the SC in the cases of two taxpayers[20] involving an identical substantial question of law. In both cases, the Bombay HC followed Emirates Commercial Bank ruling to hold that HO expense incurred exclusively for Indian branch is not subject to quantum limitation of S.44C. For the purposes of this alert, the facts relating to American Express Bank Ltd., being the lead case, are considered.

Facts:

- The Taxpayer is a NR banking company engaged in providing banking and related services across various countries, carrying on its operations in India through a branch office with HO in USA.
- For Tax Year (TY) 1997-98, the taxpayer filed return of income claiming deduction of HO expense of INR 63.91M towards solicitation of deposits for Indian branch from non-resident Indians, and INR 135M exclusively for Indian branch office[21]. The Taxpayer did not apply the ceiling limit of 5% of ATI and claimed the deduction in full on the ground that the entire expenditure was incurred exclusively for the Indian branch.
- The Tax Authority, however, applied the ceiling limit of 5% by contending that the quantum limitation is mandatory and applies to HO expenses irrespective of whether expenses are common in nature or incurred specifically for the Indian branch. The First Appellate Authority upheld the Tax Authority's view.
- However, the Mumbai Tribunal and the Bombay HC allowed the Taxpayer's claim, holding that the restriction is inapplicable where the expenditure is incurred exclusively for the Indian branch, relying on Emirates Commercial Bank ruling.
- Being aggrieved, the Tax Authority preferred further appeal before the SC.

Issue before SC:

Whether HO expense incurred by NR taxpayer exclusively for its Indian branches falls within the ambit of S.44C, thereby limiting the permissible deduction to the statutory ceiling specified therein?

The SC considered the illustration provided by the Taxpayer. If a general counsel is appointed by HO solely to handle Indian matters, it constitutes exclusive expenditure. However, if a general counsel is appointed by HO to handle matters in branches across the globe (including India), it constitutes common expenditure. While Tax Authority's view was the quantum limitation applied to both types of cases, the Taxpayer's view was it applied only to common expenditure and not to exclusive expenditure.

Taxpayer's contentions:

- The HO expenses incurred are wholly and exclusively for business of Indian branch and hence allowable as revenue deduction in full without any quantum limitation. Article 7(3) of the India-USA tax treaty permits deduction of expenses incurred for a permanent establishment in India, whether incurred in India or outside India, subject to the limitations under Indian domestic law which has no prohibition on allowability.
- The ceiling limit of 5% is applicable only to HO expenditure which is in the nature of common expenditure and only part of it is attributable to business operation in India. This is borne out by the express language of S.44C which requires that, the expense should be "attributable" to the business of NR taxpayer in India.
- The Memorandum to Finance Bill 1976 refers to HO expenses which are claimed on a proportionate basis. Thus, expenditure which is solely incurred for Indian operations is not subject to ceiling limit.
- In this the present case, the expense incurred by the NR taxpayer is not attributable to business in India but, it is exclusively incurred for the business in India. Reliance was placed on Bombay HC ruling in Emirates Commercial Bank Ltd. *(supra)* which recognized the distinction between "attributable" expenditure" and "exclusive" expenditure".

[14] [2003] (262 ITR 55)(Bom)
[15] Civil Appeal No. 1544 of 2006
[16] Civil Appeal No. 5822 of 2007
[17] Civil Appeal No. 1527 of 2006
[18] The Tax Authority could not prove that non-filing of appeal was not on account of smallness of the tax effect involved.
[19] Following SC ruling in the case of Berger Paints India Ltd. vs. CIT [2004] (266 ITR 99) (SC)
[20] American Express Bank Limited (Civil Appeal No. 8291 of 2015) and Oman International Bank Limited (Civil Appeal No. 4451 of 2016)
[21] In the case of other taxpayer viz. Oman International Bank Ltd, the HO expense incurred exclusively for Indian branch involved travelling expenses of HO employees to Indian branch for purposes like local advisory board meetings, training, internal audits staff meetings, etc. certification fees for identifying such exclusive expenditure

- The Emirates Commercial Bank ruling is approved by the SC through common judgement in Deutsche Bank, Ravya Oil and Emirates Commercial Bank.

Tax Authority's contentions:

- The ceiling of 5% is applicable once the taxpayer is a non-resident, and the deduction claimed relates to HO expenditure. In such case, it is mandatory for the taxpayer to restrict the deduction to the lower of the expenses attributable to Indian operations or 5% of the adjusted total income. Accordingly, even if expenses are verifiable and incurred exclusively for the Indian branch, the deduction will be subject to the statutory ceiling of 5%.
- The legislature, through the Finance Act, 1976, introduced this ceiling to address the practical difficulties faced by Tax Authority in verifying books and documentation maintained overseas as also inflated claims for deductions by some NR taxpayers. The provision replaces subjective, case-specific scrutiny with an objective statutory limit. Accordingly, a mandatory ceiling was introduced to reduce the evidentiary burden and prevent inflated deductions.
- The expenses incurred by the Taxpayer qualify as HO expenditure, hence will fall within the scope of the statutory restriction. The argument to exclude expenses which are specifically incurred for the Indian branch will defeat the legislative intent and revive the need of verification which was sought to be prevented by introducing the quantum limitation.
- The Bombay HC ruling in Emirates Commercial Bank's case is distinguishable. In that case, the HC was dealing with case where the NR taxpayer's HO had actually recovered the relevant expenditure from the Indian branch by issuing specific debit notes, which is not the fact in the present case. Furthermore, the Bombay HC ruling does not lay down the correct law, as it introduces an artificial distinction between "exclusive" and "common" expenses, which is absent in plain language.
- Similarly, the Calcutta HC in Rupenjuli's case is distinguishable. In that case, the NR taxpayer carried on its entire business operations solely in India and foreign HO was maintained for statutory compliance purpose. Hence, it was held that concept of allocation is irrelevant. The ratio of the Calcutta HC ruling is not applicable where NR taxpayer carries on business both outside and within India.

SC ruling:

The SC ruled in favor of Tax Authority and held that the quantum limitation of S.44C applies to both common and exclusive HO expenditure. The principles for interpretation of taxing statutes and analysis adopted by SC are summarized below.

Principles for interpretation of taxing statutes:

Drawing references from *Principles of Statutory Interpretation* by Justice G. P. Singh and multiple SC rulings[22], the SC considered the following principles of interpretation as relevant to the present issue:

- Taxation statutes require strict interpretation.
- Where the words are plain and unambiguous, the Court is bound to give effect to their plain meaning.
- The determination of whether language is "plain and unambiguous"' is not a mechanical exercise, and it necessitates interpreting words within their specific context rather than in isolation.
- The legislative intent is primarily to be gathered from the specific words used by the legislature. Reference to the object and purpose becomes crucial in those situations where the language is ambiguous and capable of multiple constructions.
- Under ordinary circumstances, it is impermissible for the Court to add or read words into the statute, especially when the language is plain and unambiguous, on the notion that such words will appear to better serve the legislative object or purpose.

Analysis of S.44C to conclude that it covers both common and exclusive HO expenditure:

- S.44C can be divided into two separate, but interconnected parts. The first is operative or substantial provision, which outlines the conditions for applying to the section and details the computation mechanism. The second is definitional provision which clarifies the scope of HO expenditure. Once an expense falls within the definition of HO expenditure, the operative framework of S.44C comes into effect.
- The operative part lays down specific conditions like applicability to NR taxpayers, computation of business income, ceiling limit etc. It overrides the general provisions relating to computation of business income. Thus, once the twin conditions of taxpayer being NR and expenditure being HO expenditure are met, S.44C will apply regardless of other provisions allowing full deduction. This means that even if such expenditure is fully allowable under general provision, the quantum of deduction is restricted to ceiling limit of 5% of ATI.
- The meaning assigned to HO expenditure in second part of S.44C requires close examination. On such examination, it does not appear that legislature intended to cover only common HO expenditure within the definition. The definition is unambiguous in stating that for an expenditure to be considered as HO expenditure, two conditions are required to be satisfied viz. (i) the expenditure should be incurred outside India, and (ii) the expenditure must be in the nature of EGA expenditure, including those specified in four clauses of S.44C. Accordingly, the provision applies irrespective of

[22] Illustratively, CIT, Madras v. Kasturi & Sons Ltd. (1999) 3 SCC 346, State of Uttar Pradesh & Ors v. Dr. Vijay Anand Maharaj (1962) SCC OnLine SC 12, M.V. Joshi v. M.U. Shimpi & Anr, (1961) SCC OnLine SC 56 & Godrej and Boyce Manufacturing Company Limited v. DCIT, Mumbai, (2017) 7 SCC 421, CIT, Kerala v. Tara Agencies, (2007) 6 SCC 429

whether such expenses are of a common nature or incurred exclusively for the Indian branch.

- The scope of the provision is clear, explicit and unambiguous. Reading a requirement of "common expenses" into the statute would amount to supplying words not used by the statue, which is not permissible when the plain language is clear and unambiguous. To support the Taxpayer's view, one may be required to add words like "common and shared" EGA or "except where such expenditure is incurred exclusively for Indian branch" in the provision which is clearly impermissible.

Distinguishing Rupenjuli and Deutsche Bank Rulings:

- In Rupenjuli ruling, the Calcutta HC held that where the entire business of the non-resident taxpayer is carried on exclusively in India and foreign HO is maintained merely for statutory compliance, the statutory ceiling will not be applicable, as there will be no question of attribution or allocation of expenditure. The decisive factor in decision was the absence of any business operations carried on outside India by the NR taxpayer, including at its HO. Similar is the ratio in Ravya Oil ruling.
- The Deutsche Bank ruling was on the point that where any of the limbs of S.44C become unworkable, the quantum limit cannot apply due to failure of computational mechanism[23].
- Both rulings are distinguishable in present case where the Taxpayer carries on business both outside and within India and it is not a case of unworkability of any of the limbs of ceiling limits.

Overruling of Bombay HC Emirates Commercial Bank Ruling:

- In Emirates Commercial Bank ruling, the Bombay HC drew a distinction between "common" and "exclusive" expenditure. However, such a distinction is not supported by the meaning attached to "head office expenditure".
- A plain reading of the provision does not indicate any legislative intent to restrict its applicability only to common HO expenses while excluding expenses incurred exclusively for the Indian operations. The provision is broad and unqualified, without carving out any exception for exclusive expenditure.
- The Taxpayer's reliance on use of term "attributable" in the definition to support coverage of only common HO expense which requires allocation is misplaced. "Attributability" is a genus of which "exclusivity" is merely a species. In fact, exclusivity forms the strongest form of attribution. Expenditure incurred wholly and exclusively for Indian operations is, by its very nature, attributable to the business in India.
- If the legislature intended to confine the applicability of the ceiling limits only to common or shared expenses, it would have employed such specific language. Thus, reading such words into the provision will amount to rewriting the statute, which is impermissible.
- Reference may be made to the Memorandum to the Finance Bill, 1976 and CBDT[24] Circular[25] to understand the mischief sought to be remedied and cannot be used to determine the meaning of provision. Even otherwise, these merely reinforce that the provision was introduced to curb inflated claim of expenses by certain NR taxpayers and do not support the taxpayer's contention to exclude exclusive expenses.
- While the Memorandum does refer to "proportion" of general HO expenses claimed by taxpayers, it was not employed to exclude exclusive expenditure but to highlight the mischief that some foreign entities arbitrarily inflated the proportion of HO expenses attributed to India. Thus, the legislative history does not support the Taxpayer's contention; rather it reinforces that plain and unambiguous meaning of the provision must be given full effect to remedy the mischief the legislature sought to address.
- Article 7(3) of the India-USA tax treaty permits deduction of expenses incurred for a permanent establishment in India, but subject to the limitations under Indian domestic law. Accordingly, such deduction will be subject to the ceiling limit of 5% and does not support the exclusion of exclusive expenses.
- It is true that the SC vide its common judgement dated 26 August 2008 dismissed Tax Authority's appeals against Deutsche Bank, Ravya Oil and Emirates Commercial Bank rulings on the basis that Tax Authority did not appeal against Rupenjuli ruling. But the facts and reasoning governing Rupenjali and Emirates Commercial Bank are starkly different. The Bombay HC in Emirates Commercial Bank did not refer to Rupenjuli ruling. Consequently, it could in no manner be stated that SC had accepted the principle of law that exclusive expenditure cannot be brought within the ambit of HO expenditure. The SC ruling dated 26 August 2008 does not operate as binding precedent on the principle of law on non-applicability of S.44C to exclusive expenditure.

Rejecting Tax Authority's contention of broad scope of HO expenditure definition:

- S.44C defines HO expense to mean EGA expenditure incurred outside India and includes specified list of expenses under its four limbs. The fourth limb covers any other matter connected with EGA as may be prescribed by rules.
- The Tax Authority contended that the definition is very broad to include any EGA expenditure and expenses covered by four limbs are merely illustrative. However, the SC rejected this contention.
- The SC held that EGA represents broad genus whereas specific items enumerated in the four limbs

[23] This is based on well settled ratio of SC ruling in CIT v. B. C. Srinivasa Setty [1981] (128 ITR 294)(SC)

[24] Central Board of Direct Taxes which is apex administrative direct tax body in India

[25] No. 202 dated 05 July 1976

constitute distinct species. The Tax Authority's contention is impermissible since it ignores the fourth limb. It is a clear statutory indicator that the definition only includes EGA expenditure which are of the kind covered in the four limbs. Any other view will render the fourth limb otiose and redundant.

- Therefore, HO expenses cover only those expenses which satisfy the tripartite test of (a) incurred outside India (b) falling within broad genus of EGA and (c) also falling within specific nature enumerated in four limbs.
- In support of restrictive interpretation, the SC relied on the Memorandum regarding delegated legislation forming part of the Notes on Clauses to the Finance Bill, 1976 which clarified that the definition enumerates expressly, as far as practicable, all the items of HO expenditure and that the power to specify other items of HO expenditure is being taken only by way of abundant caution to cover items of such expenditure which could not be easily visualized then.

Remand back to Tribunal for factual determination:

- Although the SC decided the pivotal issue of coverage of exclusive HO expenditure, it held that lower authorities had not done granular factual verification whether the impugned expense fell within the scope of HO expenditure as enumerated in the four limbs. Hence, it remanded the matters back to the Tribunal with a direction to examine the expenses afresh in the light of legal principles enunciated by the SC, more particularly to verify whether the disputed expenditure satisfy the tripartite tests.

Comments

The present SC ruling is a landmark ruling on exposition on quantitative limitation for HO expenses for NR taxpayers. Being *pari-materia*, it may also apply to comparable provision of new Income tax Act 2025 which will substitute the existing ITL 1961 w.e.f. 1 April 2026.

The core controversy addressed by the SC was whether EGA expenses incurred by HO exclusively for Indian branch is covered within the quantum limitation which the SC held against the Taxpayer by ruling that even such exclusive expenditure is covered. The SC applied the rules of interpretation of taxing statutes (in particular, Heydon's mischief rule), considered the object and purpose of introduction of quantum limitation, the textual contours of the provision and nature of additions required to the provision to support the Taxpayer's interpretation while concluding in favour of Tax Authority's interpretation.

In the process, the SC disapproved of Bombay HC ruling in Emirates Commercial Bank which took a restrictive view of scope of quantum limitation to cover only common HO expenses. The SC also disagreed with Taxpayer's contention that approval of Emirates Commercial Bank ruling by earlier two-judge Bench of SC was a binding precedent on the principle of law that exclusive expenditure cannot be brought within the ambit of quantum limitation. It may be noted that the earlier SC ruling was a two-judge Bench ruling and the present ruling is also a two-judge Bench ruling. This aspect might raise issue whether the SC in the present case more appropriately ought to have referred the issue to a larger bench.

It may be important to note that the SC distinguished the Rupenjuli, Ravya Oil and Deutsche Bank rulings as involving different fact patterns of either NR's business operations confined to India or unworkability of computational limbs. The ratio of those rulings on non-applicability of quantum limitation to HO expenses may be relevant in similar situations.

Despite concluding against the taxpayer on the coverage of exclusive HO expenditure within the quantum limitation, the SC rejected the broader interpretation of Tax Authority that the definition of HO expenditure covers any EGA expenditure and not necessarily those expressly enumerated in the definition. The SC held that HO expenditure covers only those EGA expenses which satisfy the tripartite tests of (a) incurred outside India (b) falling within broad genus of EGA and (c) also falling within specific nature enumerated in the definition.

In this background, the scope of inquiry in pending cases (including the matters remanded to Tribunal by the SC in the present ruling) and/or in future cases is likely to be distinction between EGA and non-EGA expenditure and within EGA, distinction between those falling within the specific nature enumerated in the definition and those falling outside. Such exercise is likely to be highly fact specific.

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