IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE-PRESIDENT

ITA No.382/Del/2023
Assessment Year: 2016-17
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CPI India Ltd., C/o- Vasa Chauhan and Associates Off. No. 41, 3rd Floor, High Life Premises, P.M. Road, Santacruz West, Mumbai	**Vs.**	ACIT, International Taxation, Circle -1(2)1), Delhi
PAN :AADCC1505G		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ajay Vohra, Sr. Advocate Sh. Divyanshu Agrawal, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	10.11.2023
Date of pronouncement	21.11.2023

ORDER

Captioned appeal of the assessee challenges the final assessment order dated 19.01.2023 passed under section 147 read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2016-17 in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. Ground nos. 1 and 2 are on the validity of the assessment order passed under section 147 of the Income-tax Act, 1961 (in short 'the Act'). Whereas, ground nos. 3 and 4 are on merits relating to the issue of taxability of capital gain arising on sale of shares.

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of Mauritius and a tax resident of Mauritius. As stated, the assessee is an investment holding company incorporated under the Mauritius Companies Act, 2001 on 12th January, 2006. The assessee also holds a valid Tax Residency Certificate (TRC) for the year under consideration. As observed by the Assessing Officer, though, for the assessment year under dispute the assessee has filed a return of income on 29.09.2016, however, such return was not subjected to scrutiny. Subsequently, information was received from Income Tax Officer, Ward-2(2)(1), International Taxation, New Delhi that an Indian company, i.e., M/s. Logix Soft-tel Pvt. Ltd. has remitted an amount of Rs.162 crores to the assessee towards purchase of shares of M/s. Noida Cyber Park Pvt. Ltd. without withholding any tax. Based on the information received, the Assessing Officer verified the records and found that as per the returns filed by the

assessee for past assessment years, it is continuously claiming loss. Taking note of the fact that, on one hand, the assessee is claiming loss, on the other hand, the remittance of Rs.160 crores was made to the assessee without deduction of tax. The Assessing Officer reopened the assessment under section 147 of the Act. In response to the notice issued under section 148 of the Act, the assessee filed its return of income on 29.04.2021 declaring net long term capital loss of Rs.33,34,167/-. In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish information relating to transactions in purchase and sale of shares in Indian companies. From the information/details furnished by the assessee the Assessing Officer noticed that in the year under consideration, the assessee has received total sum of Rs.407,32,20,235/- towards sale of shares of four Indian companies. Whereas, it has claimed net long term loss of Rs.33,34,167/-. On verifying the computation of income, the Assessing Officer found that the assessee has computed the capital gain in respect of sale of shares by applying the provisions of first proviso to section 48 of the Act read with Rule 115A. He observed that while doing so, the assessee has not followed the provisions contained under section 112(1)(c)(iii) of the Act, which

specifically debars the benefits given under the second proviso to section 48 of the Act. Thus, he held that the assessee cannot claim benefit under the first proviso to section 48, thereby, reducing capital gain. After analyzing the issue in detail, the Assessing Officer ultimately disallowed assessee's computation of net long-term capital loss by applying the provisions to the first proviso to section 48(1) read with Rule 115A. Thus, ultimately, he held that the assessee had net long-term capital gain of Rs.141,28,52,811/-, which is subject to tax in India. Having held so, he also rejected assessee's claim of exemption under Article 13(4) of India – Mauritius Double Taxation Avoidance Agreement (DTAA) on the reasoning that the assessee is not entitled to treaty benefits, as it is mere a paper company created in Mauritius to avail treaty benefits. Thus, after allowing unabsorbed long-term capital loss pertaining to assessment year 2012-13, the Assessing Officer added back net capital gain amounting to Rs.122,42,10,688/-. Accordingly, he framed the draft assessment order.

4. Against the draft assessment order so passed, the assessee raised objections before learned DRP, both on the merits of the addition made towards long-term capital gain as well as on the

validity of reopening of assessment under section 147 of the Act. However, learned DRP dismissed the objections of the assessee.

5. Before us, learned Senior Counsel appearing for the assessee submitted that reopening of assessment under section 147 of the Act is invalid, as there is no escapement of income. Drawing our attention to the reasons recorded for reopening of assessment, a copy of which is at page 9 of the paper-book, learned counsel submitted that as per the reasons recorded, assessment has been reopened obviously for the reason that the assessee having received huge amount of Rs.162 crores is claiming huge losses year after year and has not offered the amount of Rs.162 cores to tax. He submitted, the allegations of the Assessing Officer in the reasons recorded that the assessee has failed to make full and true disclosure of its income is totally misplaced, as in the return of income furnished for the year under consideration, the assessee has shown the gain from sale of shares in India, including the sale of shares of Noida Cyber Park Pvt. Ltd. He submitted, since, the assessee is a tax resident of Mauritius capital gain, is not subject to tax in India under India – Mauritius DTAA, as shares were purchased prior to 01.04.2017. Further, he submitted, Rs.162 crores referred to by

the Assessing Officer in the reasons recorded is the gross sale consideration, out of which, the cost of acquisition has to be deducted for computing capital gain. Therefore, he submitted, the Assessing Officer's observations that the amount of Rs.162 crores has escaped assessment, is wholly erroneous. He submitted, reasons must have nexus with formation of belief and formation of belief cannot be on vacuum. In support of such contention, he relied upon the decision of the Hon'ble Supreme Court in case of ITO Vs. Lakhmani Mewal Das (1976) 103 ITR 437. Further, he submitted that there was no tangible material available before the Assessing Officer to reopen the assessment. He submitted, the information based on which the Assessing Officer reopened the assessment was already there in the return of income filed by the assessee. He further submitted that without properly examining the facts, the competent authority has approved the reopening of assessment mechanically, which is against all cannons of law. In this context, he relied upon the decision of the Hon'ble Supreme Court in case of CIT Vs. M/s. Kelvinator of India Ltd. (2010) 187 Taxman 312. Thus, he submitted, reopening of assessment under section 147 of the Act is invalid. Hence, the assessment order is unsustainable.

6. On merits, learned counsel submitted, as per the first proviso to section 48 of the Act, in case of a non-resident, capital gains arising from transfer of shares and debentures of Indian company shall have to be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with transfer of shares and the full value of consideration received as a result of transferred into the same foreign currency, which was utilized in the purchase of the shares and debentures, and the capital gain so computed, in such foreign currency, shall be converted in Indian currency. He submitted, if the capital gain in case of the assessee is computed in the mode and manner provided under the first proviso to section 48 read with Rule 115A of the Act, then there will be a loss, hence, section 112 of the Act would not apply. He submitted, section 112 of the Act, does not override the computation mechanism in section 48 of the Act. Only if there is a position income from capital gain, then section 112 gets triggered. In support, he relied upon the following decisions:

1) *Commissioner of Customs (Import) Mumbai Vs. Dilip Kumar & Co. (2018) 95 Taxmann.com 327.*
2) *Mathuram Agrawal Vs. State of Madhya Pradesh (1999) 8 SCC 667*

3) *Indian Banks' Association Vs. Devkala Consultancy Services [2004] 4 JT 587*
4) *Consumer Online Foundation Vs. Union of India (2011) 5 SCC 360*
5) *Sulltana Begum Vs Prem Chand Jain (1997) 1 SCC 373*

7. Finally, he submitted, when two interpretations are possible, the views favourable to the assessee needs to be adopted. For such proposition, he relied upon the following decisions:

1) *CIT Vs. Vegetable Products Ltd. 88 ITR 192 (SC)*
2) *CIT Vs. J.K. Hosiery Factory, 159 ITR 85 (SC)*

8. Without prejudice, learned counsel submitted, the assessee, being a tax resident of Mauritius holding a valid TRC is entitled to treaty benefits. He submitted, there is not disputed between the parties that the shares, sales of which, resulted in capital gain were purchased by the assessee prior to 01.04.2017. Thus, he submitted, in terms of Article 13(4) of India – Mauritius DTAA, long-term capital gain arising on sale of shares is exempt. He submitted, as per CBDT Circular No. 789, TRC is the determinative factors for tax residency. Therefore, the departmental authorities cannot go behind the TRC to decline the treaty benefits to the assessee by questioning the residential status of the assessee. In support, he relied upon the following decisions:

1) *MIH India (Mauritius) Ltd. Vs. ACIT (Delhi ITAT), ITA No.1023/Del/2022*
2) *Blackstone Capital Partners (Singapore) VI FDI Three PTE. Ltd. Vs. ACIT (IT)*

9. Thus, he submitted, under no circumstances long-term capital gain arising to the assessee on sale of shares can be made taxable in India.

10. Learned Departmental Representative submitted that, since, huge remittances were made to the assessee without deduction of tax at source and the issue was never examined at any stage due to mere processing of return under section 143(1) without any scrutiny assessment. The Assessing Officer has validly formed the belief that income chargeable to tax has escaped assessment. He submitted, since, the issue was never examined earlier, there is no change of opinion while reopening of assessment.

11. Insofar as merits of issue is concerned, learned counsel submitted that the assessee's claim that capital gain has to be computed by applying the provisions of first proviso to section 48 of the Act read with Rule 115A without applying the provisions of section 112 is thoroughly misconceived as section 112(1)(c)(ii) specifically excludes applicability of second proviso to section 48 of the Act. In certain circumstances assessee's claim cannot be

accepted. He submitted, the decisions relied upon by learned counsel for the assessee are prior to the introduction of section 112(1)(c)(ii) of the Act, hence, may not be relevant for deciding the issue at hand. In support of his contention, learned counsel relied upon the decision of the Coordinate Bench in case of Legatum Ventures Ltd. Vs. ACIT (IT) [2013] 149 taxmann.com 436 (Mumbai – Trib.).

12. Insofar as assessee's claim of exemption under Article 13(4) of India – Mauritius DTAA, learned Departmental Representative relied upon the observations of the Assessing Officer and learned DRP.

13. We have given a thoughtful consideration to the rival contentions and perused the materials on record. We have also applied our mind to the decisions relied upon by both sides. In our view, the core issue arising for consideration is taxability of capital gain on sale of shares under the treaty provisions. Therefore, at the very outset, we will proceed to address the issue from that perspective.

14. Undisputedly, the assessee is a tax resident of Mauritius holding a valid TRC and is engaged in the business as an investment holding company having a Category 1 global business

licence issued by the competent authority in Mauritius. It is a fact on record that the assessee is in existence since January, 2006 and has been carrying on business activities. In terms with its objects, the assessee has invested in shares of various Indian companies through Foreign Direct Investment (FDI) route. For the year under consideration, the assessee had sold shares of four Indian companies, including the shares of Noida Cyber Park Pvt. Ltd. Before the Assessing Officer, the assessee had claimed exemption on capital gain arising on sale of shares by taking shelter under Article 13(4) of India – Mauritius tax treaty. However, both the Assessing Officer and learned DRP have rejected assessee's claim by holding that assessee being a mere paper company is not entitled to treaty benefits.

15. In our view, the reasoning, on which, the departmental authorities have denied assessee's claim of benefit under Article 13(4) of the tax treaty are unacceptable. It is evident, in course of proceedings before the departmental authorities, the assessee has furnished all materials and evidences to establish its residential status, bank statements reflecting details of investments made in foreign currency, Foreign Inward Remittance Certificate (FIRC) and various other documents have been submitted by the

assessee before the departmental authorities. Whereas, neither the Assessing Officer, nor DRP, except making vague allegations regarding the status of the directors and the structure of the company have held that since, the assessee is a mere paper company, it is not entitle to treaty benefits.

16. This, in our view, is against the spirit of CBDT Circular no. 789, dated April 13, 2000 and the ratio laid down by the Hon'ble Supreme Court in case Union of India Vs. Azadi Bachao Andolan (supra). In a recent decision of Hon'ble Jurisdictional High Court in case of Blackstone Capital Partners (Singapore) VI FDI Three PTE. Ltd. (supra), it has been held that once the assessee holds a valid TRC, the Departmental Authorities cannot go behind it to question residential status. Though, the Assessing Officer referred to certain observations of the Hon'ble Supreme Court in case of Vodafone International Holdings B.V. Vs. Union of India [2012] 17 taxmann.com 202 (SC), however, no material has been brought on record to establish that there is round-tripping of money or any other illegal activities. Though, the Revenue has authority to dispute the residential status of the assessee merely on the strength of TRC, however, it is incumbent upon the Revenue to make proper inquiry and to establish the fact that the party

claiming benefit and the strength of the TRC is a shell/conduit company.

17. In the facts of the present appeal, except making vague allegations, the departmental authorities have failed to bring on record any cogent material to substantiate their allegations that the assessee is merely a paper company, hence, cannot be treated as a genuine tax resident of Mauritius.

18. Pertinently, there is nothing on record to suggest that the departmental authorities are disputing the fact that the assesse had made investment in the shares giving rise to the capital gain prior to 07.04.2017. That being the established factual position, assessee will certainly be entitled to the benefit provided under Article 13(4) of the tax treaty. Interestingly, though, the Assessing Officer has made various allegations regarding the status and genuineness of the assessee while denying benefit under Article 13(4) of the tax treaty, however, while computing the capital gain he has allowed set off of long-term capital loss of Rs.18,86,42,123/- relating to the assessment year 2012-13. This fact shows that the Assessing Officer to certain extent has accepted the genuineness of the activities carried on by the assessee, i.e., investment in shares of Indian companies. Thus, in

the aforesaid view of the matter, we hold that the assessee is entitled to claim exemption under Article 13(4) of the tax treaty qua the capital gain arising on sale of shares. Therefore, the amount in dispute is not taxable in India. Ground no. 4 is allowed.

19. Insofar as ground nos. 1, 2 and 3 are concerned, in view of our decision in ground no. 4, they have become academic and do not require adjudication at this stage. However, the issues are kept open.

20. Ground no. 5, being consequential in nature, does not require adjudication.

21. In the result, the appeal is partly allowed, as indicated above.

Order pronounced in the open court on 21st November, 2023

Sd/- **(G.S. PANNU)** **VICE-PRESIDENT**	**Sd/-** **(SAKTIJIT DEY)** **VICE-PRESIDENT**

Dated: 21st November, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi