IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.1023/Del/2022
Assessment Year: 2017-18

MIH India (Mauritius) Ltd., Sanne House, Bank Street, Twenty Eight Cyber City, EBENE 72201, Mauritius	**Vs.**	ACIT, Circle -2(2)(1), Intl. Taxation, New Delhi
PAN :AAICM3822F		
(Appellant)		**(Respondent)**

Appellant by	Sh. Kamal Sawhney, Advocate Sh. Prashant Meharchandani, Advocate Sh. Arun Bhadouria, Advocate
Respondent by	Ms. Sapna Bhatia, CIT(DR)

Date of hearing	18.08.2022
Date of pronouncement	16.11.2022

ORDER

PER SAKTIJIT DEY, JM:

Assessee has filed the captioned appeal challenging the final assessment order dated 06.04.2022 passed under section 143(3) read with section 143C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2017-18, in pursuance to

the directions of learned Dispute Resolution Panel (DRP)-2, New Delhi.

2. The basic grievance arising in the appeal relates to taxability of short term capital gain of Rs.4,77,44,375/- arising on sale of shares.

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of Mauritius and is a tax resident of Mauritius. The assessee has been issued a valid Tax Residency Certificate (TRC) by Mauritian Tax Authorities entitling the assessee to claim benefit under India – Mauritius Double Taxation Avoidance Agreement (DTAA), to the extent it is more beneficial to the assessee. It is an accepted factual position that the assessee had no Permanent Establishment (PE) in India in the year under consideration. Be that as it may, the assessee was holding equity shares of Citrus Payments Solutions Pvt. Ltd. (In short 'Citrus India'), a company incorporated in India. As it may, as stated by the Assessing Officer, by share purchase agreement dated 13th September, 2016, the assessee purchased following equity shares of Citrus India:

1. *4,52,652/- equity shares from Jitendra Gupta and Shivani Gupta; and*

2. 19,64,515/- cumulative preference shares from White Pay Pte. Ltd.

3.1 Subsequently, the assessee purchased 1,02,435 equity shares of the same company on 1st September, 2016. All these equity shares and cumulative preference shares of Citrus India were sold to another Indian based corporate entity, PayU Payments Pvt. Ltd. (in short 'PayU India') on 28th March, 2017 for a consideration of Rs.223,35,26,327/-. The resultant short term capital gain of Rs.4,77,44,375/- was claimed as exempt under Article 13(4) of India – Mauritius Tax Treaty. In course of assessment proceeding, the Assessing Officer called for necessary details relating to the share transaction of Citrus India and after examining the details found that both Citrus India and PayU India are Associated Enterprises (AEs) of the assessee and Jitendra Gupta, from whom the assessee had purchased equity shares of Citrus India, is a key management personnel of PayU India. The Assessing Officer observed that the holding company of the assessee is PayU Global B.V., a company incorporated in Netherlands. Thus, PayU Global B.V. is beneficial owner of the assessee company. Further, he observed, PayU Global B.V., in turn, is owned by Prosus NV, another company incorporated in

Netherlands with primary listing at Amsterdam Stock Exchange. Further, on perusal of bank statement of the assessee, the Assessing Officer noticed that prior to purchase of shares, the holding company PayU Global B.V. has transferred money in form of loan to the assessee, which was utilized for purchase of shares of Citrus India. Further, on going through the financial statements of the assessee, the Assessing Officer observed that the assessee is incurring meager expenses and almost negligible expenses for operational requirements for running a business/commercial venture. He observed, the assessee does not carry out any commercial/business activity in Mauritius. After analyzing all these facts the Assessing Officer held that the assessee is a mere conduit entity through which the holding company at Netherlands has invested in shares of Citrus India. He observed, the effective control and management of the assessee company lies with the holding company at Netherlands and the holding company essentially is the beneficial owner of the capital gain. He observed, only for the purpose of claiming benefit under the India – Mauritius Tax Treaty the entire share purchase arrangement has been structured. Thus, he held that the assessee had no economic or commercial substance and the only

object of introducing the assessee company is to obtain tax advantage under India – Mauritius Tax Treaty. Thus, he ultimately concluded that the beneficial provisions of India – Mauritius DTAA would not be applicable as the beneficial owner of short term capital gain is the holding company at the Netherlands. Hence, the provisions of India - Netherlands DTAA would be applicable. While coming to such conclusion, the Assessing Officer referred to the protocol to India – Mauritius Tax Treaty effective from 01.04.2017.

3.2 Further, referring to the fact that India is a signatory to Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) which may completely alter the position of taxation of capital gain under Article 13(4) after its amendment on implementation of MLI preamble, subject to, Mauritius signing the MLI, the Assessing Officer held that the prevailing legal position based on the ratio laid down by the Hon'ble Supreme Court in case of ***Union of India Vs. Azadi Bachao Andolan, 263 ITR 706 (SC)*** would significantly change and even if the assessee is having a valid TRC, still it would not be entitled to tax exemption under the Treaty. Further, he observed, since, the effective control and

management of the assessee company rests at the hands of the holding company in Netherlands, the provisions of India – Mauritius Tax Treaty would not apply to taxability of capital gain. The Assessing Officer observed, to ascertain the true intent of the transaction, the doctrine of substance over form has to be applied. Thus, ultimately, the Assessing Officer concluded that the beneficial provisions of India – Mauritius Tax Treaty would not be applicable to the short term capital gain arising on sale of shares, as, the assessee has entered into such transaction as a conduit of the holding company based in Netherlands. Accordingly, he brought to tax the short-term capital gain of Rs.4,77,44,375/- at the hands of the assessee. Against the draft assessment order passed by the Assessing Officer proposing the addition, the assessee raised objections before learned DRP, however, rejecting the objections, learned DRP confirmed the addition made by the Assessing Officer.

4. Before us, learned counsel appearing for the assessee submitted, the assessee is a company incorporated in Mauritius in the year 2006. He submitted, the assessee is into investment activities since its inception. He submitted, even in the year under consideration, the assessee had proposed to make investments of

Rs.665 crores. He submitted, while purchasing shares in Citrus India the assessee had made inbound investments and had subsequently sold the shares to PayU India, wherein, the assessee is having substantial interest, as, it holds 82% of the shares. He submitted, even till date, PayU India is holding the shares of Citrus India. He submitted, it is a fact on record that the assessee is a Mauritius based company having a valid TRC issued by Mauritian Tax Authorities. Therefore, as per the Circular No. 789, dated 13.04.2000 issued by Central Board of Direct Taxes (CBDT), the assessee is entitled to get the benefit of India – Mauritius Tax Treaty, as, applicable to the relevant assessment year. He submitted, in case of ***Azadi Bachao Andolan (supra)***, it has been clearly and categorically held that the beneficial provisions of India – Mauritius Tax Treaty can be availed on the strength of TRC. In this regard, he drew our attention to the relevant observations of the Hon'ble Supreme Court in case of ***Azadi Bachao Andolan (supra)***.

5. Proceeding further, he submitted, the allegation of the Assessing Officer that the assessee is a conduit company and has been transposed to avail the benefit of India – Mauritius Tax Treaty is without any basis. Drawing our attention to Article 13(4)

of India – Mauritius Tax Treaty, as it existed prior to its amendment by protocol to the treaty issued by Notification No. SO 2680(E), dated 10.08.2016 w.e.f. 01.04.2017, he submitted, gains derived from sale of shares by a resident of a particular country is taxable in that country alone. He submitted, after the amendment to the Tax Treaty, the capital gain arising out of sale of shares acquired on or after 1st April, 2017 of a company situated in one of the resident Contracting State can be taxed in that State. However, he submitted, amended provisions would not be applicable to the assessee because not only it is effective from assessment year 2018-19, but it applies to shares acquired on or after 1st April, 2017. He submitted, anticipating such future events, which has not yet happened, such as, signing of the MLI by Mauritius, the Assessing Officer has declined to apply the settled legal principles as laid down by Hon'ble Supreme Court in case of ***Azadi Bachao Andolan*** (supra). In this regard, he also relied upon the decision of the Coordinate Bench in case of ***HSBC Bank (Mauritius) Ltd. Vs. DCIT, [2018] 96 taxmann.com 544 (Mumbai)***. Without prejudice, he submitted, even assuming that India – Mauritius Tax Treaty is not applicable to the underlying

transaction, even as per India – Netherlands Tax Treaty, the amount is not taxable.

6. Drawing our attention to Article 13(4) of India – Netherlands Tax Treaty, learned counsel submitted, as per said provision, gain derived from sale of shares of an Indian company can be taxed in India, if the value of such shares is derived principally from immovable property situated in India, other than, property in which the business of the company was carried on. He submitted, the burden is on the revenue to establish that the value of shares of the Indian company is derived principally from immovable property situated in India. In this regard, he relied upon a decision of the Coordinate Bench in case of ***JCIT Vs. Merrill Lynch Capital Market Espana SA SV in ITA No. 6109/Mum/2018, dated 11.10.2019***. He submitted, since, the Assessing Officer has failed to factually establish such fact by bringing any cogent material on record, the amount is not taxable even under Article 13(4) of India – Netherlands Tax Treaty. In support of his contention, learned counsel relied upon the following decisions as well:

1. *UASC/ CSL Ltd. Vs. DCIT [2007] 12 SOT 588 (Mum.)*
2. *Motorola Inc. Vs. Deputy Commissioner of India Tax, Non-Resident Circle [95 ITD 269 (Delhi Tribunal)]*

7. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned DRP. She submitted, the Assessing Officer has established on record that the assessee had made investment in shares in Citrus India by availing loan from its holding company. She submitted, though, the holding company actually intended to buy the shares from Citrus India, however, to avoid taxation of capital gain in India, the holding company made the investment through its conduit company based at Mauritius. She submitted, the structuring of the arrangement would establish that, in substance, the transaction in investment of shares in Citrus India is by the holding company at Netherlands. She submitted, there is nothing in the share purchase agreement to suggest the period of holding of shares. She submitted, in such a scenario, 'look through' approach has to be adopted, rather than, 'look at' and substance over form has to be seen. She submitted, the factual analysis of the Assessing Officer clearly establishes that the assessee company without having any economic and commercial substance has been transposed to derive benefit under the Tax Treaty. Thus, he submitted, the addition made by the Assessing Officer should be sustained.

8. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. As far as the factual aspect of the issue in dispute is concerned, it is a fact that the assessee is a resident of Mauritius and the Mauritian Tax Authorities have issued TRC in favour of the assessee. Thus, on the strength of the TRC, the assessee has claimed benefit under Article 13(4) of India – Mauritius Tax Treaty as it existed prior to its amendment. Whereas, the Assessing Officer has held that the assessee is not entitled to claim benefit under the India – Mauritius Tax Treaty. The reason for coming to such conclusion can, more or less, be summed up as under:

- The assessee lacks commercial and economic substance.
- It had no financial strength to invest in the shares of the Indian company and the entire fund was routed through the assessee by the holding company PayU Global B.V. Netherlands
- The effective control and management of the assessee lies with the holding company at Netherlands. The assessee is merely used as a conduit to get benefit of the India – Mauritius Tax Treaty.

- India has deposited ratified MLI with the OECD and it has come into force in India on 1st October, 2019 and the MLI preamble will be added to the India – Mauritius Tax Treaty, if Mauritius signs the MLI and notifies the India – Mauritius Tax Treaty as a Covered Tax Agreement (TCA).
- Once MLI preamble is added to the Tax Treaty, there will be significant change in the legal position established in Azadi Bachao Andolan (supra) as the MLI preamble specifically provides for prevention of opportunities for tax avoidance/evasion through treaty shopping

9. As observed, learned DRP has simply endorsed the reasoning of the Assessing Officer without recording any independent finding of their own. Having taking note of the factual position, it is necessary to observe, the taxability of capital gain arising from sale of shares of Citrus India to PayU India by the assessee, in normal course, would be subject to Article 13(4) of the Tax Treaty or the domestic law, whichever is more beneficial to the assessee. Article 13 of the Tax Treaty prior to its amendment read as under:

> *"ARTICLE 13 - Capital gains - 1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may*

be taxed in the Contracting State in which such property is situated.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State,
3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.
5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States,

10. On a reading of Article 13 of India – Mauritius Tax Treaty as a whole, it is very much clear that the capital gain derived by the assessee on sale of shares would be covered under Article 13(4) of the Tax Treaty. A reading of Article 13(4) would make it clear that the capital gain derived by the assessee would be taxable in Mauritius. Article 13 of India – Mauritius Tax Treaty was subsequently amended by a protocol and the amended Article 13 which was made effective from 01.04.2017 applicable to assessment year 2018-19 reads as under:

"ARTICLE 13

CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment Which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise.) or of such a fixed base, may be taxed in that other State.

3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

6[3A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.

3B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated; I

7[4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident]

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.

11. On a reading of Article 13 post amendment, it becomes quite clear that some changes were made to the pre-amended Article 13 by insertion of paragraph 3A and 3B and substitution of

paragraph 4 with a new paragraph 4. Paragraph 3A of Article 13 specifically deals with gains from alienation of shares acquired on or after 1st April, 2017 by providing taxing power to the source country. Paragraph 3B allowed grand fathering for a period of two years by providing beneficial rate of tax not exceeding 50% of the tax rate applicable on such gain in source country, subject to, applicability of Limitation of Benefits under Article 27A of the Treaty. However, in the facts of the present appeal, since, the shares resulting in capital gain were acquired prior 01.04.2017, it will not be covered under Article 13(3A) and 13(3B) of the amended Article 13. In sum and substance, the present transaction of the assessee would be governed under pre-amended Article 13 of India – Mauritius Tax Treaty. That being the position, the assessee otherwise is entitled to avail the beneficial provision of Article 13(4) on the strength of TRC.

12. Having held so, it is necessary now to deal with the reasoning of the Assessing Officer in denying the Treaty benefits to the assessee. The primary objection of the Assessing Officer is to the effect that the assessee is a conduit company having no economic and commercial substance. Therefore, it being a mere case of treaty shopping, benefits under India – Mauritius Treaty

cannot be given. Rather, the beneficial owner of capital gain being the holding company at Netherlands, the provisions of India – Netherlands Tax Treaty would apply. It is necessary to examine the validity of the aforesaid reasoning of the Assessing Officer. Undisputedly, the assessee was incorporated in Mauritius in the year 2006. It is not disputed that the assessee had been carrying on investment activity in India as well as other places. The TRC issued by the Mauritian Tax Authorities bears testimony to this fact. Further, audited financial statements of the assessee indicate that not only it had made substantial investments in India, but, proposes to make additional investment to the tune of Rs.665 crores in the year under consideration and subsequent years. Interestingly, PayU India to whom the assessee had sold the shares of Citrus India is a company in India, wherein, the assessee had substantial interest, as, it holds 82.94% shares. It is also a fact that shares of Citrus India sold to PayU India are still held by PayU India and has not been sold. These facts clearly establish that the assessee is not a fly by night operator or mere conduit company as the Assessing Officer has attempted to make out. Merely because the assessee availed loans from its holding

company to invest in shares of Citrus India, ipso facto, cannot be a reason to treat the assessee as a conduit company.

13. The CBDT Circular no. 789 dated 13.04.2000, while dealing with the issue of TRC issued by Mauritian Authorities and applicability of the beneficial provisions of India – Mauritius Tax Treaty on the strength of such TRC, states as under:

> *"It is hereby clarified that wherever a certificate of residency 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 DTAA accordingly."*

Thus, as per the aforesaid circular issued by CBDT, wherever a certificate of residency is issued by the Mauritian Tax Authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the provisions of India – Mauritius Tax Treaty. The validity of the aforesaid CBDT Circular came up for consideration before Hon'ble Supreme Court in case of ***Union of India & Another Vs. Azadi Bachao Andolan*** (supra). Relevant facts relating to this case are, a Public Interest Litigation (PIL) was filed before Hon'ble Delhi High Court challenging the validity of Circular No. 789, dated 13.04.2022 issued by the CBDT. While deciding the Writ Application, the Honble Delhi High Court

quashed the circular by holding that the said circular is ultra vires the provisions of section 90 and section 119 of the Act. Interestingly, the aforesaid decision of the Hon'ble Delhi High Court was challenged by the Union of India before Hon'ble Supreme Court. While upholding the validity of the CBDT Circular No. 789, dated 13.04.2000, the Hon'ble Supreme Court specifically dealt with the concept of treaty shopping and observed as under:

> *"134. There are many principles in fiscal economy which, though at the first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping in our view, is another. Despite the sound and fury of the respondents over the so-called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when the Indo-Mauritius DTAC was entered? into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy. Rule in McDowell"*

14. Further, elsewhere in the decision, the Hon'ble Supreme Court accepted the contention put forward by the appellants that the motives with which the residents have been incorporated in Mauritius are wholly irrelevant and cannot in any way affect the legality of the transaction, as, there is nothing like equity in a

fiscal statute. Either, the statute applies *proprio vigore* or it does not. There is no question of fiscal statue by intendment if the expressed words do not apply. We must say, unfortunately, the Assessing Officer has made a desperate and unacceptable attempt to overcome the ratio laid down by the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra) by anticipating a futuristic event of ratification of MLI providing amendment to the preamble of India – Mauritius Tax Treaty by Mauritius Government, which is yet to see the light of the day. In our view, without unreservedly following the binding ratio of the Hon'ble Supreme Court in case of ***Azadi Bachao Andolan*** (supra), which is the law of the land under Article 141 of the Constitution of India, the Assessing Officer has allowed his mind to be clouded by extraneous considerations and contingent events to deny the benefit of India – Mauritius Tax Treaty to the assessee, which the assessee is legally entitled to on the strength of the TRC issued by the Mauritian Tax Authorities and as per CBDT Circular No. 789, dated 13.04.2000. In view of the aforesaid, we have no hesitation in holding that the gain derived by the assessee on sale of shares of Citrus India to PayU India is not taxable in India as per pre-amended Article 13(4) of India – Mauritius Tax Treaty. While

coming to such conclusion, we have followed the binding ratio of the Hon'ble Supreme Court in case of ***Azadi Bachao Andolan*** (supra) and CBDT Circular no. 789, dated 13.04.2022.

15. Having held so, for the sake of completeness, it is necessary to examine, in case, we accept Assessing Officer's reasoning that the assessee is not entitled to claim benefit under India – Mauritius Tax Treaty and on the contrary, the holding company at Netherlands being the beneficial owner, the provisions of India – Netherlands Tax Treaty would apply, what would be the position. On a careful reading of Article 13 of India – Netherlands Tax Treaty, which deals with taxation of capital gain, it becomes clear that the subject transaction would have fallen under Article 13(4) of the Tax Treaty, which reads as under:

> *"13(4) Gains derived by a resident of one of the States from the alienation of shares (other than shares quoted on an approved stock exchange) forming part of a substantial interest in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State other than property in which the business of the company was carried on, may be taxed in that other State. A substantial interest exists when the resident owns 25 per cent or more of the shares of the capital stock of a company."*

16. A careful reading of Article 13(4) makes it clear that the source State has the authority to tax the capital gain, only if, the value of shares sold is derived principally from immovable property situated in the source State, other than, property in

which the business of the company whose shares were sold was carried out. In case of ***JCIT Vs. Merrill Lynch Capital Market Espana SA SV (supra)*** the Coordinate Bench, while dealing with an identical provision under India – Spain DTAA has held that the onus is entirely on the Assessing Officer to prove that the value of shares is derived principally from immovable property situated in the source country. In other words, it has to be proved that the Indian company in which the assessee had invested the money towards equity was principally holding immovable property. Neither any such allegation has been made by the Assessing Officer in the assessment order before invoking Article 13(4) of India – Netherlands Tax Treaty, nor in course of the proceeding before DRP or even the Tribunal any material has been brought on record by Revenue to demonstrate that the condition of Article 13(4) of India – Netherlands Tax Treaty is satisfied.

17. That being the position emerging on record, the short term capital gain will not be taxable even under Article 13(4) of the India – Netherlands Tax Treaty. Thus, seen from any angle, the short-term capital gain arising on sale of shares is not taxable in India. In view of the aforesaid, we delete the addition made by the

Assessing Officer. Ground nos. 3 and 4 being consequential and premature, do not require adjudication at this stage.

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

Order pronounced in the open court on 16th November, 2022

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 16th November, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi