

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

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**IT(TP)A no.842/Mum./2016**  
(Assessment Year : 2011-12)

UBS AG  
Level 3, 2 North Avenue, Maker Maxity  
Bandra Kurla Complex, Bandra (East) ..... Appellant  
Mumbai 400 051 PAN – AAACU5003G

v/s

Dy. Commissioner of Income Tax  
International Taxation .....Respondent  
Circle-4(3)(1), Mumbai

**ITA no.1347/Mum./2016**  
(Assessment Year : 2011-12)

Dy. Commissioner of Income Tax  
International Taxation ..... Appellant  
Circle-4(3)(1), Mumbai

v/s

UBS AG  
Level 3, 2 North Avenue, Maker Maxity  
Bandra Kurla Complex, Bandra (East) .....Respondent  
Mumbai 400 051 PAN – AAACU5003G

Assessee by : Shri Dinesh Bafna a/w  
Ms. Chandni Shah and  
Shri Yogesh Malpani  
Revenue by : Ms. Vatsalaa Jha

Date of Hearing – 12/09/2022

Date of Order – 09/12/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present cross-appeals have been filed by the assessee and the Revenue challenging the impugned final assessment order dated 12/01/2016,

passed under section 144C(13) r/w section 143(3) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions dated 18/12/2015 issued by the learned Dispute Resolution Panel-2, Mumbai, ("*learned DRP*"), for the assessment year 2011-12.

**ITA No. 842/Mum/2016**  
**Assessee's Appeal- A.Y. 2011-12**

2. In its appeal, the assessee has raised the following grounds:-

*"1. The learned Deputy Commissioner of Income Tax - International Tax, Range 4(3)(1) ('Ld AO'), Mumbai erred on the facts and circumstances of the case and in law in making an addition to the total income of the Appellant amounting to Rs. 3,34,38,510, in pursuance to the directions of the Hon'ble Dispute Resolution Panel (DRP) upholding the adjustment to the transfer price proposed by the learned Transfer Pricing Officer (Ld. TPO').*

*1.1 The Ld. DRP/AO/ TPO erred in re-computing the Arm's Length Price ('ALP') of the international transaction pertaining to receipt of fees for marketing of fixed income products, including interest rate derivative products (collectively known as FID business) by the Appellant from its Associated Enterprises (AEs) as Rs. 5,08,18,810 as against Rs 1,73,80,300 and hence making an adjustment of Rs. 3,34,38,510, without appreciating the Functions Asset and Risk ('FAR') Analysis documented by the Appellant in the Transfer Pricing Study Report and various supporting documents, information, explanation submitted by the Assessee.*

*1.2 The Ld. DRP/AO/ TPO erred in holding that the entire market spread belongs to the Appellant and allocation of market spread is without any basis.*

*It is prayed that the adjustment be deleted.*

*2. On the facts and circumstances of the case, the Ld. DRP/AO/TPO erred in questioning the commercial expediency of the manner in which the Appellant and its AEs carry on their business.*

*3. On the facts and circumstances of the case, the LD DRP/AO/TP erred in not accepting the Appellant's transfer pricing policy for FID business which is consistently applied across jurisdictions and has been accepted by Indian tax authorities in prior years.*

*It is prayed that the adjustment be deleted.*

*4. On the facts and circumstances of the case and in law, the Assessing Officer erred in levying interest under section 2348 and 234C of the Act.*

*It is prayed that the adjustment be deleted.*

*The Grounds stated above are independent of, and without prejudice to one another.*

*The Appellant craves leave to add to, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the time of hearing."*

3. The only grievance of the assessee is against transfer pricing adjustment in respect of international transaction pertaining to fees received for marketing of fixed income products.

4. The brief facts of the case as emanating from the record are: The assessee is a Foreign Institutional Investor (FII) registered with the Securities and Exchange Board of India ('SEBI') for the purpose of making investment in Indian debt securities. The assessee is a tax resident of Switzerland, holding Tax Residency Certificate for the year under consideration. During the year under consideration, the assessee has a branch in India, which constitutes the Permanent Establishment of the assessee in India. The assessee filed its return of income, for the year under consideration, on 30/11/2011 declaring a total income of Rs. 114,50,48,499. The return filed by the assessee was selected for scrutiny and notice under section 143(2) was issued and served on the assessee. Subsequently, notices under section 143(2) as well as 142(1) were issued and served on the assessee. The Assessing Officer ('AO') made a reference under section 92CA(1) of the Act to the Transfer Pricing Officer ('TPO') for the determination of the arm's length price of the international transaction reported by the assessee in Form 3CEB. In respect of international transaction pertaining to fees received for marketing of fixed income products, the assessee was asked to submit evidence of the work done by the associated

enterprises. In reply, the assessee filed its global transfer pricing policy. The TPO vide order dated 28/01/2015 passed under section 92CA(3) of the Act noted that in the transfer pricing policy, functions performed by the associated enterprises are not mentioned. Accordingly, in the absence of evidence of functions performed, assets used for the said functions, and risk taken by the associated enterprises, the TPO considered the entire '*market spread*' in the hands of the assessee and proposed a transfer pricing adjustment of Rs. 3,34,38,510.

5. In its objections filed before the learned DRP, the assessee submitted that the TPO has completely ignored the FAR (functions performed, assets employed and risks assumed) analysis of the assessee documented in the TP study report and attributed 100% of the transaction fees for fixed income products and interest rate derivative products to the assessee for the sales and marketing functions. It was further submitted that based on the fixed income products transfer pricing policy it was considered appropriate that the marketing locations would receive 33% of the '*market spread*' and 100% of the markup having regard to the functions performed and risks assumed by the marketing locations. Further, in respect of interest rate derivative, it was concluded that the marketing locations would receive 50% of the '*market spread*' and 100% of the markup. The assessee also emphasised on the role performed by the assessee as well as the associated enterprises in the entire transaction and the risk analysis of the assessee vis-à-vis the associated enterprises. The learned DRP vide its directions issued under section 144C(5) of the Act rejected the objections filed by the assessee. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative (*'learned AR'*) submitted that the allocation of *'market spread'* amongst the marketing location i.e. India Branch of the assessee and its associated enterprises is based on the global transfer pricing policy, whereby 33% of *'market spread'* in case of fixed income product and 50% of *'market spread'* in case of interest rate derivative was allocated to the assessee. By referring to the chart, which forms part of the TPO's order on page 3, and learned DRP's direction on page 21, the learned AR submitted that in case the difference in the price achieved by the marketer and the price quoted by the trader is allocated to the marketer.

7. On the contrary, the learned Departmental Representative (*'learned DR'*) vehemently relied upon the orders passed by the lower authorities and submitted that the benchmarking analysis undertaken by the assessee is not based on Profit Split Method as provided under the Rules.

8. We have considered the rival submissions and perused the material available on record. The assessee is a leading wealth manager in Switzerland, Europe, and the Asia-Pacific region. The assessee i.e. UBS AG is the parent entity within the UBS group. The assessee has a branch in India, namely, UBS AG, Mumbai Branch. The Indian branch commences banking operations with effect from 14/01/2009, after obtaining the necessary clearance and approvals from the RBI. The Indian branch of the assessee, inter-alia, provides marketing functions of fixed income products/interest rate derivative products to its associated enterprises. The fixed income distribution business is part of the group's global trading activity, which involves distribution/sales and

trading operations of secondary market fixed income products. During the year under consideration, the Indian branch of the assessee has carried out distribution/marketing of fixed income product lines (which are booked in trading locations) in the secondary market for its associated enterprises, for which it has received marketing commission/fee based on group's transfer pricing policy.

9. The fixed income products are securities, which bear a rate of interest (fixed or floating) and a set maturity. In this transaction, the distribution/marketing locations such as the Indian branch are primarily responsible for generating/originating transactions from third-party clients. This may involve either the purchase or sale of these fixed income products. As part of its function, the Indian branch performs general marketing, client relationship management, and liaison internally for trading and research. On the other hand, UBS AG, the trading location, is engaged in carrying out the function of actually executing and booking trades marketed by the distribution/marketing location like the Indian branch. As per the assessee, the expertise and knowledge base required to trade in these fixed income products resides with the trading location. It is further the submission of the assessee that the salesperson at the marketing location cannot commit to a transaction without traders at UBS AG providing a dealing price (i.e. the price at which the trader is willing to either buy or sell the specified product). Such a commitment is the responsibility of the trader and the salesperson at the marketing location does not have the flexibility to adjust the pricing provided by a trader i.e. provide a discount on the price quoted by the trader. Further, as per the assessee, significant risks including marketing risk and funding and

liquidity risk are borne by UBS AG. The assessee, on a global basis, by adopting the OECD guidelines considered the commission basis as the most appropriate transfer pricing method to compensate for the distribution / marketing function performed by the marketing location. Accordingly, in respect of the fixed income products, 33% of the '*market spread*' was allocated to the marketing location i.e. the Indian Branch.

10. The '*market spread*' is the difference between the market price and bid/offer price. The '*bid price*' is the price that the trader quotes to buy the product from the clients, while the '*offer price*' is the price at which a trader is willing to sell the product to the clients. If the marketer is able to achieve the price higher than the price quoted by the trader to sell the product, the difference is allocated to the marketer. Similarly, if the marketer is able to purchase the product at a price lesser than the price quoted by the trader to buy the product, the difference is allocated to the marketer. The same is called '*local spread*'. Therefore, whatever additional markup is earned is allocated 100% to the marketer. In respect of interest rate derivatives, 50% of the '*market spread*' was allocated to the marketer. During the year, as noted by the TPO on page 3 of its order and by the learned DRP on page 21 of its directions, the assessee executed 9 transactions of fixed income products (including interest rate derivatives). Out of these transactions, the transaction at serial No. 4 resulted in '*local spread*' of USD 8000, and the entire amount was credited to the marketing location i.e. the Indian Branch in addition to the allocation of 50% market spread, being a transaction in derivatives. Apart from this transaction, no other transaction has resulted in '*local spread*'. It is

the claim of the assessee that the benchmarking/allocation of 'market spread' has been done on basis of the global scenario.

11. We find that the TPO without appreciating the FAR of the associated enterprise at the trading location allocated the entire '*market spread*' of 11,07,404.89 USD to the assessee's marketing location i.e. the Indian Branch. Further, the learned DRP also rejected the objections filed by the assessee on the basis that the assessee company has executed a transaction in India and therefore the entire '*market spread*' belongs to the India Branch. We are of the considered view that the lower authorities failed to appreciate that in the entire transaction, the sales/marketing function and its activities (such as trading) cannot be separated from the other functions, all of which together are necessary elements for the assessee to realise income on these transactions. Therefore, it is necessary to take into consideration the functions performed, assets employed and risks assumed by the trader-associated enterprises, while allocating the commission. It is further pertinent to note that the entire '*local spread*', i.e. the markup earned by the marketer either over the price offered by the trader to sell or lower than the price quoted by the trader to buy the product, is entirely allocated to the marketer. Accordingly, in view of the above, we find no merits in upholding the transfer pricing adjustment on this issue. Hence, the TPO/AO is directed to delete the transfer pricing adjustment in respect of international transaction of fees receipt for marketing of fixed income products. As a result, grounds No. 1 – 3 raised by the assessee are allowed.

12. Ground No.4, raised in assessee's appeal, is pertaining to the levy of interest under section 234B and 234C of the Act, which is consequential in nature. Therefore, ground No. 4 is allowed for statistical purposes.

13. The application dated 24/03/2021, by the assessee seeking admission of additional ground of appeal was not pressed during the course of the hearing. Accordingly, the aforesaid application is dismissed as not pressed.

14. In the result, the appeal by the assessee is allowed.

**ITA No. 1347/Mum/2016**  
**Revenue's Appeal- A.Y. 2011-12**

15. In its appeal, the Revenue has raised the following grounds:

*"1. Whether on the facts and in the circumstances of the case, the learned DRP erred in relying upon its own order for AY 2008-09, without appreciating that the facts of A. Y. 2008-09 were not identical to the year under consideration. The Id. DRP 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. DRP 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 the 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 income.*

*3. "The Appellant prays that the order of the DRP be set aside on the above grounds and the draft order of the Assessing Officer be restored.*

*4. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

16. The brief facts of the case as emanating from the record are: In the return of income, the assessee had characterised the gains amounting to Rs. 134,76,87,031 arising transfer of debt securities as capital gains and claimed

the same to be exempt under Article 13(6) of the India Switzerland Tax Treaty. During the course of assessment proceedings, the said gain was treated as business income and held to be taxable in India as the same is attributable directly or indirectly to the assessee's Permanent Establishment in India. The learned DRP vide its directions issued under section 144C(5) of the Act by following the decision of the coordinate bench of the Tribunal rendered in assessee's own case accepted the objections filed by the assessee. In conformity, the AO vide impugned final assessment order assessed the capital receipts of Rs. 134,76,87,031 as a capital gain. Being aggrieved, the Revenue is in appeal before us.

17. During the hearing, the learned DR vehemently relied upon the draft assessment order. On the contrary, the learned AR placed reliance upon the decisions of the coordinate bench of the Tribunal in assessee's own case in the preceding assessment years, wherein similar issue has been decided in favour of the assessee. The learned AR further submitted that in subsequent assessment years also the receipt has been treated as capital gain. It was also submitted that the decisions of the coordinate bench of the Tribunal in assessee's own case for the assessment years 2008-09 and 2009-10 has been accepted by the Department and no further appeal has been filed.

18. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in the immediately preceding assessment year in DCIT vs M/s UBS AG, ITA No. 5502/Mum./2016, vide order dated 10/08/2018, by

following the judicial precedents in assessee's own case decided a similar issue in favour of the assessee by observing as under:

*"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 aforesaid 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 aforesaid Grounds raised by the Revenue before us. Accordingly, we hereby affirm the decision of CIT(A), which is in line with the aforesaid precedents in assessee's own case. Thus, the order of CIT(A) is hereby affirmed."*

19. Thus, it is evident from the record that the issue is recurring in nature and has been decided in favour of the assessee in preceding assessment years. Further, it is also evident from the assessment orders passed in the subsequent assessment years that decisions of the coordinate bench have been accepted by the Revenue and no further appeal has been filed. Therefore, respectfully following the decision rendered in assessee's own case cited supra, we find no infirmity in the directions of the learned DRP which has rightly followed the judicial precedent in assessee's own case. As a result, grounds raised by the Revenue are dismissed.

20. In the result, the appeal by the Revenue is dismissed.

21. To sum up, the appeal by the assessee is allowed, while the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 09/12/2022

**Sd/-**  
**M. BALAGANESH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 09/12/2022**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai