IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.6098/Mum./2019 (Assessment Year : 2014–15)	**ITA no.7262/Mum./2019 (Assessment Year : 2015–16)**

Dy. Commissioner of Income Tax
Circle–2(1)(1), Mumbai ..... Applicant

v/s

Credit Suisse (Singapore) Ltd.
C/o Deloitte Touche Tohmatsu India LLP
36B, Dr. R.K. Shirodkar Marg, Parel
Mumbai 400 012 PAN – AACCC7328N ..... Respondent

Assessee by : Shri Percy Pardiwala a/w
Shri Paras Savla
Revenue by : Shri Milind Chavan, Sr. DR

Date of Hearing – 29.03.2022	Date of Order – 06/06/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the Revenue challenging the impugned orders dated 29/07/2019 and 25/09/2019, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-56, Mumbai ["*learned CIT(A)"*], for the assessment years 2014-15 and 2015-16, respectively.

2. Since both these appeals pertain to the same assessee and the issues involved, inter−alia, are common, therefore, these appeals were heard together as a matter of convenience and are being adjudicated by way of this consolidated order. Further, as the basic facts in both these appeals are same, we have elaborately mentioned only the facts for assessment year 2014−15 for the sake of brevity. However, if any particular issue is arising in other assessment year for the first time, the facts pertaining to the same are discussed accordingly.

ITA no.6098/Mum./2019
Assessment Year – 2014−15

3. The Revenue, in its appeal for the assessment year 2014−15, has raised following grounds:−

> *1. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) is right in holding the commission income received by the assessee of Rs. 16,38,81,455/- from HDFC Asset Management Company is in the nature of business income and not of the nature of other income?*
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> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition by the AO amounting to Rs. 16,38,81,455/- as commission income taxable as per article 23 of India- Singapore treaty?*
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> *3. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored."*

4. The only issue arising in appeal for assessment year 2014−15 pertains to deletion of addition of commission income received by the assessee from HDFC Asset Management Co Ltd.

5. The brief facts of the case pertaining to this issue, as emanating from record are: The assessee is a company incorporated in Singapore under the Singapore Companies Act. The assessee is a tax resident of Singapore and accordingly, is entitled to the beneficial provisions of India Singapore Double Taxation Avoidance Agreement ('*DTAA*'). The assessee is registered as Foreign Institutional Investor ('FII') with Securities and Exchange Board of India ('*SEBI*') and conducts portfolio investments in Indian securities in its capacity as SEBI registered FII/FPI. For assessment year 2014−15, assessee filed its return of income on 29/11/2014 declaring total income of Rs. 26,05,54,889. During the year under consideration, the assessee has carried out transactions in equity shares, GDRs, FCCBs, IDRs, Exchange Traded Derivatives, Debt Securities, Mutual Fund etc. The assessee and HDFC Asset Management Co Ltd had entered into a Offshore Distribution Agreement dated 06/09/2011 pursuant to which the assessee agreed to distribute Mutual Fund schemes launched by HDFC Asset Management Co Ltd, with a view to procure subscriptions for such schemes from investors outside India. As per the Agreement, the assessee creates awareness about the schemes of funds, and identifies investors from amongst its clients and procures subscriptions to units in the schemes of the funds. Under the Agreement, the assessee also ensure that the subscriptions are made in accordance with and on the terms and conditions set out in the offer

document and without making any representations of giving warranties not contained in the offer document.

6. During the year under consideration, the assessee, inter-alia, earned Offshore Distribution Commission Income of Rs. 16,38,81,445 from HDFC Asset Management Co Ltd, which was claimed as exempt under Article 12 of DTAA. During the course of assessment proceedings, assessee was asked to give justification for exemption claimed under the provisions of DTAA. In reply, assessee submitted that commission income received by it does not fall in the category (i) or (iii) of Article 12(4) of DTAA. Further, assessee submitted that it has neither provided any technology to HDFC Asset Management Co Ltd nor made available any technical knowledge, experience, skill, know-how or process. Thus, '*make available*' test is also not satisfied in the present case. Therefore, Offshore Distribution Commission Income is exempted from tax in India under Article 12 of the DTAA. The assessee further submitted that even if offshore distribution commission income is regarded as '*business income*' of assessee in India, such income would not be taxable in India under Article 7 of the DTAA in the absence of assessee's permanent establishment in India. The Assessing Officer vide order dated 16/02/2018 passed under section 144C(3) r.w.s. 143(3) of the Act observed that assessee is carrying out distribution activity of products of HDFC Mutual Fund, which are regulated by SEBI in India and since

assessee is the SEBI registered FII/FPI, it is not authorised to carry out any other activity including business activity other than FII related transactions in securities. The Assessing Officer came to the conclusion that commission paid to assessee cannot be treated as fees for technical services as the assessee is getting a fixed ratio of commission on quarterly basis for rendering the services. The Assessing Officer further held that as the assessee is operating as a distributor/lead manager of HDFC Mutual Fund, an Indian fund, which is controlled and regulated by SEBI and RBI in India, therefore, location control and management of the fund is situated in India, which constitutes a business connection in India and creates a sufficient nexus of the offshore distribution income with India. Accordingly the Assessing Officer taxed the commission income received by the assessee under Article 23 of DTAA r.w.s. 5(2) of the Act.

7. The learned CIT(A) vide impugned order dated 29/07/2019 upheld the conclusion of the Assessing Officer that the offshore distribution income is not fees for technical services. The learned CIT(A) further held that offshore distribution income earned by the assessee is in the nature of business income and in the absence of permanent establishment is not taxable in accordance with Article 7 of DTAA. The learned CIT(A) by further referring to the decision of Co-ordinate Bench of Tribunal in Credit Suisse AG in ITA No. 1247/Mum/2016 held that offshore distribution

income is not taxable and thus, deleted the addition made by the Assessing Officer. Being aggrieved, Revenue is in appeal before us.

8. During the course of hearing, Shri Milind Chavan, learned Departmental Representative by vehemently relying upon the order passed by the Assessing Officer submitted that the HDFC Mutual Fund in which assessee has dealt is regulated and controlled by SEBI and RBI in India, which creates sufficient nexus of offshore distribution income with India and thus the said income is taxable in India.

9. On the other hand, Shri Percy Pardiwala, learned Sr. Counsel appearing for the assessee submitted that the assessee sells products of HDFC Asset Management Co Ltd in Singapore. All the services were rendered by the assessee outside India and no service was rendered within India. Thus, the offshore distribution income is not taxable in India. The learned Sr. Counsel by referring to the decision of Hon'ble Supreme Court in CIT vs Toshoku Ltd., [1980] 125 ITR 525 (SC) submitted that the offshore distribution income earned by the assessee, in the present case, is similar in nature to agency commission income, which was held to be not chargeable to tax in India in the aforesaid decision since the non-resident taxpayer did not carry out any business operation in India and the income was earned for services rendered outside India.

10. We have considered the rival submissions and perused the material available on record. At the outset, it is pertinent to note certain provisions of the Act, which are relevant in order to decide the issue at hand. Section 5(2) of the Act provides that the total income of a person who is non-resident includes all income from whatever source derived, which is received or deemed to be received in India; or accrues or arises or is deemed to accrue or arise in India to the assessee. Further, section 9 elaborates the expression "Income deemed to accrue or arise in India". As per section 9(1)(i) of the Act, all the income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source in India, or through the transfer of a capital asset situated in India shall be deemed to accrue or arise in India. Explanation 1 to section 9(1)(i) of the Act, further provides as under:

> "*(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;*"

Thus, as per the aforesaid provision of Explanation 1(a) to section 9(1)(i) of the Act, it is only that portion of the income which is '*reasonably attributable'* to the operations carried out in India shall be deemed to accrue or arise in India for the purpose of taxation under the Act.

11. In the present case, it is not in dispute that the assessee is non-resident for the purpose of the Act. It is also not in dispute that the assessee earns offshore distribution commission income by distributing Mutual Fund schemes launched by HDFC Asset Management Co Ltd, with a view to procure subscriptions for such schemes from investors outside India. It is further not in dispute that assessee does not carry out any operation within India for the purpose of earning offshore distribution commission income. The Revenue has sought to tax the said offshore distribution commission income only by treating the same to be having sufficient nexus / business connection with India, as the Mutual Funds distributed by the assessee were controlled and regulated by SEBI and RBI in India. In the present case, it is pertinent to note that the Revenue has sought to tax the offshore distribution commission income earned by the assessee by invoking the provisions of section 9(1)(i) of the Act and it is not the case of the Revenue that the income is taxable under any other provision of section 9 of the Act. Further, as noted above, for the purpose of treating the income as deemed to accrue or arise in India, it is relevant that the said income should be '*reasonably attributable*' to the operations carried out in India. As, in the present case, all the operations of the assessee were carried out outside India, therefore, in such circumstances offshore distribution commission income earned by the assessee cannot be treated as being '*reasonably attributable*' to any operation carried out in India.

12. Before concluding, it is relevant to note that the following observations of Hon'ble Supreme Court in Toshoku Ltd. (supra):

> *"The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to s. 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of cl. (a) of the Explanation to cl. (i) of sub-s. (1) of s. 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India (See CIT v. R.D. Aggarwal and Co. [1965] 56 ITR 20 (SC) and Carborundum Co. v. CIT [1977] 108 ITR 335 (SC) which are decided on the basis of s. 42 of the Indian I.T. Act, 1922, which corresponds to s. 9(1)(i) of the Act).*
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> *In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."*

13. Further, as the assessee conducts portfolio investments in Indian securities in its capacity as SEBI registered FII/FPI, conclusion of the learned CIT(A) that the offshore distribution commission income is in the

nature of '*business income*' of the assessee does not require any interference. Thus, in view of the above factual and legal position, we do not find any infirmity in the impugned order passed by the learned CIT(A). As a result, grounds raised by the Revenue are dismissed.

14. In the result, appeal by the Revenue for assessment year 2014–15 is dismissed.

ITA no.7262/Mum./2019
Assessment Year – 2015–16

15. The Revenue, in its appeal for the assessment year 2015–16, has raised following grounds:–

> *"1. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) is right in holding the commission income received by the assessee of Rs. 31,66,75,512/- from HDFC Asset Management Company is in the nature of business income and not of the nature of other income?*
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> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition by the AO amounting to Rs. 16,38,81,455/- as commission income taxable as per article 23 of India- Singapore treaty?*
>
> *3. Whether On the facts and in the circumstances of the case and in law, the learned CIT(A) is right in directing the A.O. to verify the claim of the assessee on the ground involving charging of tax at the rate of 15% (amounting to Rs.2,37,31,728) on interest income of Rs.15,82,11,520) without adjudicating the ground of appeal because such directions tantamount to setting aside the issue for which the Ld. CIT(A) 9is not authorized.*
>
> *4. Whether On the facts and in the circumstances of the case and in law, the learned CIT(A) is right in not adjudicating the ground of appeal involving computation of education cess and higher education cess amounting to Rs.1,28,19,766 and erred in directing the A.O. to follow the decision in ITA no.1458/Kol./2011, in the event of any income being charged under Double Taxation Avoidance Agreement in final computation of demand because such directions tantamount to setting aside the issue for which the Ld. CIT(A) is not authorized.*

3. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored."

16. The issue arising in ground nos. 1 and 2 raised in Revenue's appeal pertaining to deletion of addition of commission income received by the assessee from HDFC Asset Management Co Ltd. is similar to Revenue's appeal for assessment year 2014-15. Thus, our findings/conclusion in Revenue's appeal being ITA No. 6098/Mum/2019 for assessment year 2014-15 shall apply *mutatis mutandis*. Accordingly, ground nos. 1 and 2 raised in Revenue's appeal are dismissed.

17. The issue arising in ground No. 3 pertains to charging of tax on interest income received on rupee denominated bonds/government securities at correct rate.

18. The brief facts of the case pertaining to this issue, as emanating from record are: The assessee had offered interest income of Rs. 15,82,11,520 received on rupee denominated bonds/government securities to tax at the rate of 5% under section 115 AD read with section 194 LD of the Act. However, the Assessing Officer vide order dated 29/01/2019 passed under section 144C(3) r.w.s. 143(3) of the Act computed the tax on such interest income at the rate of 15% under Article 11 (2) of DTAA, which increased the gross tax liability of the assessee by Rs 1,71,10,570. The learned CIT(A) vide impugned order

dated 25/09/2019 directed the Assessing Officer to verify assessee's claim vis-à-vis section 115 AD and pass suitable order. Being aggrieved, Revenue is in appeal before us.

19. As the issue pertains to applicability of correct rate of tax on interest income earned by the assessee and since the Assessing Officer without recording any reasons has applied the rate of 15% under Article 11(2) of DTAA and has also not examined the basic facts regarding the nature of investment on which interest income is earned. Therefore, we deem it appropriate to remand this issue to the file of Assessing Officer for *de novo* adjudication. The assessee is directed to furnish all the details of investments to the Assessing Officer. We further direct that if it is found that the investment is made on eligible instruments specified in section 115 AD then benefit of lower rate of tax under section 115AD r.w.s. 194 LD of the Act be granted to the assessee. Thus, to this extent we endorse the findings of learned CIT(A). Since we are remanding this issue to the file of Assessing Officer for *de novo* adjudication, which causes no prejudice to the interest of the Revenue, ground No. 3 raised in Revenue's appeal becomes academic in nature in the present case and is accordingly dismissed.

20. As regards ground No. 4 raised in Revenue's appeal, same pertains to charging of education cess and higher education cess. As, the learned CIT(A) vide impugned order merely directed the Assessing Officer to

follow the judicial precedents on this issue, wherein it has been held that education cess and higher education cess is subsumed within the tax of 10% under Double Taxation Avoidance Agreement, we find no infirmity in the impugned order passed by learned CIT(A) on this issue.

21. In the result, appeal by the Revenue for assessment year 2015−16 is dismissed.

Order pronounced in the open court on 06/06/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 06/06/2022

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.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai