IN THE INCOME TAX APPELLATE TRIBUNAL

"H" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.5411/Mum./2018
(Assessment Year : 2012–13)

HSBC Bank (Mauritius) Ltd.
C/o BSR & Co., LLP
1st Floor, Lodha Excelus
Apollo Mills Compound ……. Appellant
N.M. Joshi Marg, Mahalakshmi
Mumbai 400 011
PAN – AABCH9075N

v/s

Dy. Commissioner of Income Tax
International Taxation ……. Respondent
Circle–2(2)(2), Mumbai

ITA no.5636/Mum./2018
(Assessment Year : 2012–13)

Dy. Commissioner of Income Tax
International Taxation ……. Appellant
Circle–2(2)(2), Mumbai

v/s

HSBC Bank (Mauritius) Ltd.
C/o BSR & Co., LLP
1st Floor, Lodha Excelus
Apollo Mills Compound ……. Respondent
N.M. Joshi Marg, Mahalakshmi
Mumbai 400 011
PAN – AABCH9075N

Assessee by : Shri Niraj Sheth
Revenue by : Shri Avaneesh Tiwari

Date of Hearing – 23.09.2019	Date of Order – 20.12.2019

O R D E R

PER SAKTIJIT DEY, J.M.

The aforesaid cross appeals arise out of order dated 16th July 2018, passed by the learned Commissioner of Income Tax (Appeals)–56, Mumbai, pertaining to the assessment year 2012–13.

ITA no.5411/Mum./2018
Assessee's Appeal

2. In grounds no.1 and 2, the assessee has challenged the addition of interest income of ₹ 225,96,13,605, and ₹ 392,77,64,878, earned on foreign currency loan given to Indian Corporates and on debt securities respectively.

3. Brief facts are, the assessee, as stated by the Assessing Officer, is a Limited Liability Company incorporated and registered in Mauritius. The assessee is a Foreign Industrial Investor (FII) duly approved by the Securities Exchange Board of India (SEBI). For the year under consideration, the assessee filed its return of income on 28th September 2012, declaring nil income. In the course of assessment proceedings, the Assessing Officer noticing that the assessee has earned interest on debt securities and foreign currency loans to India Corporate, called upon the assessee to explain why such income has not been offered to tax in India. In response, it was submitted by the

assessee that it being a tax resident of Mauritius is governed by India–Mauritius Double Taxation Avoidance Agreement. It was submitted, the assessee being a tax resident of Mauritius and carrying on bonafide banking business, the interest income in India will not be taxable in terms of Article–11(3)(c) of the Tax Treaty, as the assessee is a beneficial owner. In this context, the assessee also referred to the CBDT Circular no.789 dated 13th April 2000. The Assessing Officer, however, did not find merit in the submissions of the assessee and brought the interest income to tax. Being aggrieved, the assessee went in appeal before the first appellate authority.

4. The learned Commissioner (Appeals), however, relying upon his decision in assessee's own case for the assessment year 2010–11, upheld the decision of the Assessing Officer with regard to interest income earned on foreign currency loans given to Indian Corporate. Insofar as the interest income earned on debt securities, learned Commissioner (Appeals) following his decision in assessee's own case for the assessment year 2013–14, directed the Assessing Officer to decide the issue following the same.

5. The leaned Counsel for the assessee submitted, both the issues viz. taxability of interest income earned on foreign currency loans to Indian corporate and interest on debt securities came up for consideration before the Tribunal in assessment year 2011–12,

wherein, the Tribunal not only accepted assessee's claim that the interest income was derived by the assessee from bonafide banking business, but the assessee is also the beneficial owner of such interest income, hence, it is not taxable as per Article–13(1)(c) of the India–Mauritius Tax Treaty. He submitted, following the aforesaid decision, the Tribunal accepted assessee's claim while deciding the issue in the assessment years 2009–10, 2010–11 and 2013–14. In this context, he drew our attention to the respective orders of the Tribunal. Thus, he submitted, the issue is covered in favour of the assessee.

6. The learned Departmental Representative, though, agreed that the issues are decided in favour of the assessee by the Tribunal in other assessment years, however, he relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

7. We have considered rival submissions and perused the material on record. Facts on record reveal that identical issue came up for consideration before the Tribunal in assessee's own case in various other assessment years. In fact, learned Commissioner (Appeals) while deciding the issue has himself followed his own orders passed in the assessment years 2010–11 and 2013–14. While deciding the issue in the assessment year 2011–12, the Tribunal in ITA no.1708/Mum./2016, dated 2nd July 2018, has held in the following manner:–

"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 aforestated 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 aforestated 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 ld. 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 IndiaMauritius 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 DCIT, [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 IndiaMauritius 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 ld. 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 pre-requisites 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 as 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 IndiaNetherlands 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 11(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/- qua the provisions of Article 11(3)(c) of the India-Mauritius Tax Treaty and thus, such income is not taxable in India."

8. The aforesaid decision was followed by the Tribunal while deciding the issue in assessee's own case in the assessment year 2013–14 vide ITA no.2213/Mum./2018, dated 2nd January 2019, and in assessment years 2009–10 and 2010–11, vide ITA no.1087/Mum./2018 and others, dated 30th August 2018. Facts being identical, respectfully following the decisions of the Tribunal in

assessee's own case, as referred to above, we hold that the interest income earned by the assessee is not taxable in India as the assessee is a beneficial owner as per Article–11(3)(c) of the India–Mauritius Tax Treaty. Accordingly, grounds no.1 and 2 are allowed.

9. Apropos ground no.3, the assessee has filed a letter dated 23rd September 23rd September 2019, expressing the intention not to press this ground. Accordingly, this ground is dismissed as not pressed.

10. In ground no.4 the assessee has challenged levy of interest under section 234B of the Act.

11. The learned Counsel submitted, assessee being a non–resident, the obligation is on the payer to deduct tax at source. Therefore, he submitted, the assessee cannot be fastened with the liability of interest under section 234B of the Act on account of failure of the payer to deduct tax at source. He submitted, while deciding identical issue in assessee's own case in the assessment year 2013–14 the Tribunal has expressed this view.

12. The learned Departmental Representative submitted, levy of interest under section 234B is mandatory and consequential in nature.

13. We have considered rival submissions and perused the material on record. While deciding grounds no.1 and 2 we have deleted the

addition made on account of interest income earned by the assessee. Consequently, there may not be any occasion for levy of interest under section 234B of the Act. Suffice to say, while deciding identical issue relating to levy of interest under section 234B of the Act, the Tribunal in assessee's own case for the assessment year 2013–14 (supra) has held that no such interest can be levied as the payer of such interest is obliged under the Act to deduct tax at source. Therefore, the issue is otherwise covered in favour of the assessee by the aforesaid decision of the Tribunal.

14. Ground no.5, challenging the initiation of penalty proceedings under section 271(1)(c) of the Act being premature at this stage does not require adjudication, hence, dismissed.

15. In the result, assessee's appeal is partly allowed.

ITA no.5636/Mum./2018
Revenue's Appeal

16. Grounds no.1 to 4, are on the issue of taxability of interest income.

17. In view of our decision in grounds no.1 and 2, in assessee's appeal being ITA no.5411/Mum./2018, these grounds have become redundant, hence, are dismissed.

18. In grounds no.5 and 6, the Revenue has raised the issue of levy of interest under section 234B of the Act.

19. In view of our decision in ground no.4, of assessee's appeal being ITA no.5411/Mum./ 2018, these grounds have become infructuous, hence, dismissed.

20. Grounds no.7 and 8, being general in nature do not require adjudication.

21. In the result, Revenue's appeal stands dismissed.

22. To sum up, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 20.12.2019

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 20.12.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai