IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.794/Mum./2022	**ITA no.795/Mum./2022**
(Assessment Year : 2016−17)	(Assessment Year : 2017−18)

Credit Suisse AG
10th Floor, Ceejay House
Plot−F, Shivsagar Estate ..... Appellant
Dr. Annie Besant Road, Worli
Mumbai 400 018 PAN − AABCC9113E

v/s

Dy. Commissioner of Income Tax
International Taxation .....Respondent
Circle−2(1)(1), Mumbai

Assessee by : Shri Percy Pardiwala, Shri Harsh Shah, Shri Paras Savla
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing − 06/03/2023	Date of Order − 24/03/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the separate impugned orders of even date 28/02/2022, 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 2016−17 and 2017−18.

2. Since both appeals pertain to the same assessee and the issues involved are also common, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. With the consent of the parties, the assessee's appeal for the assessment year 2016−17 is taken up as a lead case.

ITA no.794/Mum./2022
Assessee's Appeal : A.Y. 2016−17

3. In its appeal, the assessee has raised following grounds:−

"Based on the facts and circumstances of the case, and in law, the Appellant respectfully submits that the learned Deputy Commissioner of Income-tax (International Tax)-2(1)(1) (learned AO) has in his order dated February 27, 2020, issued under section 143(3) read with section 144C(3) of the Act, and as upheld by the learned Commissioner of Income-tax (Appeals) ['learned CIT(A)'] vide his order dated February 28, 2022, issued under section 250 of the Act, erred:

1. In holding that aggregate interest of Rs 3,460 paid by the Mumbai branch office of Credit Suisse AG (CSMB') to the Singapore branch office of ('CSSB') and the London branch office (CSLB) of Credit Suisse AG is liable to tax in India by virtue of the Explanation inserted in section 9(1)(v) of the Income-tax Act, 1961 (Act') by the Finance Act 2015, without considering that the Appellant has filed its income-tax return for AY 2016-17 under the provisions of the India-Switzerland tax treaty, and that the aforesaid Explanation to section 9(1)(v) of the Act does not extend to the provisions of the India-Switzerland tax treaty.

2. In not demonstrating, as to how the aggregate interest of Rs 3.460 paid by CSMB to CSSB and CSLB is chargeable to tax in India under the provisions of the India-Switzerland tax treaty, other than by claiming that the interest is sourced in India.

3. In including the net capital gains of Rs 6,98,62.29,231 earned by the Appellant which are not subject to tax in India pursuant to Article 13(6) of the India-Switzerland tax treaty, after reducing fees for technical services of Rs. 91,72,530 earned by the Appellant, while computing the Appellant's total income in the income-tax computation sheet accompanying the assessment order for AY 2016-17.

4. In including interest of Rs 1,30,90,54,199 under 234B of the Act in the Appellant's income-tax liability, by using an incorrect principal tax liability as the base.

5. In directing that penalty proceedings be initiated under section 271(1)(c) read with section 274 of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any of the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide this appeal according to the law.

For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the Appellant requests that the appeal be allowed as prayed."

4. The issue arising in grounds no.1 and 2, raised in assessee's appeal, is pertaining to the taxability of interest paid by the Indian branch office to the other overseas branches of the assessee.

5. The brief facts of the case pertaining to this issue are: The assessee is a company incorporated in Switzerland and is a tax resident of Switzerland. The Singapore branch office of the assessee, i.e. Credit Suisse Singapore Branch ("*CSSB*") is registered with the Securities and Exchange Board of India ("*SEBI*") as a Foreign Institutional Investor ("*FII*") and conducts portfolio investments in Indian securities in its capacity as a SEBI registered FII. The assessee has a bank branch office in Mumbai, i.e. Credit Suisse Mumbai Branch ("*CSMB*"), which is registered with the Reserve Bank of India and undertaking Banking Operations in India. Since the assessee is a tax resident of Switzerland, the assessee had opted for benefit of the India-Swiss Confederation Double Taxation Avoidance Agreement ("*Indo-Swiss DTAA*") in respect of income earned by CSSB and CSMB. The Indian branch office, i.e. CSMB, constitutes a fixed place Permanent Establishment ("*PE*") of the assessee in India as per Article 5 and it has offered its income under Article 7 of the Indo-Swiss DTAA. During the year under consideration, the assessee filed its return of income on 30/11/2016 declaring a total income of Rs.

393,98,74,790. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. The Indian branch office has procured loans from CSSB and Credit Suisse London branch ("*CSLB*") aggregating to USD 2,000,000. During the year under consideration, the Indian branch office paid total interest amounting to Rs. 3416 to the London branch and Singapore branch. The said interest was not offered to tax by the Singapore branch on the basis that the assessee and the above-mentioned branches are one and the same enterprises, placing reliance upon the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation vs DDIT (2012) 145 TTJ 649 (Mum.)(SB). The assessee has claimed the interest payment as a deduction while computing the business profits of the Indian branch office. The Assessing Officer ("*AO*") vide draft order dated 23/12/2019 passed under section 144C of the Act did not agree with the submissions of the assessee and held that the system of attribution of profit/expense between head office/other branches and Indian branch was not brought before the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra) by the Department and the case was discussed if there is income/expense arising or accruing to head office from branches or vice versa. The AO further held that interest payment shown by the assessee to the head office is the attribution of interest income to the head office as provided in Article 7(2) of the DTAA on the basis of functions carried out, assets deployed and risks assumed by the head office and not to be considered as an expenditure as there is no concept of income from self. Accordingly, the income attributable to the head office/overseas branches was taxed in the hands of the assessee. As the assessee opted not to

file the objection against the draft order before the learned DRP and intimated that the final assessment order be passed, accordingly, the AO passed the assessment order dated 27/02/2020 under section 144 r/w section 144C(3) of the Act.

6. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue and held that interest paid by the PE to the head office and other branches etc. is an interest sourced in India and is liable to be taxed under the source rule in India. The learned CIT(A) by referring to the provisions of Explanation to section 9(1)(v) of the Act held that the Explanation has been added in the case of a person engaged in the business of banking and is therefore applicable in this case. Being aggrieved, the assessee is in appeal before us.

7. We have considered the rival submissions and perused the material available on record. In the present case, it is the plea of the assessee that the fiction of hypothetical independence or a separate entity approach as laid down in the DTAA is only applicable for the computation of profit attributable to the PE and the same does not extend to the computation of profit of the head office, in order to tax the interest received by the head office/overseas branches from the Indian branch office. On the contrary, as per the Revenue the Explanation to section 9(1)(v) was specifically inserted to overcome the decision of the Special Bench in Sumitomo Mitsui Banking Corporation (supra) and therefore after the amendment by the Finance Act 2015, the concept of payment to self is not an income is no longer valid. We find that while dealing with similar arguments in respect of the similar issue of payment of interest by

the Indian branch office to the overseas branches in the context of India France DTAA, the coordinate bench of the Tribunal in BNP Paribas vs ACIT, in ITAs No. 1076/Mum./2021 and 1670/Mum./2022, vide order dated 24/01/2023, for the assessment years 2017-18 and 2018-19 held that interest paid by the Indian branch/PE to the head office/GE is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). We find that the coordinate bench further held that even if the submission of the Revenue that the amendment by Finance Act 2015, whereby Explanation to section 9(1)(v) of the Act was inserted specifically to overcome the aforesaid decision of the Special Bench, is accepted, the same will not lead to taxation of the interest paid to the head office/overseas branches under the provisions of the DTAA. The relevant findings of the coordinate bench of the Tribunal in the aforesaid decision are as under:

> *"21. We have considered the rival submissions and perused the material available on record. During the year, the Indian branch office paid interest to its head office and other overseas branches on debt and overdrafts. In the present case, it is undisputed that the various branches of the assessee in India constitute the PE of the assessee under the provisions of the India-France DTAA. Further, it can also not be disputed that in terms of section 90(2), the provisions of the Act or the DTAA, whichever is more beneficial to the assessee shall be applicable. Thus, being an entity covered under the provisions of the India-France DTAA, the payment of interest to the head office and other overseas branches was claimed as a deduction by the Indian branch office under the provisions of Article 7(3) of the DTAA. The Revenue, in the present case, has not disputed the deduction claimed by the Indian branch office. However, as per the Revenue, the interest received by the head office/overseas branches is taxable under the provisions of section 9(1)(v)(c) of the Act.*
>
> *22. Since the India-France DTAA is applicable in the present case, therefore, before proceeding further it is pertinent to consider the relevant provisions of the said DTAA vis-à-vis the facts of the present case. As per Article 12(1) of the DTAA, interest arising in a contracting state (i.e. say India) and paid to a resident of the other contracting state (i.e. say France) may be taxed in the other contracting state (i.e. France). Further, under Article 12(2) of the DTAA, such interest may also be taxed in the contracting state in which it arises (i.e.*

say India), and according to the laws of that state, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10% of the gross amount of interest. Para 5 of Article 12 provides that the provisions of para 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a contracting state (i.e. say France), carries on the business in the other contracting state (i.e. say India) in which interest arises, through a PE situated therein, or performs in that other contracting state independent personal services from a fixed base situated therein, and the debt claim in respect of which the interest is paid is effectively connected with such PE or fixed base. Para 5 further provides that in such a case, the provisions of Article 7 or Article 15 as the case may be shall apply. Article 15 deals with independent personal services, which is not relevant to the present case. Since the assessee has PE in India, therefore, Article 7 which deals with business profits, becomes relevant for consideration in the present case. As per Article 7(1) of the DTAA, the profit of an enterprise is taxable in the other contracting state to the extent it is attributable to the PE. Further, Article 7(2) of the DTAA provides that the profit attributed to the PE shall be the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE. Article 7(3)(b) deals with payment by the PE to the head office of the enterprise and vice versa, and the same reads as under:

> *"(b) However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices."*

23. Thus, in the case of a banking enterprise, any payment by the PE to the head office of the enterprise by way of interest on money lent to the PE shall be allowed as a deduction. Further, the amount charged by the PE to the head office of the enterprise by way of interest on money lent to the head office of the enterprise shall be considered for the determination of profits of the PE. In the present case, it is not in dispute that the money has been lent to the PE and not the other way around. Thus, the first part of Article 7(3)(b) of the Act is only applicable in the present case, as the second part of this Article deals with the case wherein money is lent by the PE to the head office. Accordingly, in the present case, the assessee has claimed a deduction in respect of interest paid by the PE to its head office/overseas branches.

24. Further, in view of Article 7 of the India-France DTAA, the Revenue though has rightly accepted that the fiction of hypothetical independence or a separate entity approach, as stated in this Article, comes into play for the

limited purpose of computing the profit attributable to the PE. However, extended this fiction of hypothetical independence also for the computation of profit of the head office, for bringing to tax the interest received from the Indian branch office under the provisions of the Act. We are of the considered opinion that the latter approach is flawed. This aspect was extensively dealt with by the coordinate bench of the Tribunal in assessee's own case in BNP Paribas SA vs ADIT, in ITA No. 3422/Mum/2009, for the assessment year 2004-05. In the aforesaid decision, the coordinate bench held that the principles for determining the profits of the PE and GE/head office are not the same, and the fiction of hypothetical independence does not extend to the computation of the profit of the GE/head office. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"22. Clearly, the principles for determining the profits of the PE and GE are not the same, and the fiction of hypothetical independence does not extend to computation of profit of the GE. The principles of computing separate profits for the PE and the GE treating them as distinct entities, in the case of Dresdner Bank AG (supra),was in the context of Section 5(2). The separate profit centre accounting approach for the HO does not hold good in the treaty context, because, even if it is an income of the GE as a profit centre, all that is taxable as business profits of the GE is the income attributable to the PE. As regards its being treated as interest income of the assessee, arising in the source jurisdiction, i.e. India, can only be taxed under Article 12 but then as provided in article 12 (5), the charging provisions of Article 12(1) and (2), which deal with taxability of interest in the source state, will not apply "if the beneficial owner of the interest of the interest, being a resident of a contract state, carries on business in the other contracting state in which the interest arises, through a permanent establishment situated therein" and that in such a case the provisions of Article 7, which deal with taxability of profits of the permanent establishment alone will apply. In plain words, when interest income arises to a GE even if that be so, the taxability under article 12 will not apply, and it will remain restricted to taxability of profits attributable to the permanent establishment under article 7. The profits attributable to the PE have anyway been offered to tax. As regards the theory, as advanced by learned Assessing Officer in considerable detail, that for taxing the GE, the taxability has to be in respect of (i) income attributable to the permanent establishment as a profit centre; and (ii) income of the GE in its own capacity by treating it as another independent separate profit centre, for the detailed reasons set out above and particularly as the fiction of hypothetical independence does not extend to the computation of GE profits, we reject the same. The authorities below were, therefore, clearly in error in holding that the interest of Rs.1,59,32,854 paid by the Indian PE to the GE, or its constituents outside India are taxable in India.*
>
> *23. We may also add that in the case of Sumitomo Mitsui Banking Corpn. (supra),a five member bench has held that interest payment by PE to the GE is a payment by a foreign company's Indian PE to the foreign company itself, it cannot give rise to any income, in the hands of the GE, which is chargeable to tax under the Income Tax Act, 1961 itself, and, as such, treaty provisions are not really relevant. We humbly bow before the conclusions arrived at in this judicial precedent. Of course, we have reached the same destination by following a different path but then as long as reach the same destination, our traversing through a different path does not really matter at all. For this reason also, the grievance of the assessee deserves to be upheld."*

25. From the aforesaid findings, it is also relevant to note that the coordinate bench of the Tribunal came to the conclusion that the interest paid by the

> *Indian branch/PE to the head office/GE is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). Thus, in view of the above, even though the submission of the Revenue that the amendment by Finance Act 2015, whereby Explanation to section 9(1)(v) of the Act was inserted specifically to overcome the decision in Sumitomo Mitsui Banking Corporation (supra), is accepted, the same would still not lead to taxation of the interest paid to the head office/overseas branches under the provisions of the DTAA. Accordingly, in view of aforesaid findings and respectfully following the judicial precedent in assessee's own case cite supra, we direct the AO to delete the addition on account of interest income received by the head office/overseas branches. As a result, ground no.4 raised in assessee's appeal is allowed."*

8. In the present case also, it is an accepted fact that the Indian branch office of the assessee constitutes PE in India under the Indo-Swiss DTAA. Therefore the provisions of the Act or the DTAA, whichever are more beneficial to the assessee shall be applicable, in view of section 90(2) of the Act. We find that para-5 of Article 11 in Indo-Swiss DTAA is worded similarly to the provisions of India-France DTAA and the same reads as under:-

> *"5.] The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a case the provisions of Article 7 or Article 14, as the case may be, shall apply."*

9. Since the assessee has a PE in India, therefore, the interest has been claimed as a deduction while computing the business profits of the Indian branch office. Further, as per Article 7(2) of the Indo-Swiss DTAA, the profit attributed to the PE shall be determined which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is the PE. Thus, in view of the

aforesaid decision in BNP Paribas (supra), the fiction of hypothetical independence of the PE and head office/overseas branch cannot be extended to the computation of the profit of the head office/overseas branch, and the same is restricted only for computation of profit attributable to the PE. From the perusal of extracts of the OECD report, as quoted by the AO on pages no.11-12 of its order dated 27/02/2020, it is pertinent to note that the same specifically refers only to the calculation of profit or losses of the PE from all its activities. Before concluding, it is also relevant to note that even though Explanation to section 9(1)(v) of the Act can be said to have overcome the findings of the Special Bench in Sumitomo Mitsui Banking Corporation (supra), whereby it was held that the interest paid by the Indian branch to the head office/overseas branch is not taxable in India as per the domestic law being payment to self, however, it cannot be denied that the Special Bench in para-70 of its order accepted that the independent fiction and separate entity approach under Article 7 of the tax treaty is only for the purpose of determining the profit attributable to the PE and not for the purpose of determining the total profits of the enterprise as a whole. Therefore, in view of our aforesaid findings, we direct the AO to delete the addition on account of interest income received by the overseas branches of the assessee from the Mumbai branch office. As a result, grounds no.1 and 2 raised in assessee's appeal are allowed.

10. Grounds no.3 and 4 raised in assessee's appeal were not pressed during the hearing. Accordingly, the said grounds are dismissed as not pressed.

11. Ground No. 5 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

12. In the result, the appeal by the assessee is partly allowed.

ITA no.795/Mum./2022
Assessee's Appeal : A.Y. 2017–18

13. In its appeal, the assessee has raised following grounds:–

"Based on the facts and circumstances of the case, and in law, the Appellant respectfully submits that the learned Deputy Commissioner of Income-tax (International Tax)-2(1)(1) ('learned AO) has in his order dated February 27, 2020, issued under section 143(3) read with section 144C(3) of the Act, and as upheld by the learned Commissioner of Income-tax (Appeals) ['learned CIT(A)'] vide his order dated February 28, 2022, issued under section 250 of the Act, erred:

1. In holding that interest of Rs.3,58,49,989 paid by the Mumbai branch office of Credit Suisse AG (CSMB') to the Singapore branch office of ('CSSB') of Credit Suisse AG is liable to tax in India by virtue of the Explanation inserted in section 9(1)(v) of the Income-tax Act, 1961 (Act) by the Finance Act 2015, without considering that the Appellant has filed its income-tax return for AY 2017-18 under the provisions of the India-Switzerland tax treaty, and that the aforesaid Explanation to section 9(1)(v) of the Act does not extend to the provisions of the India-Switzerland tax treaty.

2. In not demonstrating, as to how the interest of Rs. 3,58,49,989 paid by CSMB to CSSB is chargeable to tax in India under the provisions of the India-Switzerland tax treaty, other than by claiming that the interest is sourced in India.

3. In including the net capital gains of Rs.11,684,843,093 earned by the Appellant which are not subject to tax in India pursuant to Article 13(6) of the India-Switzerland tax treaty, after reducing fees for technical services of Rs. 85,09,971 earned by the Appellant, while computing the Appellant's total income in the income-tax computation sheet accompanying the assessment order for AY 2017-18.

4. In including interest of Rs.1,63,35,38,270 under 234B of the Act in the Appellant's income-tax liability, by using an incorrect principal tax liability as the base.

5. In levying incremental interest of Rs. 6,83,084 under section 234C of the Act.

6. In not granting credit for taxes deducted at source of Rs. 73.20,890 from interest on income- tax refund offered to tax by the Appellant in financial year 2016-17.

7. In directing that penalty proceedings be initiated under section 270A(2) read with section 274 of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any of the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide this appeal according to the law.

For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the Appellant requests that the appeal be allowed as prayed."

14. The issue arising in grounds no.1 and 2, raised in assessee's appeal, is pertaining to the taxability of interest paid by the Indian branch office to the other overseas branches. Since a similar issue arising out of similar facts has been decided in assessee's appeal for the assessment year 2016-17, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.1 and 2 raised in assessee's appeal are allowed.

15. Grounds no.3, 4, 5 and 6 raised in assessee's appeal were not pressed during the hearing. Accordingly, the said grounds are dismissed as not pressed.

16. Ground No. 7 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

17. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 24/03/2023

Sd/-	**Sd/-**
M. BALAGANESH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 24/03/2023

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai