

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NO. 5502/MUM/2016 : A.Y : 2010-11

DCIT(IT)-4(3)(1),
Mumbai (Appellant)

Vs. M/s. UBS AG
Level 3, 2 North Avenue,
Maker Maxity, Bandra Kurla
Complex, Bandra (E), Mumbai.
PAN : AAACU5003G (Respondent)

Appellant by : Shri Samuel Darse
Respondent by : Shri Arvind Sonde

Date of Hearing : 09/08/2018

Date of Pronouncement : 10/08/2018

ORDER

PER G.S. PANNU, AM :

The captioned appeal filed by the Revenue pertaining to Assessment Year 2010-11 is directed against an order passed by CIT(A)-58, Mumbai dated 26.05.2016, which in turn arises out of an order passed by the Assessing Officer under Section 144C(3) r.w.s. 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 26.05.2014.

2. In this appeal, Revenue has raised the following Grounds of appeal :-

"1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in relying upon the order of the ITAT passed in the A.Y 2008-09, without

appreciating that the facts of A.Y. 2008-09 were not identical to the year under consideration, as the assessee has setup Indian branch of bank, after A.Y 2008-09. The Ld. CIT(A) failed to appreciate that during the year the assessee has also a branch in India (PE), engaged in the business of banking, which was relevant for determination of nature of income.

2. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding the income from securities as capital gain without appreciating that in view of force of attraction principle enshrined in Article 7(1) of DTAA with Switzerland, the income of assessee from trading in security as FII being similar to the investment activities carried by the branch of assessee in India, was also liable to be taxed as business income.*

3. *The Appellant prays that the order of the CIT(A) be set aside on the above ground(s) and of the Assessing Officer be restored.”*

3. It was a common point between the parties that the issues raised in the appeal by the Revenue are fully covered by the following precedents in assessee's own case for earlier assessment years :-

- i) ITA No. 1207/Mum/2013 & CO No. 69/Mum/2014 dated 17.04.2015
- ii) ITA No. 4525/Mum/2014 & CO No. 210/Mum/2015 dated 27.06.2016

So, however, in order to impart completeness to the order, the following discussion is relevant.

4. The respondent-assessee before us is a tax resident of Switzerland and is registered as a Foreign Institutional Investor (FII) in India with SEBI for the purpose of making investments in Indian securities. Assessee also carries on banking business in India through a branch based on a licence obtained from the RBI. Further, assessee is also engaged in rendering services to Indian

concerns whereby it has earned advisory fee and fee for technical services for such services. The substantive dispute relates to characterisation of income earned by the assessee from sale and purchase of securities in India. As per the assessee, such income was in the nature of Short Term Capital Gain and was not taxable in India on the strength of Article 13(6) of India-Switzerland Tax Treaty. On the contrary, the stand of the Assessing Officer was that the investment activities of the assessee as a FII in India yield business income and has to be seen alongwith the activity of banking being carried through a branch in India and, in that view of the matter, the gains earned by the assessee on sale and purchase of securities as a FII activity could be attributed to its Indian Branch as a Permanent Establishment (PE) in India. Therefore, as per the Assessing Officer, such income being attributable directly or indirectly to the PE would be taxable in India as 'business income' even as per the provisions of India-Switzerland Tax Treaty. This stand of the Assessing Officer was carried in appeal before the CIT(A), who has disagreed with the same by noting that the Tribunal in assessee's own case for Assessment Year 2008-09 (supra) held that the gain arising through transactions in debt securities was in the nature of capital gain and not a business income, as computed by the Assessing Officer. The CIT(A) also noted that for Assessment Year 2011-12 also, the Dispute Resolution Panel had decided the issue in favour of the assessee by placing reliance on the order of Tribunal for Assessment Year 2008-09 dated 17.04.2015 (supra) in the case of assessee. In this background, Revenue is in appeal before us.

5. Quite clearly, there are two facets to the dispute before us. Firstly, as regards the nature of gain from the transaction of securities; according to the Assessing Officer, it is a 'business income', whereas it has been held to

be 'Capital Gains' by the CIT(A). In this context, considering the precedents in assessee's own case for Assessment Years 2008-09 (supra) as well as 2009-10 (supra), it has to be held that income of a FII from sale and purchase of securities is liable to be taxed as 'Capital Gains'. The second facet of the dispute is the taxability of such income, which has been held to be non-taxable in India under Article 13(6) of the India-Switzerland Tax Treaty by the Tribunal in the aforestated precedents. The Tribunal, in Assessment Year 2009-10 (supra) held that banking branch of the assessee in India would not constitute a PE *qua* the aforesaid income. Thus, the aforesaid decisions of the Tribunal in assessee's own case, and which continue to hold the field as they have not been altered by any higher authority, fully cover the aforestated Grounds raised by the Revenue before us. Accordingly, we hereby affirm the decision of CIT(A), which is in line with the aforestated precedents in assessee's own case. Thus, the order of CIT(A) is hereby affirmed.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 10th August, 2018.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 10th August, 2018

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "L" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai