

**IN THE INCOME TAX APPELLATE TRIBUNAL “L” BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM**

I.T.A. Nos. 1086 & 1087/Mum/2018  
(Assessment Years: 2009-10 & 2010-11)

HSBC Bank (Mauritius) Ltd. 6 <sup>th</sup> Floor, HSBC Centre, 18, Cybercity, Ebence-72201, Mauritius	Vs.	DCIT(IT)-2(2)(2) 16 <sup>th</sup> Floor, R. No. 1606, AIR India Bldg., Nariman Point, Mumbai-400 021
PAN/GIR No. AABCH 9075 N		
<b>(Assessee)</b>	:	<b>(Revenue)</b>

&

C.O. Nos. 92 & 93/Mum/2018  
(Arising out of ITA Nos. 1086 & 1087/Mum/2018)  
(Assessment Years: 2009-10 & 2010-11)

DCIT(IT)-2(2)(2) 16 <sup>th</sup> Floor, R. No. 1606, AIR India Bldg., Nariman Point, Mumbai-400 021	Vs.	HSBC Bank (Mauritius) Ltd. 6 <sup>th</sup> Floor, HSBC Centre, 18, Cybercity, Ebence-72201, Mauritius
PAN/GIR No. AABCH 9075 N		
<b>(Cross Objector)</b>	:	<b>(Assessee)</b>

<b>Assessee by</b>	:	Shri P. J. Pardiwala/ Shri Niraj Sheth
<b>Revenue by</b>	:	Shri Samuel Darse

<b>Date of Hearing</b>	:	21.08.2018
<b>Date of Pronouncement</b>	:	30.08.2018

**ORDER**

Per Bench:

These are appeals by the assessee and cross objections by the Revenue arise out of the orders of the learned Commissioner of Income Tax (Appeals)-56, Mumbai ('ld.CIT(A)' for short) both dated 22.12.2017 and pertain to the assessment years ('A.Y.' for short) 2009-10 & 2010-11.

2. In assessee's appeal, the common grounds raised read as under:

Ground 1 - Additions in respect of interest income of Rs 258,94,38,991 (Rs.141,37,94,601/- for 2010-11) earned on foreign currency loans given to Indian Corporates.

On the facts and circumstances of the case and in law, the CIT(A) erred in denying the benefits of Article 1 l(3)(c) of the Double Taxation Avoidance Agreement between India and Mauritius ('India-Mauritius Tax Treaty') and upholding the contentions of the Assessing Officer in taxing interest income of Rs. 258,94,38,991 earned on foreign currency loans and thereby raising a tax demand of Rs. 106,61,82,043 on the Appellant on the ground that the interest income is not beneficially owned by the Appellant.

The Appellant prays that the additions made by the Assessing Officer which has been upheld by the CIT(A) in respect of interest income on foreign currency loans be deleted.

Ground 2 - Failed to appreciate the information placed by Appellant to demonstrate that it is the 'beneficial owner' of interest income

While upholding the assessment order, the CIT(A) erred on the following counts:

- By not following the Circular No. 789 dated 13 April 2000 issued by the Central Board of Direct Taxes, the decision of Supreme Court in case of Azadi Bachao Andolan v. DCIT [2003] 263 ITR 706 (SC) and the jurisdictional Bombay High Court in the case of DIT v. Universal International Music B. V [2013] 31 taxman.com 223 (Bombay HC) and considering the Appellant as not the 'beneficial owner' of the interest income earned on foreign currency loans;
- By ignoring the other details / information, which clearly prove that it is the 'beneficial owner' of the interest income;
- By disregarding the information / details / documentation filed before the CIT(A) / AO during the course of appeal proceedings / scrutiny assessment proceedings;
- By insisting on production of names and address of the depositors, which have no bearing on the issue before him and which the Appellant was prohibited by the Mauritius Laws from providing the same; and
- By relying on the definition of 'beneficial ownership' as defined by The Financial Action Task Force ('FATF') guidelines and Investopedia by neither discussing the matter during the course of hearing nor providing an opportunity to the Appellant to be heard. Even as per definitions relied by Hon'ble CIT(A), the Appellant is considered as the 'beneficial owner' of the interest income.

The Appellant prays that based on the aforesaid Circular, judicial precedents and information / details furnished, the Appellant be considered as the 'beneficial owner' of the interest income on foreign currency loans.

Ground 3 - Lew of interest under section 234B of the Act of Rs 51,94,22,000 (Rs.24,17,30,611/- for A.Y. 2010-11)

On the facts and circumstances of the case, the CIT(A) erred in holding that interest under section 234B of the Act can be levied on a non-resident at the instance of the assessee or has a mutual agreement with the payer that the later should not deduct taxes at source.

While doing so, the CIT(A) erred in law to appreciate that the Appellant being a non-resident, is not liable to pay advance tax under section 207 read with section 209 of the Act as its taxable income is subject to withholding of taxes in India and hence interest under section 234B is not leviable. He failed to appreciate that no such condition is warranted or laid down in law and in any event there is no such agreement or mutual understanding.

The Appellant prays that the levy of interest liability under section 23-IB of the Act by the Assessing Officer be deleted.

Ground 4 - Initiation of penalty proceedings under section 271(iyc) of the Act

On facts and in the circumstances of the case, the Assessing Officer erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant prays that to instruct the Assessing Officer to drop the initiation of penalty proceedings.

3. The assessee is a limited liability company and registered as Tax Resident of Mauritius. It is also an FII registered with SEBI. The issue in dispute raised by the assessee pertains to the exigibility to taxation of the interest income earned under the provision of the Income Tax Act, 1961 ('the Act' for short). As per the assessee, being a resident of Mauritius, it has the benefit of India – Mauritius Tax Treat w.r.t. section 90(2) of the Act and article 11(3)(c) of the Tax Treaty. However, assessee's plea was negated by the Assessing Officer ('A.O.' for short) and the A.O.'s order was confirmed by the Id. CIT(A).

4. At the outset, the Id. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case vide order dated 02.07.2018.

5. Upon careful consideration, we deem it apposite to refer to the Income Tax Appellate Tribunal ('ITAT' for short) decision as under:

3. The appellant before us is a limited liability company which is incorporated, registered and tax resident of Mauritius. During the previous year relevant to the assessment year under consideration, assessee had, inter-alia, earned interest income of Rs. 94,57,45, 856/- from investments in debt securities made in accordance with the SEBI Regulations. In its return of income, the aforesaid interest income was claimed not taxable in India on the strength of Article 11(3)(c) of the India-Mauritius Double Tax Avoidance Convention (hereinafter referred to as 'India-Mauritius Tax Treaty'). The said exemption was denied by the Assessing Officer in the assessment order passed u/s 143(3) r.w.s. 144C(13) of the Act dated 28.01.2016, which was in conformity with the directions of the Dispute Resolution Panel (DRP). Pertinently, the exemption was denied on the ground that the requisite conditions prescribed in Article 11(3)(c) of the India-Mauritius Tax Treaty were not fulfilled by the appellant-assessee inasmuch as - (i) the interest was not "derived" by the assessee; (ii) that interest was not "beneficially owned" by the assessee; and, (iii) that the assessee ought to be carrying on bona fide banking business, which it did not. All the aforesaid issues were taken up by the assessee in appeal before the Tribunal, which vide order dated 16.12.2016 (supra) accepted the pleas of the assessee so far as the first two aforesaid conditions were concerned. In other words, the Tribunal held that the interest income in question was derived by the assessee and that it was carrying on bona fide banking business. So however, with regard to the third condition of 'beneficial ownership', the Tribunal remanded the issue to the file of the Assessing Officer with certain directions. This aspect was agitated by the assessee by way of a Miscellaneous Application u/s 254(2) of the Act and vide its order dated 10.01.2018 (supra), the Tribunal recalled its decision so far as it pertained to the issue of 'beneficial ownership'. In this background, the learned representative for the assessee pointed out that the captioned proceeding is to adjudicate the issue of 'beneficial ownership' while evaluating assessee's claim of non-taxability of the aforesaid interest income in terms of Article 11(3)(c) of the India-Mauritius Tax Treaty. Insofar as the scope of the present proceeding is concerned, the Id. DR appearing for the Revenue did not dispute the assertions of the assessee and, in fact, our attention was also invited to two Affidavits filed by the Assessing Officer dated 21.03.2018 and 15.03.2018 before the Hon'ble Bombay High Court wherein the Revenue took the stand that the order passed by the Tribunal dated 16.12.2016 (supra) was recalled u/s 254(2) of the Act vide order dated 10.01.2018 (supra) only to the extent of the issue of 'beneficial ownership'.

4. In this background, we have heard both the parties on the issue of 'beneficial ownership' under Article 11(3)(c) of the India-Mauritius Tax Treaty qua the interest

income of Rs. 94,57,45,856/- earned by the assessee. On this aspect, we find that the DRP required the assessee to explain as to how it fulfils one of the requirements of Article 11(3)(c) of the India-Mauritius Tax Treaty which prescribes that such interest must be 'beneficially owned' by the assessee. As per the DRP, the aforesaid was one of the pre-requisites before Article 11(3)(c) of the India-Mauritius Tax Treaty could be applied to say that the interest income in question was not taxable in India. The DRP has reproduced the submissions put forth by the assessee wherein assessee asserted that the interest income of Rs.94,57,45,856/- earned from investment in debt securities was beneficially owned by it. Assessee specifically drew attention of the DRP to CBDT Circular no. 789 dated 13.04.2000 which, inter-alia, prescribed that wherever a Certificate of Residence is issued by Mauritian authorities, such Certificate will constitute sufficient evidence for not only accepting the status of residence, but also the beneficial ownership in order to apply the provisions of India-Mauritius Tax Treaty. Further, in support of such a plea, assessee also relied on the judgment of the Hon'ble Bombay High Court in the case of DIT vs Universal International Music B.V, [2013] 31 taxman.com 223 which held that a company incorporated under the laws of Netherlands and holding valid Tax Residency Certificate issued by the Netherland authorities was to be construed as the beneficial owner of the Royalty income received from the Indian company and was accordingly held entitled to the benefits of Article 12 of the Double Taxation Avoidance Agreement between India and Netherlands. It was pointed out that assessee had obtained Tax Residency Certificate from the Mauritian Revenue authorities, a copy of which was also filed before the DRP. On the aforesaid basis, assessee sought to explain the fulfilment of the condition of 'beneficial ownership'. The DRP, however, rejected the plea of the assessee as according to it, no documents were placed by the assessee to suggest that the interest income in question was beneficially owned by the assessee. As per the DRP, assessee had failed to show the immediate source of funds for making the impugned investment and also the immediate application of the impugned interest income earned by it. Against such observations of the DRP, assessee is in appeal before us.

5. Before us, the learned representative for the assessee reiterated the reliance on the CBDT Circular no. 789 dated 13.04.2000 (supra) whose validity, according to the learned representative, has also been upheld by the Hon'ble Supreme Court in the case of UOI vs Azadi Bachao Andolan, [2003] 263 ITR 706 (SC). Furthermore, it is pointed out that the Ministry of Finance vide Press Clarification dated 01.03.2013 clarified that the CBDT Circular no. 789 dated 13.04.2000 (supra) continues to be in force. Another aspect which is brought out by the learned representative is based on the decision of Chennai Bench of the Tribunal in the case of Hyundai Motor India Ltd. vs DOT, [2017] 81 taxmann.com 5. In this case, the interest paid by Hyundai Motor India Ltd. to the assessee was disallowed u/s 40(a)(i) of the Act on the ground that the payer therein, i.e.

Hyundai Motor India Ltd. had not deducted the requisite tax at source. The Tribunal in the aforesaid decision, inter-alia, examined the provisions of Article 11 of the India-Mauritius Tax Treaty and concluded that the assessee was indeed the 'beneficial owner' of such interest income. The relevant extract of the decision referred to reads as under:-

"The doubts expressed by the DRP with regard to beneficial owner of the interest income are devoid of any legally sustainable basis. No case has been made out by the revenue for the beneficial owner of the interest income being entities other than Mauritian entities in question. In terms of article 11(3), interest arising in a Contracting State (i.e. India, in this case) shall be exempt from tax in that State (i.e. India) provided it is derived and beneficially owned by, inter alia, by any bank carrying on a bona fide banking business which is a resident of the other Contracting State (i.e. Mauritius). There is no dispute that Mauritian entities in question were carrying out banking business in Mauritius, and there is nothing on record to show, or even indicate, that the beneficial owner of interest income were not these Mauritian entities.

The protection of article 11(1) cannot, therefore, be declined on the facts of the present case. We are, therefore, of the considered view that the income embedded in these interest payments are not taxable in India. Accordingly, the assessee did not have any tax withholding obligations, u/s 195, in respect of these payments, and, as a corollary thereto, disallowance u/s 40(a)(i) was not justified."

6. On the aforesaid basis, it is pointed out that following the decision of Chennai Bench of the Tribunal in the case of Hyundai Motor India Ltd. it is, therefore, to be held that assessee was indeed the 'beneficial owner' of the interest income in question also.

7. On the other hand, the Id. DR appearing for the Revenue, has merely reiterated the discussion made by the DRP in its order, which we have already noted in the earlier paras and is not being repeated for the sake of brevity.

8. Article 11(3)(c) of the India-Mauritius Tax Treaty, inter-alia, prescribes that interest income arising in a contracting state shall be exempt from tax in that state provided it is derived and beneficially owned by any bank carrying on a bona fide banking business which is resident of the other contracting state. The limited point before us is as to whether assessee, who is a tax resident of Mauritius, beneficially owns the interest income of Rs. 94,57,45,856/- in question. The other prerequisites of Article 11(3)(c) of the India-Mauritius Tax Treaty are not for consideration before us as they have already been dealt with by our predecessor Bench in its order dated 16.12.2016 (supra). Be that as it may, in support of the proposition that the impugned interest income is beneficially owned by the it, the appellant has primarily relied on the Tax Residency Certificate issued by the

Mauritian Revenue authorities certifying the fact that assessee is a tax resident of Mauritius. Copies of such Certificates have been placed in the Paper Book at pages 268 to 270. Factually speaking, there is no dispute on this aspect. The only controversy is whether such Tax Residency Certificate enables an inference that the interest income in question is beneficially owned by the assessee. In this context, the CBDT Circular no. 789 dated 13.04.2000 (supra) of the CBDT is quite eloquent, whose relevant content reads as under :-

"2. ....It is hereby clarified that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well Q5 beneficial ownership for applying the DTAC accordingly. "

[underlined for emphasis by us]

Ostensibly, as per the clarification issued by the CBDT, wherever a Certificate of Residency is issued by the Mauritian authority, such Certificate will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the provisions of the India-Mauritius Tax Treaty. Thus, in our considered opinion, the aforesaid clarification by the CBDT supports the assertion of the assessee that based on the Certificate of Tax Residency issued by the Mauritian authority there is sufficient evidence to accept the position that the 'beneficial ownership' of the impugned interest income is with the assessee.

9. At this point, we may note that the CBDT Circular no. 789 dated 13.04.2000 (supra) is specifically in the context of incomes by way of dividend and capital gain on sale of shares. So, however, in our considered opinion, it would equally apply even in the situation before us where the application of the provisions of the India-Mauritius Tax Treaty is sought to be applied for considering the taxability of interest income as per Article 11(3)(c) of the India-Mauritius Tax Treaty. We say so by drawing strength from the judgment of the Hon'ble Bombay High Court in the case of Universal International Music B. V (supra). The issue before the Hon'ble High Court was relating to the taxability of Royalty income in the context of India - Netherlands Double Taxation Avoidance Agreement. In the said decision also, CBDT Circular no. 789 dated 13.04.2000 (supra) was held applicable in the context of Royalty income. Thus, in our considered opinion, even in the context of the impugned interest income, Circular no. 789 dated 13.04.2000 (supra) of the CBDT is applicable while applying the provisions of Article II(3)(c) of the India-Mauritius Tax Treaty. On this aspect itself we uphold the plea of the assessee that assessee is the 'beneficial owner' of the impugned interest income on the strength of the Tax Residency Certificate issued by the Mauritian authorities.

10. Moreover, in the context of element of interest income earned by the assessee from Hyundai Motor India Ltd., the Chennai Bench of the Tribunal in its decision in the case of Hyundai Motor India Ltd. (supra) has already observed that the recipient therein (i.e. the assessee before us), was the 'beneficial owner' of the

interest income qua the provisions of Article 11 of the India-Mauritius Tax Treaty. Be that as it may, in view of our aforesaid discussion, we uphold the stand of the assessee that it is the 'beneficial owner' of the interest income of Rs.94,57,45,856/- quo the provisions of Article 11(3)(c) of the India-Mauritius Tax Treaty and thus, such income is not taxable in India.

11. In the result, appeal of the assessee is allowed.

6. In this regard, the ld. Departmental Representative (ld. DR for short) submitted that though the ITAT had decided the issue in favour of the assessee, it has erred inasmuch as interest has not been covered in the CBDT Circular no. 789 dated 13.04.2000 referred by the ITAT. He claimed that the said circular was only with respect to the dividend and capital gain on sale of shares. That ITAT had extrapolated the same to interest income without any cogent reasoning or mentioning the underlying principle. He submitted that he would rely on the order of the ld. CIT(A).

7. Per contra, the ld. Counsel of the assessee submitted that the ITAT has already dealt with the issues raised by the ld. DR and the Revenue. That the ITAT has also referred to the Hon'ble Bombay High Court decision in the case of *Universal International Music B. V* (supra), where the same circular was held to be applicable in the context of the royalty income.

8. Upon careful consideration, we note that on same facts, the ITAT has already decided the issue in favour of the assessee. The matter is already before the Hon'ble High Court. Hence, we do not find any reason to deviate from the decision of the co-ordinate bench of the Tribunal in assessee's own case as above. Hence, following the said

precedent, we allow the assessee's appeal. We set aside the orders of the ld. CIT(A) and decide the issue in favour of the assessee.

Apropos Revenue's cross objection

9. The common grounds raised reads as under:

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in directing the Assessing Officer to examine the failure on part of prayer to deduct tax on source when the Ld. CIT(A) had himself held in para 27 that "ordinarily interest u/s. 234B is consequential warranting no separate discussion?"

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in setting aside the issue of interest u/s. 234B to the Assessing Officer instead of deciding it by himself.

3. The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.

10. In this regard, the ld. Counsel of the assessee submitted that the issue is covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case of *Director of Income-tax (International Taxation) v. Ngc Network Asia LLC* [2009] 313 ITR 187 (Bom).

11. The ld. DR did not dispute this proposition.

12. Upon careful consideration, we note that the Hon'ble jurisdictional High Court in the above said decision has held as under:

In view of the decision of *CIT v. Sedco Forex International Drilling Co. Ltd.* [2003] 264 ITR 320 (Uttaranchal), it was to be held that when a duty is cast on the payer to deduct and pay the tax at source, on payer's failure to do so, no interest under section 234B can be imposed on the payee assessee.

13. Be as it may, we have already decided the issue of exigibility to taxation in favour of the assessee. Hence, this issue is consequential.

14. In the result, the assessee's appeal stands allowed and the Revenue's cross objection stands dismissed.

*Order pronounced in the open court on 30.08.2018*

Sd/-  
(Sandeep Gosain)  
Judicial Member

Sd/-  
(Shamim Yahya)  
Accountant Member

Mumbai; Dated :30.08.2018  
Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai