

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

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

ITA No.1812/Del/2022  
Assessment Year: 2018-19

SAIF II-SE INVESTMENTS MAURITIUS LIMITED, 3 <sup>RD</sup> FLOOR, STANDARD CHARTERED TOWER, 19 CYBERCITY, EBENE, MAURITIUS, C/O- PRICE WATERHOUSE & CO. LLP SUCHETA BHAWAN, II-A, VISHNU DIGAMBAR MARG, NEW DELHI	<b>Vs.</b>	Assistant Commissioner of Income Tax, Circle – International Taxation (3)(1)(2), Delhi
<b>PAN :AAMCS0710J</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Kanchun Kaushal, CA Sh. Kshitij Bansal, CA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	17.05.2023
Date of pronouncement	14.08.2023

**ORDER**

Captioned appeal has been filed by the assessee challenging the final assessment order dated 18.07.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act'), pertaining to assessment year 2018-19,

in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. In total, the assessee has raised 9 grounds. Ground no. 1 is a general ground. Whereas, at the time of hearing, on instructions, learned counsel appearing for the assessee did not press ground nos. 2 and 3. Accordingly, these two grounds are dismissed as not pressed.

3. In ground nos. 4 to 6, the assessee has raised the issue of non-taxability of long term capital gain derived from sale of shares in an Indian company to be exempt under Article 13(4) of India – Mauritius Double Taxation Avoidance Agreement (DTAA).

4. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Mauritius and is a tax resident of Mauritius. As stated by the Assessing Officer, the assessee operates as an investment holding company for undertaking various investments. He has also noted that the assessee holds a valid Tax Residency Certificate (TRC) issued by Mauritius Tax Authorities for the year under consideration. The assessee also holds a valid Global Business Licence (Category 1) (GBL-1) issued by the Financial Service Commission in Mauritius. The assessee's holding companies are SAIF II Mauritius Company

Ltd. ("SAIF II"), which owns 51% shareholding and SAIF III Mauritius Company Limited ("SAIF III"), which holds 49% shareholding in the assessee company. He has also noted that two of the directors of the assessee company are residents of Mauritius, whereas, two other directors are from Hongkong.

5. In the year under consideration, the assessee received dividend income of Rs.47,64,37,500/- on equity shares of National Stock Exchange ("NSE"), whereas, it received net long term capital gain of Rs.465,99,50,702/- on part disposal of equity shares of NSE. In the return of income filed for the assessment year under dispute, the assessee claimed the dividend income as exempt under section 10(34) of the Act. Whereas, he claimed the net long term capital gain to be exempt under Article 13(4) of India – Mauritius tax treaty.

6. In course of assessment proceedings, the Assessing Officer, from time to time, issued statutory notices under section 142(1) and 143(2) of the Act calling for various informations. Each of such notices were complied by the assessee. The basic query of the Assessing Officer was with regard to assessee's claim of exemption under Article 13(4) of India – Mauritius tax treaty. Though, the assessee justified the claim of exemption by

submitting that, being a tax resident of Mauritius holding a valid TRC, it is entitled to treaty benefits, however, the Assessing Officer remained unconvinced. He observed, though, assessee's principal activity is to hold investments, however, assessee had held investment in only one company throughout its existence, i.e., NSE. He further observed that it has not booked any income from its principal activity in the years 2016, 2017 and 2018. Similarly, it has not booked any operating expenses during these years. He further alleged that the assessee has no employees as evident from the fact that no salary expenses were debited to its books. He further observed that the dividend income earned by assessee on NSE shares were entirely used for repayment of amount owed to related parties and the assessee is not enjoying the benefits of the income in Mauritius. He further observed that the assessee is not paying any tax in Mauritius. He further observed that the key managerial personnel of the assessee and that of the holding companies are same persons. He further observed that the assessee's holding companies, in turn, are held by a company located in Cayman Island. Thus, he held that the assessee company has no commercial substance and has been set up as a conduit company under a scheme of arrangement to

get tax advantage under India – Mauritius tax treaty. Thereafter, referring to OECD Commentary and various judicial precedents, the Assessing Officer ultimately held as under:-

- i. The scheme of arrangement employed by the assessee is for tax avoidance through treaty shopping mechanism.
- ii. The assessee is just a conduit and the real owners of the income are ultimate holding companies based in Cayman Island.
- iii. TRC is not sufficient to establish the tax residency, if the substance establishes otherwise.
- iv. There is no commercial rationale of establishment of the assessee company in Mauritius.
- v. The control and management of the assessment company is not in Mauritius.

7. Based on the aforesaid reasoning, the Assessing Officer ultimately held that the assessee cannot be treated as a tax resident of Mauritius, hence, would not be entitled to treaty benefits. Accordingly, he framed the draft assessment order. The assessee filed objections against the draft assessment order before learned DRP. In course of proceedings before learned DRP, the assessee furnished various additional evidences to establish

its residential status as well as its claim of treaty benefits. Though, learned DRP admitted the additional evidences and called for a remand report of the Assessing Officer, however, ultimately, rejecting the objections, they upheld the decision of the Assessing Officer. In terms with the direction of learned DRP, the assessment was finalized.

8. Learned counsel appearing for the assessee submitted that the assessee was incorporated in Mauritius in the year 2008 and is in existence for over 15 years. He submitted, assessee's status as on date continues to be active in investment holding business even after sale of part of shares of NSE. He submitted, the assessee is not a fly by night operator, but has held the investments for a considerable length of period. He submitted, initially the investments in NSE shares were made by SAIF II, one of the holding companies of the assessee, in the year 2007. He submitted, while making the initial investment all regulatory approvals in India were obtained. In this context, he drew our attention to the approval received from Foreign Investment Promotion Board (FIPB) in Ministry of Finance, Government of India, the Press Release of Government of India declaring Foreign Direct Investment (FDI) by various entities, including the

assessee, approval from Securities Exchange Board of India (SEBI), approval from Reserve Bank of India (RBI), Board Resolution of NSE approving the acquisition of shares by SAIF II etc.

9. He submitted, as part of group's internal reorganization, SAIF II transferred its entire investment, i.e., 22,55,000 equity shares in NSE to assessee's demat account in June, 2009 for an aggregate consideration of USD 196.3 million. He submitted, as per Government policy, a foreign investor can hold 5% of shares in NSE. Thus, he submitted, SAIF II held 5 % of the shares in NSE, which subsequently got transferred to the assessee. He submitted, at the time of transfer of equity shares of NSE from SAIF II to the assessee in the year 2009, again the transaction went through entire process of regulatory approval of the competent authorities, such as, FIPB, SEBI etc. He submitted, at the time of sale of shares, third round of regulatory approval was granted. Thus, he submitted, while granting approval with regard to investment in equity shares of NSE, the regulatory authorities in India have scrutinized assessee as well as its holding companies group profile and portfolio, which include the ultimate ownership by the entity in Cayman Island. General reputation of

the assessee and its holding companies, record of fairness and integrity, including financial integrity, good reputation and character, and honesty along with impeccable track records of directors, were taken note of.

10. He submitted, when the regulatory authorities in India have scrutinized assessee's and its holding companies' credentials and have found nothing adverse, the Assessing Officer, on mere suspicion, cannot treat the assessee as conduit company having no commercial rationale or substance. He submitted, even after partially exiting from the investments made in the equity shares of NSE, the assessee still holds substantial part of the equity shares and assessee's share holding in NSE has been reduced from 5% to 3.5% only. Thus, he submitted, the allegations of the departmental authorities on the residential and business status of the assessee is wholly unsustainable.

11. Without prejudice, he submitted, the fact that the assessee has been incorporated in Mauritius and holding a valid TRC is beyond dispute. He submitted, under section 73(1)(b) of the Mauritius Income Tax Act, a company is said to be resident in Mauritius, if it satisfies either of the two conditions, i.e., the company is incorporated in Mauritius and has its central



management and control in Mauritius. He submitted, in assessee's case, both the conditions are satisfied. He submitted, as per the provisions of Mauritius Financial Services Act, 2007, Category 1 GBL, per se, establishes that its control and management is in Mauritius.

12. Without prejudice, he submitted, as per the requirement of Mauritius Financial Services Act, the assessee is having two directors, who are residents of Mauritius, its principal bank account is in Mauritius, it maintains accounting records and preparing auditing financial statements in Mauritius. Therefore, the residential status of the assessee cannot be doubted or disputed. He submitted, the TRC and Category 1 GBL licence issued to the assessee, not only establishes its residential status as a resident of Mauritius, but also establishes that its control and management is in Mauritius. He submitted, once the assessee is holding TRC, the departmental authorities cannot go behind the TRC to question the residential status of the assessee. In this context, he relied upon CBDT Circular Nos. 682, dated 30<sup>th</sup> March, 1994 and 789, dated 14<sup>th</sup> April, 2000. He also relied upon the following decisions:

- i. UOI Vs. Azadi Bachao Andolan and Another [2003] 263 ITR 706 (SC)
- ii. Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. Vs. ACIT [W.P.(C) No.2562/2022, dated 22<sup>nd</sup> December, 2022].
- iii. MIH India (Mauritius) Ltd. Vs. ACIT (ITA No. 1023/Del/2022, dated 16<sup>th</sup> November, 2022)
- iv. HSBC Bank (Mauritius) Ltd. Vs. DCIT [ITA No. 1708/Mum/2016, dated 2<sup>nd</sup> July, 2018)
- v. Reverse Age Healthcare Services Pte. Ltd. Vs. DCIT (ITA No.1867/Del/2022, dated 17<sup>th</sup> February, 2023)

13. He submitted, the decision of the Hon'ble Supreme Court in case of Vodafone International Holding B.V. [2012] 341 ITR 1 (SC) relied upon by the Assessing Officer favours the assessee. In this context, he drew our attention to the observations of the Hon'ble Supreme Court in paragraph 97 of the judgment. Thus, he submitted, the assessee, being a resident of Mauritius, is entitled to avail treaty benefits, which is more beneficial. Therefore, capital gain arising out of sale of equity shares has to be declared as exempt under Article 13(4) of the tax treaty.

14. Learned Departmental Representative strongly relied upon the observations of learned DRP and Assessing Officer.

15. We have patiently and carefully considered rival submissions in the light of decisions relied upon and perused the materials on record. The core issue arising for consideration is, whether the assessee can be treated as a tax resident of Mauritius. Consequentially, can the assessee claim benefit of exemption from taxability of capital gain on sale of equity shares under Article 13(4) of the tax treaty. For deciding this issue, few basic facts are required to be considered. Undisputedly, on perusal of certificate of incorporation issued by Registrar of Company, Mauritius, it is observed, the assessee has been incorporated on 7<sup>th</sup> January, 2008 as a private limited company. The Category 1 GBL has been issued in favour of the assessee by Financial Services Commission, Mauritius on 16<sup>th</sup> January, 2009. Further, from the date of its incorporation, the Mauritius Revenue Authorities have issued TRCs in favour of the assessee. Even, in the impugned assessment year, the assessee holds a valid TRC. These facts are not disputed by the Assessing Officer.

16. It is further relevant to observe, assessee's holding company, viz., SAIF II, acquired 5% unlisted equity shares of NSE, being

22,50,000 shares at a price of USD 55.55 per share for a total consideration USD 125 million. At the time of acquisition of shares by SAIF II, the various regulatory authorities of the Government of India, such as, FIPB, SEBI, RBI, NSE India undertook due diligence with regard to the credentials of the assessee by verifying all the documents regarding the corporate structure of the company, beneficial ownership, financial structure and various other factors. While conducting the due diligence all necessary and relevant documents were examined, which clearly disclose the share holding pattern and structure of not only the assessee, but also assessee's holding companies and as also the holding company of SAIF II and SAIF III based in Cayman Island. After thoroughly conducting the due diligence, acquisition of shares by SAIF II was approved and Government of India issued a Press Release disclosing the FDI in relation to 13 entities, including assessee.

17. Assessee's parent company subsequently transferred the shares of NSE to the assessee in the year 2009. At the time of transfer of shares from SAIF II to the assessee, the regulatory authorities again carried out due diligence and approved the transfer of shares. Again at the time of part sale of shares of NSE

by assessee in the impugned assessment year, the regulatory authorities carried out the necessary verification as per the laid out procedure and approved the sale. Thus, as could be seen from the aforesaid facts, not only the acquisition of shares by the assessee, but even sale of shares was approved after thorough inquiry by various regulatory authorities in India.

18. Thus, it has to be assumed that while granting approval the regulatory authorities have gone into the share holding and financial structure of the assessee and its parent companies and all other relevant factors. Thus, when the assessee holds a valid TRC all and Category 1 GBL and, moreover, the entire process relating to acquisition of shares of NSE and its sale went through a process of scrutiny and approval by various Government Authorities and Agency, doubt entertained by the Assessing Officer regarding residential and commercial status of the assessee company is quite surprising. The findings of the departmental authorities that the assessee is a conduit company lacking commercial substance runs in the teeth of approval granted by various Government agencies and authorities approving the purchase and sale of shares by assessee. Rather, the observations of the departmental authorities that assessee is

a conduit implies that various other Government agencies have approved the purchase and sale of shares by the assessee, that too, of a Government company, without undertaking a reality check. In other words, the Assessing Officer is pointing an accusing finger to other Government agencies. This, in our view, is preposterous, hence, unacceptable.

19. It is a fact on record that the assessee is holding the shares in NSE for more than a decade, since the year 2009, and even as on date, is still holding 3.5% shares in NSE. Thus, holding period of shares by the assessee demonstrates the status of the assessee as a genuine entity carrying on the business in holding investment. It is now fairly well settled that TRC issued by an authority in the other tax jurisdiction is the most credible evidence to prove the residential status of an entity and the TRC cannot be doubted. In fact, the CBDT, specifically in the context of India – Mauritius treaty, has issued Circular No. 682, dated 30<sup>th</sup> March, 1994 and 789, dated 14<sup>th</sup> April, 2000 clarifying that TRC issued by Mauritius Tax Authorities proves the residential status of a resident of Mauritius and no other evidence is required. In case of UOI Vs. Azadi Bachao Andolan (supra), the Hon'ble Supreme Court has not only upheld the validity of the

aforesaid CBDT Circulars, but has also held that “liable to taxation” as used in Article 4 of India-Mauritius DTAA does not mean that merely because tax exemption under certain specified head of income including capital gain from sale of shares has been granted under the domestic tax laws of Mauritius, it can lead to the conclusion that the entities availing such exemption are not liable to taxation. The Hon’ble Supreme Court categorically rejected Revenue’s contention that avoidance of double taxation can arise only when tax is actually paid in one of the contracting States. Hon’ble Court held that ‘liable to taxation’ and ‘actual payment of tax’ are two different aspects. The Hon’ble Supreme Court has further observed that for economic development, initially, many developing countries allowed some amount of treaty shopping to attract FDI.

20. In case of Black Stone Capital Partners (Singapore) VI FDI Three Pte. Ltd. (supra), the Hon’ble Jurisdictional High Court has again reiterated the legal position that the departmental authorities cannot question the validity of TRC, which proves the residential status of the entity. Thus, applying the ratio laid down in these decisions, it has to be held that once the assessee holds a valid TRC, it proves the residential status of the assessee as

resident of Mauritius, hence, it will be eligible to treaty benefits. The various allegations of the Assessing Officer regarding residential status of the assessee, lack of commercial substance etc. are in the nature of vague allegations without backed by substantive evidence, hence, do not deserve consideration. Unfortunately, learned DRP has merely endorsed the view expressed by the Assessing Officer without properly analyzing the facts and evidences brought on record.

21. In our view, the facts and materials available on record clearly establish that not only the assessee is a resident of Mauritius, but being a beneficial owner of the income derived from sale of shares, is entitled to the treaty benefits. Undisputedly, the shares sold by the assessee in the year under consideration were acquired in the year 2009, much prior to 01.04.2017. Therefore, the provisions of Article 13(3A) of the tax treaty would not be applicable. That being the case, the capital gain derived by the assessee from sale of shares would fall within the ambit of article 13(4) of the tax treaty. In that view of the matter, the capital gain, being exempt under the treaty provisions, cannot be brought to tax in India. Therefore, we direct



the Assessing Officer to delete the addition. These grounds are allowed.

22. Ground no. 8 relating to levy of interest under sections 234A and 234B, being consequential in nature, and ground no. 9, challenging the initiation of penalty under section 270A of the Act, being premature at this stage, are dismissed.

23. In the result, appeal is partly allowed.

***Order pronounced in the open court on 14<sup>th</sup> August, 2023***

***Sd/-***  
**(G.S. PANNU)**  
**PRESIDENT**

***Sd/-***  
**(SAKTIJIT DEY)**  
**VICE PRESIDENT**

Dated: 14<sup>th</sup> August, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi