**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.2251/Del/2022
Assessment Year: 2018-19
.

| Veg 'N' Table,<br>801, Tower-A 1,<br>Ansal Corporate Park,<br>Sector-142,<br>Noida | **Vs.** | DCIT,<br>Circle- International Tax - 3(1)(1),<br>Delhi |
|---|---|---|
| **PAN :AAGCV2131A** | | |
| **(Appellant)** | | **(Respondent)** |

| Assessee by | Sh. Sunny Mittal, CA<br>Sh. Gaurav Singhal, CA |
|---|---|
| Department by | Sh. Vizay B. Vasanta, CIT(DR) |

| Date of hearing | 11.10.2023 |
|---|---|
| Date of pronouncement | 31.10.2023 |

**ORDER**

Captioned appeal by the assessee arises out of final assessment order dated 20.06.2022 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. At the outset, Registry has reported delay of 27 days in filing the appeal. The assessee has filed the application for condonation of delay, explaining the reasons for delay.

3. Having considered the submissions of the parties, we are inclined to condone the delay and admit the appeal for adjudication on merits.

4. The dispute in the present appeal is confined to taxability of long-term capital gain claimed as exempt by the assessee under Article 13(4) of India – Mauritius Double Taxation Avoidance Agreement ('DTAA').

5. Briefly the facts are, as stated by the Assessing Officer, the assessee is non-resident corporate entity and tax resident of Mauritius having a valid Tax Residency Certificate issued by Mauritius Revenue Authorities for the impugned assessment year. He has also stated that the assessee is an investment holding company and has a global business licence issued by the competent authorities in Mauritius. The assessee had acquired certain shares in an Indian company, namely, M/s. EmNa Bios Diversus Pvt. Ltd. prior to 01.04.2014 and in the impugned assessment year it has sold them for a total consideration of Rs.2,81,94,834/-. In the return of income filed for the impugned

assessment year, the assessee computed net long-term capital gain at Rs.1,41,87,874/- and claimed exemption under Article 13(4) of India – Mauritius DTAA. Assessee's case was selected for scrutiny to examine high refund to TDS ratio. In course of assessment proceeding, while examining assessee's claim of exemption under Article 13(4) of the tax treaty, the Assessing Officer observed that 75% of assessee's shares are held by a company in United Kingdod (UK) and the remaining 25% shares are held by an individual, who is a Canadian resident. On examining the audited financial statements and books of account, the Assessing Officer observed that the assessee has invested in only two Indian companies and has not booked any operating and passive revenue from its principal activity in 2017 and 2018. Neither it has booked any operating expenses during these two years. Thus, he observed that the assessee has no economic substance and no commercial rationale can be attributed to its creation. He observed that, though, the assessee claimed to have employed well qualified individuals as its directors, however, no remuneration appears to have been paid to them. He further observed that as per the information available in public domain, two out of three directors hold multiple directorships in a number

of companies in Mauritius. He observed, one of the directors, i.e., Emmanuel Mancion, who is a Canadian resident, is the ultimate beneficial owner of the assessee company. He observed that immediately after deriving the capital gain, the assessee has repatriated the money from Mauritius to UK company by showing it as a loan repayment. Thereafter, referring to OECD Commentry and various judicial precedents, the Assessing Officer ultimately held that, though, the assessee was having a valid TRC, however, neither it can be treated as tax resident of Mauritius nor treaty benefit can be allowed to the assessee, reasons being:

1. *The scheme of arrangement employed by the assessee is one of tax avoidance through treaty shopping mechanism.*

2. *The is a clear lack of beneficial ownership at the level of the assessee company.*

3. *The TRC is not sufficient to establish the tax residency if the substance establishes otherwise.*

4. *There is no commercial rationale of establishment of assessee company in Mauritius.*

5. *The control and management of the assessee company is also not present in Mauritius.*

6. Thus, in the aforesaid premises, he proceeded to tax the long-term capital gain at the hands of the assessee after denying treaty benefits. Out of the total consideration of Rs.2,81,94,834/-,

the Assessing Officer reduced the cost of acquisition of Rs.35,01,740/- and the net long term capital gains of Rs.2,46,93,094/- was brought to tax. Accordingly, he framed the draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP. However, learned DRP rejected the objections of the assessee.

7. We have heard Sh. Sunny Mittal, learned counsel appearing for the assessee and Sh. Vizay B. Vasanta, learned Departmental Representative. Undisputed facts are, the assessee is a company incorporated in Mauritius and is holding a valid TRC for the assessment year under dispute. Therefore, ordinarily, the assessee has to be treated as a tax resident of Mauritius on the strength of the TRC.

8. As could be seen from the facts discussed by the Assessing Officer, the assessee has invested in shares of two Indian companies, namely, M/s. Alternative Food Process Pvt. Ltd. in 2002 and EmNa Bios Diversus Pvt. Ltd. in 2010. Thus, undisputedly, the sale of shares of EmNa Bios Diversus Pvt. Ltd. giving rise to capital gain, were acquired prior to 01.04.2017 through Foreign Direct Investment (FDI).

9. Thus, as could be seen from the facts on record, the assessee has held the shares for a considerable period of time. As per Article 13(4) of India – Mauritius DTAA, capital gain derived from sale of shares acquired prior to 01.04.2017 are exempt from taxation in the source country. However, the Assessing Officer has denied the treaty benefits to the assessee by questioning the residential status of the assessee by treating the assessee as a conduit company set up for claiming treaty benefits.

10. Now, it is fairly well settled that 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. 789, 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 in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. Vs. ACIT [2023] 452 ITR 111 (Delhi HC).

11. 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 conduit entity set up in Mauritius only for the purpose of availing treaty benefits, hence, it is a colourable device to avoid tax. 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.

12. 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 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."*

13. 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 diluted 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.

14. 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 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 that the shares in the Indian companies having been acquired prior to 01.04.2017, 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 tax avoidance arrangement and Conduit Company.

15. Since, the allegations of the departmental authorities that the assessee is a conduit company and has been set up under a scheme of 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. The Assessing Officer is directed to delete the addition.

16. 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.

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

***Order pronounced in the open court on 31st October, 2023***

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

Dated: 31st October, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi