IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
and Ram Lal Negi (Judicial Member)

ITA No. 2418/Mum/2018
Assessment year: 2013-14

Deputy Commissioner of Income Tax,
International Taxation 2(2)(2), Mumbai ……..……Appellant

Vs

HSBC Bank (Mauritius) Limited ……Respondent
c/o BSR & Co LLP, 1st floor, LodhaExelus
Apollo Mills Compound, N M Joshi Marg,
Mahalaxmi, Mumbai 400 011 [PAN: AABCH9075N]

Appearances by
V Sreekar *for the appellant*
Niraj Sheth *for the respondent*

Date of concluding the hearing: : December 9,2019
Date of pronouncement : March 2, 2020

ORDER

Per Pramod Kumar, VP:

1. This appeal is directed against the learned CIT(A)'s order dated 24th January 2018 in the matter of assessment under section 143(3) r.w.s 144C of the Income Tax Act, 1961, for the assessment year 2013-14.

2. Grievances of the appellant, in substance, are two fold- first, that the learned CIT(A) was not justified in deleting the addition of Rs 496,678,73,353 on account of "interest income on securities- including T bills"; and – second, that the learned CIT(A) erred in remitting the issue of levy of interest under section 234B to the file of the Assessing Officer.

3. As regards the second grievances, it is only fit to be noted and rejected for the simple reason that the learned CIT(A) has merely followed his order for the assessment year 2010-11, and the said order now stands approved by a coordinate bench of this Tribunal vide order dated 30th August 2018. Learned representatives fairly agree that in the light of this factual position, no interference is called for. We approve the order of the CIT(A) on this point and decline to interfere in the matter.

4. Coming to the main grievance raised in this appeal, we find this issue is also covered in favour of the assessee by orders of the coordinate benches in assessee's own case. The lead order in this case is the order dated 16th December 2016 for the assessment year 2011-12. In this order, the coordinate bench upheld the treaty protection under article 11(3) of the India Mauritius Double Taxation Avoidance Agreement in principle but referred the matter to the file of the Assessing Officer for the limited examination of the question as to whether the assessee satisfied "beneficial ownership" requirement. The matter, however, did not end at that. This order was subsequently recalled for the limited purposes of deciding the "beneficial ownership" aspect on the merits. In the order dated 2nd July 2018, the coordinate bench decided this aspect also in favour of the assessee and observed as follows:

> *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'.*
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> *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 v. Universal International Music B.V [2013] 31 taxmann.com 223/214 Taxman 19 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 Union of India v. Azadi BachaoAndolan, [2003] 263 ITR 706/132 Taxman 373. 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. v. Dy. CIT [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. (supra) 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 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 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.

5. Learned representatives fairly agree that the issue in appeal is thus squarely covered, in favour of the assessee, by the aforesaid decision. Learned Departmental Representative, however, rather dutifully relied upon the stand of the Assessing Officer.

6. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee's own case. Respectfully following the same, and having noted that the learned CIT(A) has merely followed the orders of our coordinate benches, we approve the conclusions arrived at by the learned CIT(A), on this point also, and decline to interfere in the matter.

7. We may, however, hasten to add that this decision is not an authority on the connotations of "beneficial ownership" in general, and is anyway confined to the specific situation of India Mauritius DTAA, and thus on peculiar facts of this case.

8. No other issue was raised, or pressed, before us.

9. In the result, the appeal is dismissed. Pronounced in the open court today on the 2nd day of March, 2020.

Sd/- Sd/-

Ram Lal Negi **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the 2nd day of March, 2020

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai