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

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1815/Del/2023
Assessment Year: 2020-21

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ACCION Africa-Asia Investment Company, C/o- Ankul Goyal, Advocate AZB & Partners, A-8, Sector-4, Noida	**Vs.**	ACIT, International Taxation, Circle-1(1)(1), New Delhi
PAN :AAJCA1104H		
(Appellant)		**(Respondent)**

Assessee by	Sh. Deepak Chopra, Advocate Sh. Aditya Chandel, Advocate Sh. Ankul Goyal, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	11.10.2023
Date of pronouncement	26.10.2023

ORDER

Captioned appeal by the assessee arises out of assessment order dated 21.05.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act'), pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel ("DRP").

2. Dispute arising in the appeal relates to taxability of capital gain arising on sale of shares. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of Mauritius and is a tax resident of Mauritius. As stated by the Assessing Officer, the assessee holds a Category 1 Global Business Licence issued by the Financial Services Commissioner under the Mauritius Financial Services Act, 2007. The Assessing Officer has further stated that the principal activity of the assessee is to act as an investment holding company. As an investment holding company, the assessee has invested in acquiring equity shares in certain Indian companies. In the year under consideration, the assessee derived long-term capital gain on sale of shares of Northern Arc Capital Ltd. and Aye Finance Pvt. Ltd., two Indian companies, and derived total long term capital gain of Rs.91,14,47,001/- and Rs.124,90,36,610/- respectively.

3. Besides the above long term capital gains, the assessee also derived short term capital gain amounting to Rs.4,23,62,054/-. In the return of income filed for the impugned assessment year, the assessee offered the short term capital gain to tax. Whereas, the long term capital gain was not offered to tax pleading that the

assessee, being a tax resident of Mauritius holding a valid Tax Residency Certificate ('TRC'), is entitled to avail benefits under India – Mauritius Double Taxation Avoidance Agreement (DTAA). It was submitted that in terms of Article 13(4) of India – Mauritius treaty long term capital gain arising at the hands of a tax resident of Mauritius can only be taxable in Mauritius and not in India.

4. The Assessing Officer, however, did not accept the claim of the assessee. After calling for necessary details relating to corporate structure of the assessee and its activities, the Assessing Officer observed that as per information available in internet, all the group B directors in Assessee Company are employees/directors of the SANNE GROUP in Mauritius, which provides directors to such companies, which are structured with the sole purpose of availing treaty benefits. He observed that control and management decisions of the company were vested with a non-resident of Mauritius, rather than director resident in Mauritius. Further, he made various other allegations, such as, the company does not own any land/building and pays no rent. It has no electricity, water and telephone expenses. It has no employees as wages and salaries and other staff costs are nil etc. Thus, based on the aforesaid analysis of facts, the Assessing

Officer observed that the assessee is merely a paper company set up for availing treaty benefits. Accordingly, he issued a show-cause notice to the assessee to explain, why the exemption claimed under the treaty provisions should not be denied and the capital gain should not be taxed as per the provisions of the Act.

5. In reply to the show-cause notice, the assessee furnished a detailed submission reiterating its position that being a genuine tax resident of Mauritius, having a valid Tax Residency Certificate, it is entitled to treaty benefits. Hence, long terms capital gain cannot be taxed in India. The Assessing Officer, however, remained unconvinced with the submissions of the assessee and held that the assessee has been incorporated in Mauritius for the sole purpose of availing exemption under Article 13(4) of the India – Mauritius tax treaty. He observed, since, the assessee has been set up through a scheme of arrangement to avoid taxes adopting colourable device, the scheme has to be regarded as impermissible tax avoidance arrangement. Therefore, the assessee will not be entitled to treaty benefits. Accordingly, he proceeded to tax the entire long term capital gain under the provisions of the Act, while framing the draft assessment order.

6. Against the draft assessment order so framed, the assessee raised objections before learned DRP. Learned DRP dismissed the objections of the assessee with the following observations:

> *'3.3.5 The Panel has gone through the line of argument of the assessing officer and the assessee. It is seen that the ultimate holding company are not based in Mauritius nor the ultimate beneficiary of the transaction. The assessee company doesn't have any significant infrastructure, employees base or any other business activity apart from investing in shares. The control and management of the company also resides outside Mauritius. The assessee company has been interposed as a conduit company to avail the treaty benefit. As per the well laid principle purpose test under BEPS, a treaty benefit may be denied to the entity if its very existence and sum and substance to get the benefit from the treaty only, notwithstanding the fact that assessee has a valid TRC for the above period. The DRP is in agreement with the stand taken by the assessing officer. The assessee objections on the above is therefore, rejected."*

7. Before us, learned counsel appearing for the assessee submitted that the decision of the Assessing Officer to tax the long term capital gain under the provisions of the domestic law by denying treaty benefits is completely erroneous and unsustainable. He submitted, the fact that the assessee is a tax resident of Mauritius holding a valid TRC and is a investment holding company having a Category 1 Global Business Licence, has not been disputed by the Departmental Authorities. He submitted, once the assessee holds a valid TRC, the residential status of the assessee cannot be questioned. In support of such

contention, he relied upon the decision of the Hon'ble Supreme Court in case of **Union of India vs. Azadi Bachao Andolan (2003) 263 ITR 706** and CBDT Circular No. 789, dated 13.04.2000. He submitted, there is no dispute that the assessee has acquired the shares in the Indian companies, prior to 01.04.2017. Therefore, the long-term capital gain derived by the assessee is exempt under Article 13(4) of India – Mauritius DTAA.

8. He submitted, without invoking the General Anti Avoidance Rule (GAAR) provisions, the Assessing Officer has erroneously concluded that the long-term capital gain arising to the assessee is as a result of impermissible tax avoidance arrangement. He submitted, without following the statutory mandate and without bringing sufficient material on record to establish impermissible tax avoidance arrangement, the Assessing Officer cannot deny treaty benefits to the assessee. He further submitted, even GAAR provisions would not apply to capital gain arising out of sale of shares acquired prior to 01.04.2017. He submitted, this is further fortified from the fact that neither the Assessing Officer nor learned DRP have invoked the Limitation of Benefit (LOB) clause under Article 27A of the treaty. Thus, he submitted, without establishing the fact through cogent evidence that the assessee is

a conduit company, exemption claimed by the assessee under Article 13(4) cannot be denied on flimsy grounds. Further, he submitted, the issue is otherwise fully covered by the decision of the Coordinate Bench in case of Leapfrog Financial Inclusion India (II) Ltd. Vs. ACIT, ITA No.365 & 366/Del/2023, dated 11.08.2023.

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

10. We have considered rival submissions and perused the materials on record. The short issue arising for consideration is whether the capital gain derived by the assessee from sale of shares of two Indian companies is taxable in India or not, in view of Article 13(4) of India – Mauritius Tax Treaty.

11. Undisputed facts are, the assessee is a tax resident of Mauritius and is an investment holding company. It has been granted a Category 1 Globla Business Licence by the competent authority in Mauritius. The assessee is also having a valid TRC for the assessment year under dispute. It is also a fact on record that the shares of Indian companies, on sale of which, the assessee derived long-term capital gain in the impugned assessment year were acquired prior to 01.04.2017. Now, it is

fairly well settled that the TRC issued by the competent of a particular country determines the tax residency of a particular person/entity. The aforesaid position has not only been accepted by the Revenue in Circular No. 78, dated 13.04.2000, but while upholding the validity of the aforesaid Circular, the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra) has also held that the person/entity holding a valid TRC would be entitled to the treaty benefits. Subsequently, the aforesaid legal position has been followed in many decisions, including the recent decision of Hon'ble Jurisdictional High Court delivered in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. Vs. ACIT [2023] 452 ITR 111 (Delhi HC).

12. The only reason on which the Assessing Officer has declined the treaty benefits to the assessee is because, according to him, the assessee is a stepping stone conduit entity set up in Mauritius only for the purpose of availing treaty benefits, hence, it is an impermissible tax avoidance arrangement. Though, the Assessing Officer has made various allegations to conclude that the assessee is a conduit entity, however, such conclusion is not backed by any substantive and cogent material brought on record. In sum and substance, the Assessing Officer has made

mere allegations and has failed to substantiate the fact that the assessee is a conduit company through clinching evidences. Unfortunately, learned DRP without going deep into the issue factually, has simply endorsed the view of the Assessing Officer.

13. At this stage, we must observe, as per sub-section (2) of section 90 of the Act, wherever the Government of India has entered into an agreement with any other country outside India for granting relief of tax or for avoidance of double taxation, then in relation to the concerned assessee to whom the agreement applies the provisions of the Act, shall apply to the extent they are more beneficial to that assessee. In other words, if the provisions of the DTAA are more beneficial to that particular assessee, the provisions of DTAA would override the domestic law. However, Finance Act, 2013, introduced in sub-section (2A) of section 90 w.e.f. 01.04.2016, which reads as under:

> *"(2A) Notwithstanding anything contained in sub-section 2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him."*

14. As could be seen from reading of the aforesaid provision, with the introduction of sub-section (2A), earlier overriding effect of the treaty provisions to some extent has been curtailed as the

provisions of GAAR as provided under Chapter XA of the Act shall apply irrespective of the fact that such provisions are not beneficial to the concerned assessee. Thus, the department has been empowered under the statue w.e.f. 01.04.2016 to deny treaty benefits to the assessee in a case where GAAR is applicable.

15. Undisputedly, the provisions of section 90(2A) read with Chapter XA of the Act are applicable to the impugned assessment year. Though, the Assessing Officer has alleged that the assessee is a conduit company and has been set up as a part of impermissible tax avoidance arrangement, surprisingly, he has not invoked the provisions of GAAR as provided under Chapter XA of the Act. Even, the Departmental Authorities have not invoked the LOB clause as provided under Article 27A of India – Mauritius DTAA. Thus, facts on record clearly indicate that the departmental authorities were accepting the fact that the shares in the Indian companies having been acquired prior to 01.04.2017, hence, the capital gain derived from sale of such shares would be exempt from taxation in India in terms of Article 13(4) of the Indian – Mauritius DTAA. Only for the purpose of defeating assessee's claim of exemption under Article 13(4) of the

treaty, the Assessing Officer has introduced the theory of impermissible tax avoidance arrangement and Conduit Company.

16. Since, the allegations of the departmental authorities that the assessee is a conduit company and has been set up under a scheme of impermissible tax avoidance arrangement remains unsubstantiated through cogent evidence brought on record, we are inclined to accept assessee's claim of exemption under Article 13(4) of India – Mauritius DTAA, qua the capital gain derived from sale of subject shares held in two Indian entities. The Assessing Officer is directed to delete the addition.

17. For the sake of completeness, we must observe, though, the Assessing Officer has made an attempt to derive strength from certain observations of Hon'ble Supreme Court in case of Vodafone Intl. Holding Vs. Union of India [2012] 17 taxmann.com 202, however, in our view, the observations of the Hon'ble Supreme Court have to be applied keeping in view the factual context.

18. In the facts of the present appeal, since, the departmental authorities have failed to establish that the assessee is a conduit company, the TRC issued by the competent authority in

Mauritius would not only determine the residential status of the assessee, but also its entitlement under the treaty provisions.

19. Since, the Assessing Officer has not invoked the provisions contained under Chapter XA of the Act, the various grounds raised by the assessee relating to non-applicability of GAAR provisions are of pure academic nature, hence, do not require adjudication. However, the issues are kept open.

20. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 26th October, 2023

Sd/-	***Sd/-***
(DR. B.R.R KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 26th October, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi