THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

SHRI PRAMOD KUMAR, VICE PRESIDENT
&
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

I.T.A. No.792/Mum/2022 (A.Y. 2014-15)

Income Tax Officer (International Taxation) 2(3)(1). Room No. 1727, 17th Floor, Air India Building Nariman Point, Mumbai-400021	Vs.	Shri Rajeev Suresh Gehi 63/D, 3rd Floor, 233, Karataria Colony, Shivaji Park, Mahim, Mumbai-400004 **PAN AMYPG6195L**
(Appellant)		**(Respondent)**

Assessee by	Shri. N. S. Virani
Department by	Shri. Lovish Kumar
Date of Hearing	03.10.2022
Date of Pronouncement	11.10.2022

O R D E R

PER SANDEEP SINGH KARHAIL (JM) :-

The present appeal has been filed by the Revenue challenging the impugned order dated 11-02-2022 passed under section 250 of the Income-Tax Act, 1961 ('the Act') by learned Commissioner of Income Tax (Appeals)-56, Mumbai ['learned CIT(A)'], for the assessment year 2014-15.

2. The present appeal filed before us is delayed by 14 days. In the present appeal, the impugned order dated 11-02-2022 was received by the Revenue on the same date. Thus, as per the provisions of section 253(3) of the Act, the Revenue was required the filed the appeal within 60 days from the received the order. However, the Revenue filed appeal, for the year under

consideration, on 26-04-2022. We find that the Hon'ble Supreme Court, vide order dated 10/01/2022, passed in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo-Motu Writ Petition (Civil) no.3 of 2020, directed that the period from 15/03/2020 till 28/02/2022, shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial and quasi judicial proceedings. As part of the limitation period for filing the present appeal was falling within the aforesaid time-period, in view of the order passed by the Hon'ble Supreme Court, the same shall be excluded till 28/02/2022 and thus, we are of the considered view that there is no delay in filing the present appeal and we proceed to decide the same on merits.

3. In this appeal, the Revenue has raised following grounds:-

> *1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not appreciating the existence of commercial relation between the assessee and M/s. Ahuja Group."*
>
> *2. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in not appreciating the evidentiary value of statement of Shr. Jagdish Bhagwandas recorded u/s. 132(4) of the IT Act, 1961.*
>
> *3. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in deleting the addition amounting to Rs.3.65 cr. citing article 22 of India- UAE treaty without appreciating the following:*
>
> *(a) Article 22 of the India - UAE treaty provides for taxability of the income arising from immovable property.*
>
> *(b) India - UAE DTAA (the tax-treaty) provided for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961. The treaty does not cover the taxation of income of the nature such as unexplained investment."*

> *4. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) failed to appreciate that cash provided as loan must have been generated in India as there is no evidence furnished by assessee to show that it is earned outside India, and under the domestic tax law's, there is a presumption of deemed income."*

4. The only grievance of the Revenue, in the present appeal, is against the deletion of addition on account of investment made in India by the assessee, who is non-resident Indian settled in the United Arab Emirates (UAE)

5. The brief facts of the case, as emanating from the record, are: The assessee is an Indian National, fiscally domiciled in and tax resident of UAE for over three decades and therefore he is eligible for benefit of India UAE Double Taxation Avoidance Agreement. As per information received from the DDIT (Investigation), Mumbai it was noticed that the assessee has paid cash amounting to Rs. 3,65,00,000/- as loan during the year under consideration to M/s Ahuja Group. Since, the assessee has not filed his return of income within the time of prescribe u/s 139 of the Act, the case of the assessee was reopened u/s 147 of the Act. In pursuance of the notice u/s 148 of the Act, return of income was filed by the assessee on 13-04-2018 declaring miniscule amount of Rs. 1,11,368/-. During the course of assessment proceedings, the assessee submitted that only -payment made by him was towards properties purchases and/or advances against such purchases. Further, the assessee denied, to have made undisclosed investment in India. The Assessing Officer ('*A.O.*') vide order dated 29-12-2018 passed u/s 143(3) r.w.s. 147 of the Act did not agree with the submissions of the assessee and treated the amount of Rs. 3,65,00,000/- as unexplained

investment of the assessee made from the undisclosed sources and added the same to the total income of the assessee u/s 69 of the Act.

6. In appellate proceedings before learned CIT(A), the assessee filed copy of Tax Domicile Certificate dated 21-02-2019 for the period of 01-04-2013 to 31-03-2014 issued by the Ministry of the Finance, UAE. The learned CIT(A) vide impugned order dated 11-02-2022 allowed the appeal filed by the assessee by following the findings of its predecessor in assessee's own case for assessment year 2010-11. The learned CIT(A) also noted that the said findings rendered in assessment year 2010-11 have also been upheld by Co-ordinate Bench of the Tribunal vide order on 23-11-2021. The relevant findings of the learned CIT(A) are as under:

> *"9.3 This findings of the CIT(A) for AY 2010-11 have been confirmed by the Hon'ble Tribunal by order dated 23.11.2021. The Hon'ble Tribunal has held that unexplained investment could be taxed in India under sec 69, only if it can be proved that such investments were made out of income earned in India and that in the said case, an economic activity or a linkage of an income with the source country (India) which would trigger a tax incidence in India, was absent. Even if the sum of Rs 2.5 crores was to be treated as income, the right to tax the same would Article 22 of the India UAE Treaty vest with the country of residence which was UAE and not India. Considering the categorical findings on DTA, the Bench did not consider it necessary to dwell on merits. It is, however, already mentioned in para 9.2 that the CIT(A) had ruled in favor of the Appellant on merits also for AY 2009-10 and 2010-11.*
>
> *9.4 The Hon'ble Tribunal has given categorical findings that India does not have right to tax the sum in view of Article 22 of the India UAE Treaty. The sum of Rs 3.65 crores would be taxable, if at all it is so, in UAE and not in India. Also, the sum will not be taxable in India even without reference to DTAA. The observations of my predecessor in this connection are already reproduced. Following the same, I hold that the sum is not taxable even on merits. In view of both these reasons, it is held that the amount is not taxable in India u/s 69 and the addition is deleted."*

Being aggrieved, the Revenue is in appeal before us.

7. Having considered the submissions of the both sides and perused the material available on record, we find that similar issue arose for consideration before Co-ordinate Bench of the Tribunal in assessee's own case in ITO v/s Rajeev Suresh Ghai, in ITA No. 6290/Mum/2019, for assessment year 2010-11. The Co-ordinate Bench of the Tribunal, while deciding the issue in favour of the assessee, vide order dated 23-11-2021, observed as under:

> *"4. We have heard the rival contentions at length, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*
>
> *5. Let us, first of all, consider as to what is the basic nature of the transaction, which has resulted in the impugned tax liability. The assessee is said to have, even going by the claim of the revenue authorities, paid some unaccounted monies to the builder, and, by a fiction of law, these unaccounted or unexplained investments are being brought to tax. The trigger for taxability is thus investment in the immoveable property- unexplained investment at that. Bearing this in mind, let us now see the treaty provisions under which this income can be brought to tax in the hands of the assessee- in terms of the provisions of the Indo UAE tax treaty, as there is no dispute that the assessee is, being resident in and fiscally domiciled in the UAE, entitled to the benefits of the Indo UAE tax treaty. We are right now dealing with an assessment year in which tax residency certificate was not even mandatory, but quite fairly, that aspect has not even been raised before us. Coming to the taxability under the Indo UAE tax treaty, such an income is not specifically taxed under any of the heads in the tax treaty in question. That brings us to the residuary head of income, dealing with 'other income', which is covered by article 22. Under Article 22 (1) of the Indo UAE tax treaty, "Subject to the provisions of paragraph (2), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Agreement, shall be taxable only in that Contracting State". It is not even anyone's case that income has arisen here; the case is that the income has been invested here. In any event, the assessee is all along tax resident in UAE, and he does not undertake any economic activities in India. The unexplained investments, which are inherently in the nature of the application of income rather than earning of income, cannot thus be taxed in India under Article 22(1). Article 22(2) only restricts*

the scope of article 22(1) by providing that "The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base". Obviously, this has no application in the present situation either, but what it does highlight anyway is the economic activity nexus with the income, which can be taxed under Article 22(1). Of course, where revenue authorities can bring on record any material to demonstrate, or indicate, that the unexplained investments in question have been made out of incomes generated in India, the situation will be materially different, but that is not the case at present.

6. As for the plea that the India- UAE treaty provides for taxability of income arising from immovable property, this plea is contextually irrelevant inasmuch as what we are dealing with right now is not an income from the immovable property, but an income said to have been invested in an immovable property. The plea is thus devoid of any legally sustainable merits. As for article 23(1), which refers to taxation of capital represented by immovable property, the said article refers to taxation of capital but does not provide, as learned Departmental Representative seem to suggest, for taxation by virtue of investment in the immovable property. Explaining the scope of similar provision, the OECD Model Convention Commentary, which is quoted with approval in UN Model Convention Commentary, states as follows:

> *1. This Article deals only with taxes on capital, to the exclusion of taxes on estates and inheritances and on gifts and of transfer duties. Taxes on capital to which the Article applies are those referred to in Article 2.*
>
> *2. Taxes on capital generally constitute complementary taxation of income from capital. Consequently, taxes on a given element of capital can be levied, in principle, only by the State which is entitled to tax the income from this element of capital.*

7. Clearly, therefore, article 23(1) has no application in the present context. What is impugned before us is not a taxation on capital represented by an immoveable property but taxation on account of a part of investment in an immovable property being unexplained. Since a tax on capital is a tax on assets rather than a tax on income, wealth tax, which is covered by article 2(b)(iii) could at best be covered by the same, but that aspect of the matter is not even relevant in the present context.

8. Coming to the plea, embedded in the ground of appeal, that the "Indo UAE tax treaty provides for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961", we see no merits in this plea either. Classification of an income and taxation of an income is inherent part of the treaty mechanism, and unless an income fits in the treaty description of that income, it cannot be subjected to tax as such.

9. The interplay between the treaty and domestic law, as being sought to be canvassed by the revenue authorities, is alien to the treaty taxation mechanism.

10. As a matter of the fact that the ground of appeal itself states that "the treaty does not cover the taxation of income of the nature such as unexplained investment" and that is the end of the road so far as taxation of an income, in any head other than the residuary head of 'other income', is concerned, and, since the said income is not even taxable under the residuary article 22, there cannot be any taxation of this income in the hands of the assessee under the Indo UAE tax treaty.

11. It is always useful to bear in mind the fact that, on the first principles, the trigger for taxation of an income in a source jurisdiction is either the economic activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation, The assessee before us is certainly an Indian national, but he is admittedly resident in the UAE so far as his residential status, under the Indo UAE tax treaty is concerned, is of the UAE tax resident. The residuary taxation rights, in terms of the treaty provisions, belong to the residence jurisdiction, but even if that was not to be so, the residence rights can at best go to the source jurisdiction, which in turn refers to a jurisdiction in which the income is earned, rather than a jurisdiction in which the income is invested. By no Stretch logic, therefore, such an income could be taxed in India, which is neither residence nor Source jurisdiction; it is at best investment jurisdiction. However, the scheme of tax treaties limits the rights of taxation either to residence or to source jurisdiction.

12. What essentially follows is that if, under the domestic tax laws of the UAE, the amounts in question be treated as of income nature, the tax implications of these amounts, under the scheme of the Indo UAE tax treaty, can at best follow in the UAE, but that is not relevant in the present context of holding these amounts to be, even if so permissible in our domestic tax laws, taxable in India. The revenue thus derives no support from the Indo UAE tax treaty, which, under the scheme of Section 90(2), must make way

to the domestic law provisions except to the extent the applicable treaty provisions are 'more' favorable to the assessee.

13. As for the alleged interest income, there is no finding whatsoever to suggest that there was indeed any interest income inasmuch as even the Assessing Officer is tentative when he states that the related entry "probably" refers to interest receipt. The taxability of interest is, even by the standards of the revenue authorities, also thus far from established. There is no evidence whatsoever, or even a serious allegation, that there is an interest income.

14. Learned counsel, however, has much more armoury in defence of the conclusions arrived at by the learned CIT(A). It is his case that all investments in India are duly accounted for, and what is being said to unaccounted is a pure figment of imagination based on material which cannot meet any judicial scrutiny. Learned counsel invites our attention to certain nuances of the domestic tax law jurisprudence and submits, no matter how politely and in a subtle manner though, that even under the basic provisions of domestic law, the amounts in question could not be brought to tax, and there is thus no occasion to even look at the treaty provisions. He submits that the assessee was not confronted with the material on the basis of which the impugned additions are made and that the assessee was not given an opportunity to cross-examine the person from whom the alleged incriminating material was seized. Learned counsel further submits that the presumption of correctness of the seized material, under section 132, operates vis-à-vis the searched person and not vis-à-vis the universe. It is his vehement argument that, in any event, the impugned addition could not have been made in the hands of the assessee. While learned counsel is content with the relief given to the assessee on the basis of the treaty provisions, if that is the conclusion we reach, but he nevertheless wishes to reserve his rights to raise all these issues as and when, in his considered view, it is necessary to do so.

15. Given our findings as above, however, it is not really necessary to deal with these aspects on merits. The assessee before us is a tax resident of the United Arab Emirates and is thus entitled to the benefits of the Indo UAE tax treaty. When the rights to tax the income in question. under the applicable tax treaty provisions, are allocated to the residence jurisdiction, it is wholly immaterial whether or not the source jurisdiction has the right to tax that income, and, in any event, India is not even a source jurisdiction for the income in question as no economic activities have been carried out in India- it is at best the jurisdiction in which earnings are invested. That cannot anyway have any bearing on the taxation of income. In our considered view,

> *therefore, since, under the terms of the Indo UAE tax treaty, the right to tax the amounts in question, even if that be of income nature in the hands of the present assessee, does not belong to India, all these issues being raised by the learned counsel are wholly academic as of now, and do not call for our adjudication. Having said that, however, in due deference to the legitimate rights of the See we make it clear that, if so necessary in future, the assessee will be at liberty to raise these issues.*
>
> *16. In view of these discussions, and bearing in mind the entirety of the case, we approve the well-reasoned conclusions arrived at by the learned CIT(A) and decline to interfere in the matter."*

8. As noted above in the present case, the assessee has also filed the Tax Domicile Certificate for the relevant Financial Year issued by the concerned authority in Ministry of Finance, UAE, in support of its claim. The learned D.R. could not show us in any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following aforesaid judicial precedent in assessee's own case, we find no infirmity in the impugned order passed by the learned CIT(A). As a result, grounds raised by the Revenue are dismissed.

9. In the result, appeal by the Revenue is dismissed.

Order pronounced in the open court on 11.10.2022.

Sd/- **PRAMOD KUMAR** **VICE PRESIDENT**	**Sd/-** **SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

Mumbai;
Dated : 11/10/2022

ANIKET RAJUT (STENOGRAPHER)

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai