

**THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'D', NEW DELHI**

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1915/Del/2022 : Asstt. Year : 2017-18

THR Infrastructure Pte. Ltd., C/o Aakash Uppal, BDO India LLP, The Palm Springs Plaza, Officer No. 1501-8, 15 th Floor, Sector-54, Golf Course Road, Gurgaon, Haryana-122001 (APPELLANT)	Vs	DCIT, Circle-3(1)(1), International Taxation, New Delhi-110002 (RESPONDENT)
PAN No. AACCF0512B		

Assessee by : Sh. Ajay Vohra, Sr. Adv.

Revenue by : Sh. Gangadhar Panda, CIT-DR

Date of Hearing: 14.02.2023

Date of Pronouncement: 12.05.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 29.07.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. On the facts and circumstances of the case and in law, the final assessment order ('Order') passed by the Deputy Commissioner of Income Tax, International Taxation, Circle 3(1)(1), Civic Centre, New Delhi ('the Ld. AO') and directions passed by the Dispute Resolution Panel-2, New Delhi ('the Ld. Panel') is erroneous on facts and is bad in law.

2. The Ld. AO and Ld. Panel has grossly erred on facts and in law by denying the exemption from capital gain tax arising on sale of Compulsory

Convertible Debentures (CCDs) by alleging that the Appellant is not eligible for the beneficial provisions of Double Taxation Avoidance Agreement (DTAA) entered between India and Singapore.

2.1 The Ld. AO and Ld. Panel basis own surmises and conjectures has grossly erred on facts and in law in denying the beneficial provisions of DTAA between India and Singapore without appreciating that the Appellant has duly furnished a Tax Residency Certificate ('TRC') obtained from the Singapore Revenue Authorities evidencing its residential status of Singapore and being entitled to avail the DTAA benefits.

2.2 The Ld. AO and the Ld. Panel has grossly erred on facts and in law by alleging that the Appellant lacks economic substance in Singapore as per the Limitation of Benefit (LOB) clause in India-Singapore DTAA and denying the DTAA benefit without appreciating that the Appellant fulfills all conditions of LOB clause as prescribed under the DTAA.

2.3 The Ld. AO has grossly erred in ignoring the facts that the Appellant has obtained all necessary approvals and complied with necessary filings in reference to impugned transaction of CCDs issued by Fortis Hospotel Limited (FHTL) with regulatory authority i.e. RBI without any inquiries/objections being raised by the regulatory body.

3. The Ld. AO and the Ld. Panel has grossly erred on facts in concluding that the transaction of transfer of CCD lacks commercial rationale, without appreciating the fact (i) it is in pursuant to the put option clause embedded in the investment agreement (ii) it is in view of the restrictions imposed by the Haryana Urban Development Authority (HUDA).

4. The Ld. AO and the Ld. Panel has grossly erred on facts and in law by alleging that the control and management of the Appellant does not lie in Singapore and the Appellant Company is a part of an India centric venture which is effectively controlled and managed from India.

4.1 *The Ld. AO and the Ld. Panel has erred on facts in alleging that the control and management of the Appellant lies in India since the directors of the Appellant were Indian residents without appreciating that both the directors were foreign residents and treated as non-residents in India for tax purposes.*

4.2 *The Ld. AO and the Ld. Panel has erred on facts in alleging that control and management of the Appellant lies in India merely on the basis that the directors of the Appellant were also directors of an Indian company, without appreciating the following factors:*

- a. *All the decisions of the Appellant Company were taken outside India by the directors, who were non-resident in India.*
- b. *In a Multi-Global entity set-up, it is a general practice to have common directors in the companies incorporated in two or more jurisdictions.*
- c. *No supporting document has been produced by the Ld. AO in alleging that decisions are taken in India by the Directors of the Appellant.*

4.3 *The Ld. AO failed to appreciate that the directors of the company during the relevant year were non-residents, stationed outside India and the board meetings were also held outside India and thus place of effective management of the Appellant during the year under consideration was not in India, hence Appellant cannot be said to be resident in India during the year under consideration.*

5. *The Ld. AO and the Ld. Panel has grossly erred on facts and in law by ignoring the documents furnished in connection with sale of CCDs through which the sale consideration of INR 2444 per CCD's can be substantiated.*

5.1 *The Ld. AO has grossly erred in alleging the fair market value was lower of CCD without appreciating that the same is backed-up with the*

report of a reputed independent third valuer namely M/s Duff and Phelps.

5.2 The Ld. AO has not appreciated that the sale consideration on INR 2444 per CCD has itself been accepted by the Ld. AO while computing the capital gain on sale of CCD by the Appellant.

5.3 The Ld. AO failed to appreciate that the Ld. Panel has not provided any observation or direction to verify the fair market value of CCD.

6. The Ld. AO and the Ld. Panel grossly erred on facts and in law in treating the transaction of sale of CCD as sale of equity instruments, without appreciating that the Appellant has never claimed it as an equity instrument and has always claimed that CCDs are debt unless converted into equity.

6.1 The Ld. AO failed to appreciate that, in any case, both sale of equity as well as debt instruments were not taxable in India prior to 1st April 2017 as per Article 13(4) of DTAA between India & Singapore.

7. That the Ld. AO has grossly erred in law by enhancing the income which was not subject matter of dispute raised in draft assessment order and before Ld. Panel.

7.1 The Ld. AO has grossly erred in law by computing surcharge and cess on total assessed income of the Appellant, without appreciating that (a) interest income on CCDs and (b) Fee for Technical Services are offered to tax as per beneficial tax rate stipulated in India - Singapore DTAA and such rates shall not be further increased by surcharge & cess.

7.2 The Ld. AO has erred in computing the tax liability as annexed to final assessment order by denying beneficial tax rate as stipulated in DTAA on (a) interest income on CCDs and (b) Fee for Technical Services, which was never subject matter of discussion by AO either at the time of passing the draft assessment order or by DRP during the proceedings before the Ld. Panel.

8. *Without prejudice to the above, the Ld. AO has erred in computing the final tax liability on capital gains arising from sale of CCD as annexed to final assessment order by applying the tax rate of 20% (instead of 10%) as stipulated in section 115 read with section 48 of the Income tax Act (Act) without appreciating that both sale consideration and purchase consideration of CCD are denominated in Indian currency (INR) and the case of the Appellant gets covered by section 112 of the Act which provides tax rate @ 10% and not by section 48 of the Act read with tax rate scheduled in the Finance Act which provides tax rate @ 20%.*

9. *The Ld. AO has erred in computing interest under section 234C of the Act on the tax demand, without appreciating that the same is applicable on the returned income and not on the assessed income.*

10. *The Ld. AO has erred in initiating penalty proceedings under section 270A of the Act for under-reporting/mis-reporting of income without appreciating that the Appellant has duly reported this transaction of capital gain arising on sale of CCD as exempt in the income tax return form."*

3. RHT Heath Trust ('RHT'), a business trust was constituted on 29th July, 2011 and registered on 25th September, 2012 under the laws of Singapore. The assessee, formerly known as Fortis Global Healthcare Infrastructure Pte. Ltd. ('FGHIPL') is wholly owned subsidiary of RHT.

4. RHT Trust formed a wholly owned subsidiary, i.e., the assessee Company (FGHIPL) now known as "THR Infrastructure Pte. Ltd." The assessee Company, incorporated in Singapore is primarily in the business of providing consultancy and management services and also act as an investment holding company for RHT Trust. In turn, FGHIPL (i.e., the COMPANY) wholly owns Fortis Healthcare Management Limited (FHML), an

Indian incorporated company. Further, as per the laws in Singapore, all assets of the Trust has to be held by the trustee manager directly in its capacity as trustee-manager or indirectly through one or more holding subsidiaries. Accordingly, RHT Trust made all the investments via the Assessee, being its 100% subsidiary through money raised from IPO and debts/ loans obtained by the Assessee.

5. The Assessee had subscribed to, inter alia, 87,04,000 CCDs of face value of Rs.1,000 each issued by Fortis Hospotel Limited ("FHTL") in October 2012 for an aggregate consideration of Rs. 870,40,00,000/-. The subscription to CCDs issued by FHTL was made by the Assessee with due intimation to Reserve Bank of India ("RBI") which was duly acknowledged and approved by the RBI vide letter dated 13th August, 2013 (enclosed at pages 116 to 117 of the paper book Volume 1).

6. 51% of the said CCDs (44,39,040 CCDs) were sold during the previous year relevant to assessment year under consideration to Fortis Healthcare Limited ("FHL") for aggregate sale consideration of Rs.1099,98,40,802/-. The surplus on sale amounting to Rs.656,08,00,802/- was claimed not liable to tax in India, in terms of Article 13(4) of the Tax Treaty.

6. In the draft assessment order, the assessing officer alleged that:

(1) No basis of adopting fair market value at the time of issue of CCDs to the Assessee in the year 2012 was furnished by the Assessee during the course of assessment proceedings;

- (2) No commercial reason had been provided by the Assessee for the purpose of transfer of CCDs within 5 years as CCDs were to be converted into Equity instrument within 18 years;
- (3) No commercial basis was provided for undertaking the transaction of transfer of CCDs by the Assessee to FHL;
- (4) Fair market value of CCDs and sharp rise in the value adopted at the time of disposal of CCDs remained unsubstantiated by the Assessee;
- (5) For denial of benefit of the India-Singapore DTAA, the assessing officer alleged that –
 - (a) Control and Management of the Assessee does not lie in Singapore but lies in India;
 - (b) The Assessee was a conduit entity interposed in Singapore primarily to take the benefit of India - Singapore DTAA;
 - (c) Tax Residency Certificate is not sufficient to establish tax residency if there is no economic substance in the entity;
 - (d) The transfer of CCDs was a scheme of tax avoidance.

7. The Assessing Officer brought to tax the surplus on sale of CCDs as "income from other sources".

8. The Assessee filed objections before the Dispute Resolution Panel ("DRP") objecting to action of the Assessing Officer re-characterizing the surplus on sale of CCDs as "income from other sources" and in denying the exemption with respect to capital gains holding that the Assessee was not entitled to the benefit of the Tax Treaty.

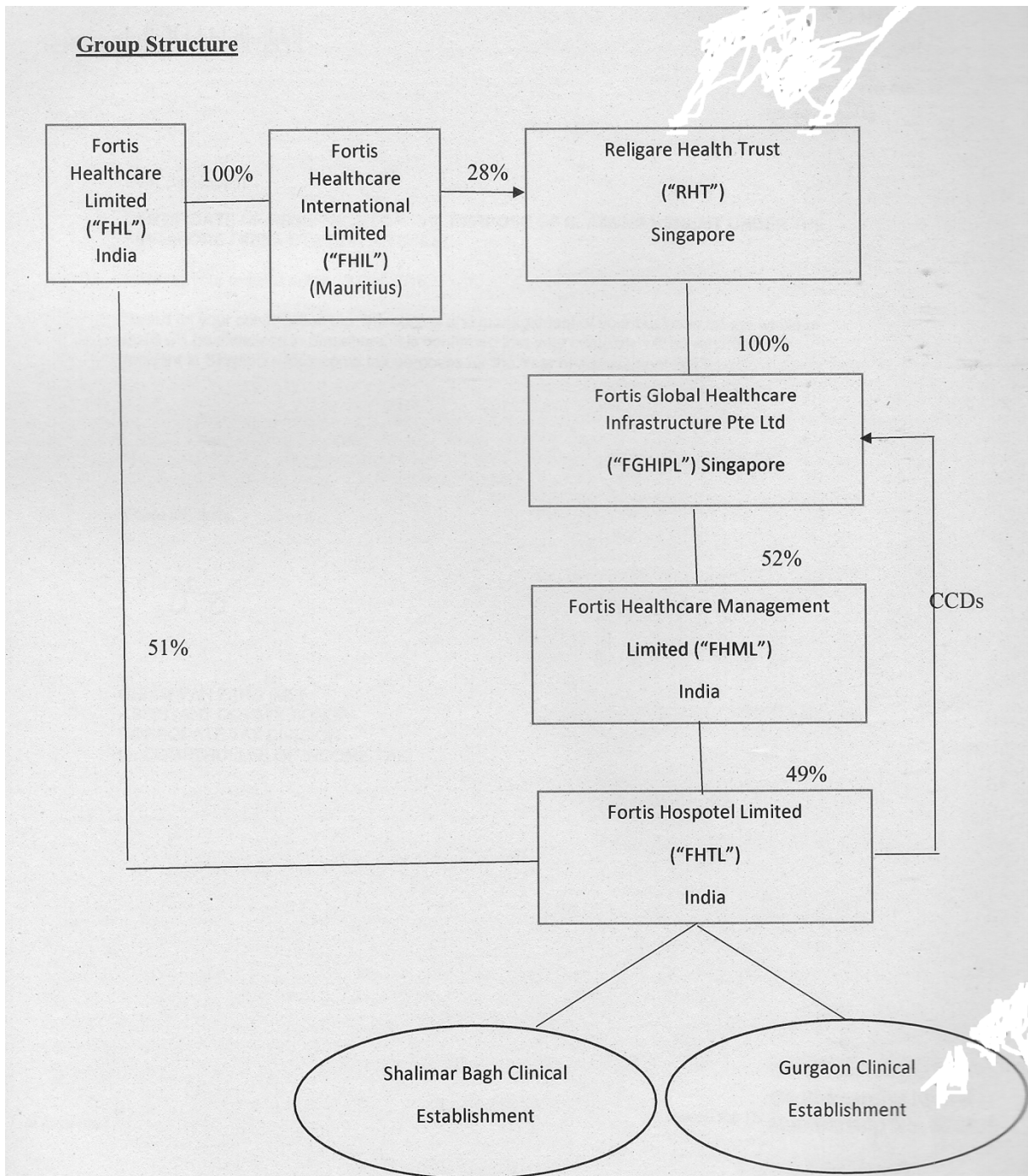
9. The Id. DRP modified the draft assessment order to the extent of holding that the surplus earned on sale of CCDs was in the nature of "capital gains" and not "income from other sources". Furthermore, the DRP directed the Assessing Officer to look into the question of valuation / cost of acquisition of CCDs.

10. Pursuant to the direction of Id. DRP, the **Assessing Officer brought to tax the surplus on sale of CCDs as income under the head "capital gains" and levied tax thereon @10% under section 112 of the Act denying the benefit of the Tax Treaty but accepting the valuation adopted by the Assessee.**

11. The grievance of the Assessee raised by grounds of appeal Nos. 2 to 6 is thus limited to the denial of the exemption under Article 13(4) of the Tax Treaty qua capital gains earned on sale of CCDs.

12. Facts relevant to the adjudication of the case are as under:

The structure of the assessee group is below:



- RHT was listed on the Singapore Stock Exchange on 19th October, 2012 with a business proposition to invest in medical and healthcare assets and services. RHT Trustee Manager Pte. Ltd. (Trustee Manager) acts as the Trustee

Manager of RHT whereas Fortis Healthcare International Limited (FHIL) is the Sponsor of RHT and holds 28% units in RHT. The list of other substantial unit holders of the Trust as of 26 June 2013 is as under-

S. No.	Name of the Unit holder	No. of Units	%
1	Fortis Healthcare International Limited	220,676,944	28.00
2	DBS Nominees Pte. Ltd.	100,777,514	12.79
3	Raffles Nominees (Pte.) Ltd.	87,805,600	11.14
4	Citibank Nominees Singapore Pte. Ltd.	85,192,400	10.81
5	HSBC (Singapore) Nominees Pte. Ltd.	37,194,655	4.72
6	DBSN Services Pte. Ltd.	24,901,075	3.16

- the Assessee had made investments in various entities operating in the healthcare segment. The list of investments made by the Assessee directly or through subsidiaries is tabulated hereunder:

Investments made directly:

S. No.	Company Name	Proportion of Ownership interest
1	Fortis Health Management Limited	100
2	International Hospital Limited	100
3	Religare Healthtrust Services Pte. Ltd.	100

Investment held through subsidiary:

S. No.	Company Name	Proportion of ownership interest
1	Hospitalia Eastern Private Limited	100
2	Fortis Hospotel Limited	49

3	Escorts Heart and Super Speciality Hospital Limited	100
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B. Subscription to CCDs and subsequent sale thereof:

- At the time of listing RHT on Singapore Stock Exchange, Fortis Healthcare Management Limited (FHML) owned 49% equity interest in FHTL, an Indian incorporated company. FHTL holds the Shalimar Bagh Clinical Establishment and the Gurgaon Clinical Establishment. The land on which Gurgaon Clinical Establishment is situated was subject, inter alia, to a condition imposed by Haryana Urban Development Authority (HUDA) that FHL holds at least 51% of the issued and paid-up equity share capital of FHTL or of the land, as indicated in HUDA's letter dated 3 January 2006. A copy of the letter issued by HUDA dated 03 January 2006 is enclosed at pages 103 104 to Paper book - Volume I. It may be noted that while the letter issued by HUDA in 2006 was issued to Fortis Health & Multi Specialty Hospital whereby it approved the ownership of land to be transferred in the hands of Oscar Boitech Private Limited, its name was later changed to Fortis Hospotel Limited i.e. FHTL.
- FHML, FHL and FHTL entered into a Shareholders Agreement (FHTL Shareholders Agreement) on 17 September 2012 to govern the relationship between FHL and FHML as shareholders of FHTL. Pursuant to FHTL Shareholders Agreement, FHML has a call option (FHTL Call Option) to the remaining 51% of the issued equity shares in FHTL which are held by FHL. The FHTL Call Option is

exercisable any time FHL is entitled to transfer its 51% shareholding interest after having obtained the necessary approvals, including approval from HUDA. In the event where the FHTL Call Option is not exercised within 5 years from the date of the shareholders agreement (i.e. 17 September 2012), FHML will be entitled to exercise a put option (FHTL Put Option) requiring FHL to acquire FHML's 49% shareholding in FHTL. Refer page 17 of the Paper Book Volume-1.

- It was originally intended that RHT Group ultimately holds 100% equity interest in FHTL by acquiring remaining 51% equity interest in FHTL. For this purpose, FHL had submitted an application on 12 June 2013 to HUDA for approval to transfer the 51% equity interest in FHTL to FHML. Copy of said letter is enclosed as per pages 105-108 to Paper book - Volume I. Despite repeated follow ups, approval has not been granted. As the requirement for FHL to hold at least 51% in FHTL was imposed from HUDA in its letter dated 3 January 2006, a waiver of this condition or approval from HUDA is required before FHL could sell its 51% interest in FHTL to FHML. The Assessee would like to categorically mention before your Honour that FHL was continuously following up with HUDA to accord their approval so that FHL could transfer its 51% shareholding in FHTL in favour of FHML so the condition with respect to maintenance of shareholding could be maintained and complied with, however after much follow-ups for around 2 years and upon no response from HUDA, the Assessee

decided to transfer the CCD's held in FHTL in favour of FHL to achieve the following objective-

- (A) 5 year condition for exercise FHTL put option was drawing near,
 - (B) that condition as imposed by HUDA with respect to minimum shareholding could be maintained.
- Taking into account the CCDs, on a fully diluted basis, legal ownership pattern of FHTL is such that FHL owns 26.7%, FHML owns 25.65% and FGHIPL (i.e., the Assessee) owns 47.65% in FHTL. The proposed ownership pattern is such that FHML and FGHIPL (ie., the Assessee) together owns 100% of FHTL. Pursuant to CCD Subscription Agreement, FHL has undertaken that in the event FGHIPL(i.c., the Assessee) is unable to acquire, whether directly or indirectly, 100% of the issued and paid-up share capital of FHTL on or before the expiry of five years from the date of execution of the FHTL CCD Subscription Agreement for reasons beyond the control of FGHIPL (i.e., the Assessee), FGHIPL shall have the right to require FHL to purchase from FGHIPL(i.e., the Assessee) the CCDs held by FGHIPL (i.e., the Assessee) in FHTL at fair market value.
 - Both FHL and the Assessee had put option to transfer the equity shares and CCDS respectively pursuant to the investment agreement dated 17th September 2012. In order not to violate the HUDA approval for the Gurgaon land, on which Gurgaon Clinical Establishment is situated, decision was taken to transfer CCDs by FGHIPL (i.e., the

Assessee). The relevant extract of the investment agreement is reproduced as under:

"7.1 Put Option

The Promoter agrees and undertakes that in the event that the investor is unable to acquire, directly or indirectly, 100% of the issued and paid up Share Capital of the Company within 5 years from the date of execution of this agreement (the date falling 5 years from the date of execution of this Agreement referred to as the ("Option Commencement Date") for reasons other than attributable to the Investor or its subsidiaries, then, without prejudice to the other rights available under Law, the Investor shall, for a period of 90 Business Days thereafter ("Put Option Period"), have the right to issue the put Option Notice (as defined hereinafter), requiring the Promoter and/or its nominee to purchase from the Investor, at the Investor's sole discretion, all, but not less than all the Investor CCDs then held by the Investor in the Company ("Put Securities") to the Promoter and/or its nominee, and the Promoter and/or its nominee shall be obliged to purchase such Investor CCDs for the Put Option Consideration (defined in Clause 7.1.2)."

13. In this background of investment, earning of interest on CCDs in India and subsequent sale of CCDs, it was argued that the capital gains earned on sale of CCDs by the assessee is not liable to tax in India by virtue of the exemption available under Article 13(4) of the Tax Treaty.

14. The Id. AR argued that the Assessee is having valid Tax Residency Certificate (TRC) and TRC is one of the prerequisites for the non-resident's entitlement to beneficial provisions of the DTAA. As per provisions of section 90(4) of the Act, a non-resident shall not be entitled to claim any relief under the DTAA unless a certificate of his being resident of the country outside India is obtained from the Government of that country. It was argued that the TRC should be considered to be a conclusive evidence to determine whether the person is a resident of the contracting state. The Id. AR placed reliance on CBDT Circular No. 789 dated 13th April, 2000, validity of which was upheld by the Hon'ble Supreme Court in Union of India vs. Azadi Bachao Andolan (263 ITR 706) and on the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India [2012] 17 taxmann.com 202. It was argued that the TRC is a sufficient document to establish that the Assessee is tax resident of Singapore and entitled to claim the beneficial provisions delineated in the DTAA. The Id. AR also relied on the Press Release dated 1" March, 2013 wherein it has been clarified that *"The tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status."*

15. The Id. AR argued that the amendment to the Tax Treaty vide Protocol is not applicable. It was argued that the Tax Treaty was amended vide Third Protocol dated 23-03-2017 w.e.f. 01-04-2017 wherein it was provided that the benefit of Tax Treaty would not be admissible to a shell company/ conduit

company. The relevant provisions of the Protocol are reproduced hereunder:

"4. A resident of a Contracting State is deemed not to be a shell or conduit company if:

(a) it is listed on a recognized stock exchange of the Contracting State; or

(b) its annual expenditure on operations in that Contracting State is equal to or more than S\$ 200,000 in Singapore or Indian Rs. 5,000,000 in India, as the case may be:

(i) in the case of paragraph 4A of Article 13 of this Agreement, for each of the 12-month periods in the immediately preceding period of 24 months from the date on which the gains arise;

(ii) in the case of paragraph 4C of Article 13 of this Agreement, for the immediately preceding period of 12 months from the date on which the gains arise."

16. It was argued that Limitation of Benefit Clause (LOB Clause) has been inserted and accordingly, the DTAA was amended vide the Protocol which was made effective from 01.04.2017, meaning thereby that amended Article is applicable for assessment year 2018-19 and onwards. The Delhi bench of the Tribunal in the case of MIH India (Mauritius) Ltd. vs. ACIT has held that similar amendment made in the India Mauritius Tax Treaty w.e.f. 1.4.2017 would apply only from assessment year 2018-19 and onwards. Accordingly, it was argued that the amendment to the Tax Treaty vide the aforesaid Protocol is not applicable, at the threshold to the assessment year under consideration, viz., assessment year 2017-18. The Id. AR

submitted that by no stretch of imagination, the assessee company can be regarded as a shell company/conduit entity.

17. It was submitted that the Assessee is wholly owned by RHT, a business Trust listed on Singapore stock exchange. In that view of the matter, it is the submission of the Assessee that it should be regarded as a listed company on a recognized stock exchange of Singapore. In this connection, the Assessee seeks to draw support from the provisions of section 2(18)(B)(c) of the Act, which provides that the wholly owned subsidiary of a listed company would be regarded as "a company in which public are substantially interested". On a parity of reasoning, the Assessee, owned wholly by RHT, a business Trust listed on the recognized stock exchange in Singapore should be regarded as listed on a recognized stock exchange of Singapore, applying the Non-Discrimination Article of the Tax Treaty (Article 26), thereby satisfying the first condition.

18. With regard to the Annual expenditure, it was submitted that the assessee incurred more than \$ 2,00,000 on operations in the contracting State. The expenditure incurred is as under:

S. No.	Name of Expenses	October 2014 to March 2015	April 2015 to March 2016	April 2016 to September 2016
		Amount (SGD)		
1.	Employee Benefit Expenses	33,327	50,734	41,213
2.	Trustee Manager fees	34,31,098	41,89,711	(Refer Note 1)
3.	Professional fees	83,887	18,50,089	7,91,692
4.	Realized foreign exchange loss	43,40,757	51,26,604	4,81,588
5.	Administrative/ Other charges paid to bank etc	27,180	54,354	27,189
6.	Interest on Bank	21,42,901	38,04,879	21,73,585
7.	Bank Charges	40,318	22,295	(Refer Note 1)

19. It was argued that the Assessee has commercial substance as evident from the following:

- (i) The Assessee has raised loans in Singapore
- (ii) The Assessee has made investments in various operating entities, other than the CCDs subscribed in FHTL
- (iii) The Assessee has office premises in Singapore and books of accounts are also maintained in Singapore.
- (iv) The Assessee has appointed Trustee Manager to advice and manage the investments, to whom substantial Trustee Manager fees is paid.
- (v) The Assessee is filing tax returns in Singapore.
- (vi) The Assessee has made necessary filing with the Accounting and Corporate Regulatory Authority of Singapore Ministry.
- (vii) The Assessee earns income by way of interest (on CCDs) and management fees (from assessment year 2017-18).
- (viii) The Assessee has incurred substantial expenditure by way of payment of interest to independent financial institutions, Trustee Manager fees, legal and professional fees, etc.
- (ix) The Assessee has an operational bank account in Singapore in its own name.

20. Invoking the rule of consistency, the Id. AR argued that the **interest earned** on CCDs have been offered to tax in India in the tax return filed in India @ 10% as provided under the Tax Treaty. The same was accepted by the assessing officer in the draft assessment order. The past assessments of the Assessee,

too, have been completed taxing the said interest @ 10%, thereby accepting that the Assessee was entitled to the Treaty benefits.

21. With regard to the Place of effective management ("POEM") of the assessee is in Singapore, the Id. AR argued that Prior to the amendment of section 6(3) of the Act by the Finance Act, 2016 w.e.f. 1.04.2017, a foreign company was said to be a resident in India in any previous year, if during that year the control and management of its affairs is situated wholly in India. With the amendment by the Finance Act, 2016 w.e.f. 1.04.2017, amended section 6(3) of the Act reads as under:

"a company is said to be a resident in India in any previous year, if

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India."

Explanation - For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made. " From a reading of amended section 6(3) of the Act it follows that a foreign company would be said to be not-resident in India in any previous year if its place of effective management in that year is not in India.

- *POEM in the case of a company engaged in active business outside India shall be presumed to be outside India if*

majority of meetings of the board of directors of the company are held outside India.

- *In case of companies engaged in active business outside India, the determination of POEM would be a two stage process:*
 - (i) Identifying or ascertaining the person(s) who actually take the key management and commercial decisions for the conduct of the company's business as a whole.*
 - (ii) Determining the place where these decisions are being made."*

22. The Id. AR argued that there were two Directors of the Assessee namely, Mr. Gurpreet Singh Dhillon and Mr. Ravi Malhotra who were tax resident of Singapore and Hong Kong respectively. It was argued that in the instant case, the place of effective management of the Assessee Company cannot be said to be in India, as the decisions by the Board of Directors were taken outside India. It was submitted that the business operations for being conducted from Singapore as Singapore is a recognized location for investors to plan their business structures as it already had a well-developed financial market and treated as a larger finance hub at the global level. Hence, it cannot be construed that any tax avoidance design was envisaged by the assessee and it cannot be said that the setting up of RHT in Singapore was motivated by consideration of tax avoidance.

23. Against the above, the Id. DR, Sh. Gangadhar Panda argued vehemently and also submitted his arguments in writing which are reproduced in *toto*:

"The appeals in the case of M/s THR Infrastructure Pte Ltd for AY 2017-18 (appellant/assessee) in respect of ITA No. 1915/DEL/2022 came up for hearing on 01/11/2022 and continued till 02/11/2022. The main issue argued during appeal hearing is regarding taxability of capital gains income in India on the sale of CCDs under Sec 112 of the IT Act due to denial of Tax Treaty benefits claimed by the applicant as per Art 13(4) of India -Singapore DTAA (DTAA).

2. Brief Facts:

2.1. During the year, the assessee received Rs. 1099,98,40,802/- from India on sale of 51% stake in CCDs (Compulsory Convertible Debentures) issued by Fortis Hospital Limited (FHTL). The assessee filed in its ITR for AY 2017-18 on 30.11.2017 and claimed Long Term Capital Gain (LTCG) of Rs. 656,08,00,802/- from the above transaction as fully exempt as per Article 13(5) of the India-Singapore DTAA.

2.2. The AO in its Final Order, taking into account the direction of the DRP, held that the assessee company is not entitled to the treaty benefits of India-Singapore DTAA as the business arrangement employed by the assessee is a scheme for tax avoidance through treaty shopping , and the assessee company is held not to be the real owner of the income so generated from the transaction , thus lacked beneficial ownership. The AO further held that the TRC is not sufficient to establish the tax residency as the substance of transaction established otherwise due to control and management of the assessee company is not present in Singapore, but rather in India. This AO held that the assessee company is not entitled to the treaty benefits of India- Singapore DTAA, and accordingly income from sale of CCDs and interest income was subject to tax as per IT Act.

3. Assessee Contention before Hon'ble Bench:-

3.1 During the proceeding, the assessee contended that it was eligible for the benefits under the DTAA owing to the fact that it had obtained a valid TRC from the Singapore Revenue authorities. The assessee further countered the finding of the AO to state that its business transactions are of economic substance as it incurred requisite expenses in the 24 months preceding of the disposal of CCDs. Finally, the assessee stated that its receipts are squarely covered under the provision of the Article 13(5) of DTAA as the Limitation of Benefit article of DTAA has no effect.

3.2 In regard to non-applicability of the LOB clause to 13(5), the assessee argued that the LOB clause of India-Singapore DTAA came into effect from 01.04.2017 onwards , and the transaction took place in 2016. The AR of the assessee filed Paper Books to counter the findings made by the AO in the final assessment order/direction of DRP order. The assessee also relied on a number of case laws compiled in the paper book to submit before the Hon'ble Bench that the subject transaction is not taxable in India in view of Art 13(5) of DTAA.

3.3 Assessee's contentions are summarized as under:-

3.3.1 TRC:-Assessee argued that the appellant holds valid TRC, therefore, it is entitled to claim benefit under DTAA and placed reliance on various case laws.

3.3.2 Amendment to the Tax Treaty vide Protocol-Assessee submitted that the amended Article which was made effective from 01.04.2017, is applicable for A.Y. 2018-19 and onwards. Further, assessee placed reliance on decision of IT AT, Delhi in the case of MIH India (Mauritius) Ltd. vs. ACIT (supra). Accordingly, the amendment to the Tax treaty vide the aforesaid Protocol is not applicable, at the threshold to the assessment year under consideration i.e. A.Y. 2017-18.

3.3.3 Assessee submitted as below, why assessee company is not to be regarded as a shell company/conduit entity. The appellant should be regarded as company listed on a recognized stock exchange of the Contracting State. Assessee submitted that the appellant is wholly owned by RHT, a business Trust listed on Singapore stock exchange. Therefore, it should be regarded as a listed company on a recognized stock exchange of Singapore. Further, assessee in support drew a reference of provisions of section 2(18)(B)(c) of the Act and placed reliance on decision of IT AT, Pune bench in the case of Daimler Chrysler India Pvt. Ltd. (ITA No. 968/PN/03).

3.3.4. Annual expenditure in Singapore on operations in that Contracting State is equal to or more than S\$200,000:- Assessee submitted the expenditure incurred by it in last 24 months from the date of transfer is in excess of the threshold of Singapore \$ 200,000 per year and these expenses were incurred and booked at the year end. Therefore, appellant has to be regarded as resident of Singapore and entitled to Tax Treaty benefits, even taking into account the amendment to the said Treaty through the Third Protocol.

3.3.5 Commercial Substance:-Assessee submitted that it has commercial substance, as it has made investments in other than CCDs subscribed in FHTL and has done all business activities in Singapore under the law of Accounting and Corporate Regulatory Authority of Singapore Ministry. Therefore, it cannot be regarded as a shell company/conduit entity.

3.3.6 Rule of Consistency:-Assessee submitted that the interest earned on CCDs have been offered to tax in India in the tax return filed in India @ 10% as provided under the Tax Treaty and it was accepted by the assessing officer in past assessment years. Therefore, Revenue is estoppel from taking a different view in the

matter in a later year, without there being any change in facts or change in law and place reliance on decision in the case of Radha Soami Satsang vs. CIT : 193 ITR 321 (SC) and CIT vs. Excel Industries : 358 ITR 295(SC).

3.3.6 Place of effective management ("POEM") is in Singapore:- Assessee submitted that there were two Directors of the appellant namely, Mr. Gurpreet Singh Dhillon and Mr. Ravi Malhotra who were tax resident of Singapore and Hong Kong respectively and the place of effective management of the assessee company cannot be said to be in India, as the decisions by the Board of Directors were taken outside India.

3.3.7 No tax avoidance involved in setting up RHT and the appellant in Singapore:- Assessee submitted that the choice of Singapore as a jurisdiction by RHT as well for acquisition of CCD's in FHTL in 2012 cannot be said to be primarily for taking tax treaty benefit as Singapore is matured market and taxpayer choose Singapore as a jurisdiction for registration of trusts since Singapore has a proper regulatory framework for business trusts under the Business Trusts Act. Further, assessee placed reliance on case of UOI vs Azadi Bachao Andolan(SC) and Vodafone International Holdings B.V. (supra).

4. Revenue Submission

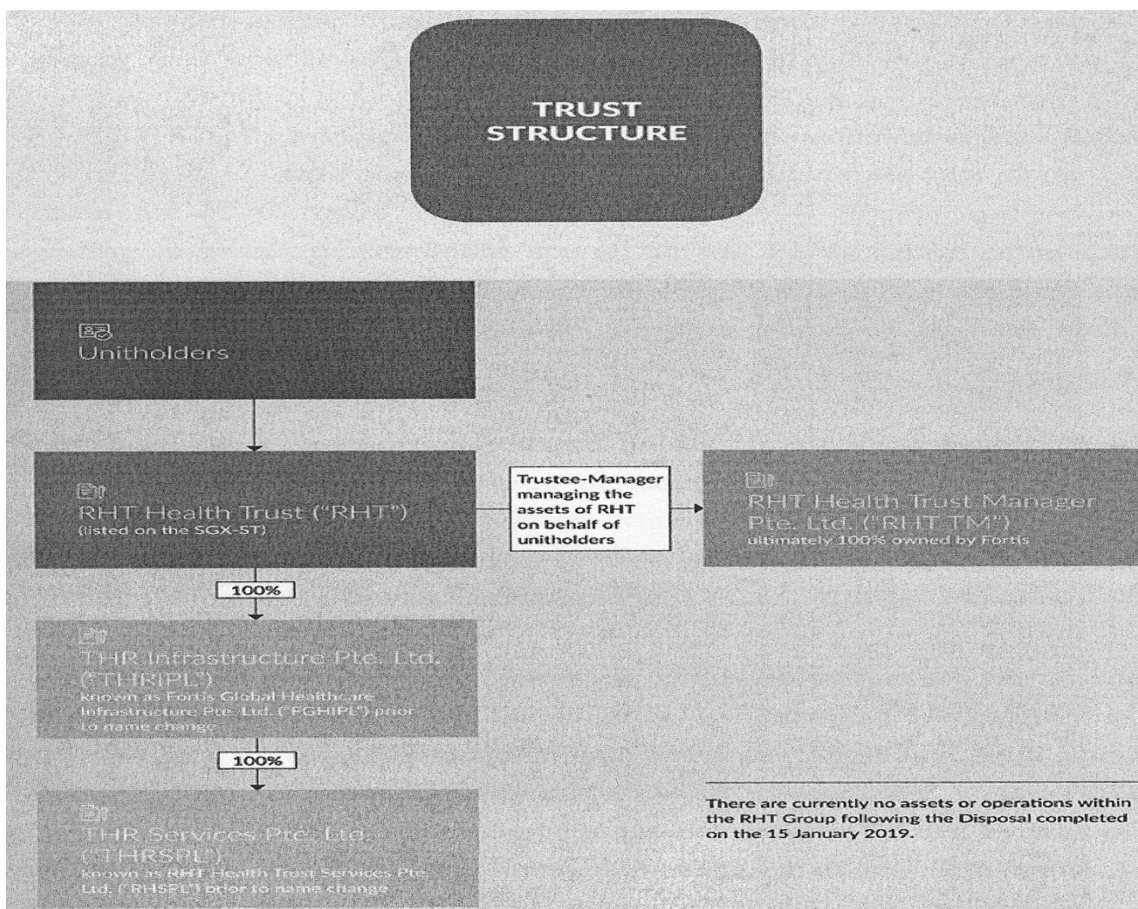
The contentions of the Revenue argued before the Hon'ble Bench is summarized as under:

4.1. Facts compiled from the Final Assessment Order, DRP Order and Paper Books of Assessee.

4.1.1 The assessee company is incorporated and registered in Singapore on 31.03.2011. The assessee company is an investment holding company and is also engaged in provision of management

and consultancy services. It has submitted a Tax Residency Certificate of Singapore in respect of interest income earned by it from India for the year under consideration.

4.1.2 Corporate Structure of the assessee's group:



4.1.3 RHT Health Trust: The India based Fortis Healthcare Ltd. (FHL) which is the lead member of the Fortis group wanted to raise funds for expanding the presence of healthcare services across India. For this purpose, it sponsored Religare Health Trust, a business trust in Singapore, by first creating a wholly-owned subsidiary in Mauritius named Fortis Mauritius.

4.1.4 Assessee company is a wholly owned subsidiary of Religare Health Trust (RHT). As per public domain information, Religare

Health Trust is a registered Business Trust constituted in Singapore in July 2011.

4.1.5 RHT Trust's principal activity is to invest in medical and healthcare assets and services, in Asia, Australasia and emerging markets in the rest of the world. All the investments of Religare Health trust namely 14 clinical establishments and 2 operating hospitals across India are all in the Fortis group of hospitals in India through the assessee company. One such investment of the assessee company is in Fortis Hospital Ltd.(FHTL), an Indian company whose CCDs have been sold during the year under consideration.

4.1.6 There are 2 main groups of unit holders in Religare health Trust namely the Fortis Group entities and institutional lenders. As per its website, the main unit holders/investors of the RHT include Mauritius based company Fortis Healthcare International Ltd. (Fortis Mauritius) (27.6% shareholding), DB Nominees (Singapore) Pte. Ltd., Citibank Nominees Singapore Pte. Ltd. and Raffles Nominees Pte. Ltd.

4.1.7 The main unit holders/investors in Fortis Mauritius are the Trustee Manager, Fortis Healthcare Ltd., Fortis Healthcare Holdings Pvt. Ltd. and the individuals Malvinder Singh, Japna Malvinder Singh, Shivinder Singh and Aditi Shivinder Singh.

4.1.8 Thereafter funds were gathered at the level of RHT Trust by way of an IPO and pumped into the Fortis group companies in the form of debt and equity. In return, the Fortis group companies provided interest income and management fees to the assessee company which in turn was passed on to RHT Trust for annual distribution to the unit holders.

4.1.9 Venture was originally only sponsored by Fortis India, its overall management was also taken control by Fortis India in 2015.

4.1.10 *From public domain information available, Fortis India established a subsidiary in the form of Stellant Capital Advisory Services Pvt. Ltd. to acquire and in turn take over the management of the trust i.e. the Trustee Manager.*

4.1.11 *As per the annual reports of the RHT Trust for the years 2016 and 2017, the Trust was headed and managed by Ravi Mehrotra who was also a Director in Fortis India at the same time. RHT Trust had a senior management team in place in India managed by various individuals based in India which was commercially sound given that the Trust's entire portfolio comprised of only Fortis hospitals in India as its assets.*

4.1.12 *As per the assessee company's financial statements for the year, its directors were Ravi Mehrotra and Gurpreet Singh Dhillon. The latter is a tax resident of India for tax purposes and is a close associate and family member of the promoters of Fortis India at the time namely Malvinder Singh and Shivinder Singh. From the above, it is evident that the control and management of the assessee does not lie in Singapore. It is part of India-centric venture and is effectively controlled and managed from India.*

4.1.13 *In September 2012, the assessee company acquired 87,04,000 fully and compulsorily convertible debentures (CCD) in FHTL at a value of INR 1000 per CCD. The assessee company earned interest on the same at the rate of 17.5% per annum. The said CCDs were convertible into 267,400,000 shares of FHTL at share value of INR 32.55 within 18 years of issuance.*

4.1.14 *In July 2016, the assessee company entered into an agreement with Fortis India to sell 51% of the CCDs of FHTL (i.e. 44,39,040 CCDs) held by it for a consideration of Rs. 1099,98,40,802/- (SGD 2271 million).*

4.1.15 *Immediately thereafter, the assessee company declared a dividend of SGD 193 million to its parent RHT Trust and also extended a loan to it. The RHT Trust in turn declared a special distribution to all its unit holders at 24.8 Singapore cents per unit on 28.10.2016 as against the usual distribution rate of 3.5 Singapore cents per unit.*

4.1.16 *RHT Trust continue to remain functional till February 2019, which coincided with the time when Fortis India publicly declared that it had taken full control of all its assets in India thereby indicating that the Trust was no longer an investor in the group's assets.*

4.1.17 *Accordingly, the Trust website indicates another special distribution to its unit holders on 04.02.2019 coinciding with the time when it had finally divested all its stakes in Fortis group assets.*

4.1.18 *As on date, the Trust website states that it has ceased to have any operational business and it is a cash trust.*

4.1.19 *On the original advancement of debt of INR 874 crores to FHTL against issue of 87,04,000 no. of CCDs for a face value of INR 1000 per CCD, no basis of adopting such fair market value was furnished.*

4.1.20 *Though the option of converting the CCDs into equity was available upto 2030 (i.e. 18 years), the conversion was made in a much short time period. No commercial reason for the same was provided for such urgency.*

4.1.21 *The valuation report submitted by the assessee cannot be accepted as the variables taken to compute the fair market value of CCDs have not been justified. The transaction therefore lacks commercial sense.*

4.1.22 *There is no commercial sense in the transactions under consideration which have been made between related parties, valuation and sharp price of value of CCDs are unsubstantiated, the conversion of CCDs were made within a short span of time and the gains have been treated as exempt under treaty provisions, it may be safely inferred that the only motive to structure the transaction in the way defined above is to avoid payment of taxes in India.*

4.1.23 *The assessee company therefore was interposed in Singapore and CCDs of FHTL were held by assessee company in order to avail tax benefit under the DTAA.*

4.2. *Summary of Arguments of Revenue for Treaty Denial:*

Based on the facts mentioned in the AO's order and DRP's order, and taking into account contention of the AR of the applicant during the hearing, the revenue has made following submissions during the course of hearing before the Hon'ble bench which is summarized as below:

- i. More than 30% of units RHT Trust are held through related parties. The trust control was with FHL (the parent company) which sponsored the trust by setting up wholly owned subsidiary in Mauritius.*
- ii. There was no commercial rationale for FHL to incorporate wholly owned subsidiary in Mauritius.*
- iii. There are no assets in RHT pursuant to disposal and distribution to the unit-holders.*
- iv. No need to create trust. The trust being a pass through entity not entitled to treaty benefit.*
- v. No commercial reason has been provided by the company for the purpose of transfer of Compulsorily Convertible Debentures (CCD's) within 5 years as CCD's were to be converted into Equity instrument within 18 years. The*

reason given regarding HUDA land conversion rule is an alibi to perpetuate this pre-conceived modus operandi to avoid taxation in Indian territory.

- vi. No basis of adopting fair market value at the time of issue of CCD to the Company in 2012 was furnished by the Company during the course of assessment proceedings. Fair market value of CCD's and sharp rise in the value of adopted at the time of disposal of CCD's also remains unsubstantiated by the Company. No commercial basis for undertaking the transfer of CCD's by the Company in Fortis Hospital Limited (FHTL).*
- vii. The appellant is a conduit entity/economic sham considering that (i) the appellant has only one employee; (ii) majority of the operational expenses are in the form of Trustee Manager fee (who also render services to other related entities) which is to a related party. Further, in the in the protocol on LOB clause, the term use is "annual expenses on operation", meaning thereby the annual expenses for the assessee solely be in the nature of operating expenses. No other expenses passive nature like realised and unrealised foreign exchange loss as well as the notional losses like unrealised fair value loss on derivatives which is not related to operation of entity but has been claimed by the assessee as operating expenditure should be excluded while applying the threshold expenditure test. Needless to say that minus the said non-operating expenses, the assessee fails to satisfy this test and turns out to be a conduit entity within the meaning of LOB clause DTAA.*
- viii. In regard to the principle of consistency claimed by the applicant, it is pertinent to consider the last paragraph (para 15) of the ruling of the Hon'ble Apex Court in Radha Soami Satsang case, an accordingly, the ruling may not be treated as a authority on aspects which have been decided*

for general observation. The observation is quoted as under:-

"The counsel for the revenue had told us that the facts of this case being very special, nothing should be said in a manner which would have general application. We are inclined to accept this submission and would like to state in clear terms that the decision is confined to the facts of the case and may not be treated as an authority on aspects which have been decided for general application."

Further, it is retreated that the res judicata does not applies to IT proceedings. For a moment if it is an assumed that rule of consistency should prevail for all assessment years, in that case the principle of reopening a case due to escapement of income after completion of assessment becomes a redundant provisions. In order to correct mis-appreciation of fact or law, the IT law framework provides the mechanism of reopening or similar other provisions to rectify such omissions which indeed becomes a deviation from the rule of consistency rule.

- ix. In regard to non-applicability of LOB clause in view of the trust being registered in Singapore Stock Exchange, it is submitted that the status of the assessee here is a Singapore company which is admittedly by the AR of the applicant is not registered in the Singapore Stock Exchange. Since, the trust and the assessee are two separate entity, so the applicability of LOB to the assessee company cannot be taken away, and it squarely applies to the assessee.*
- x. It is a Scheme of Tax Avoidance, Control and Management of the Company does not lie in Singapore but lies in India.*
- xi. The brain/control and management of the appellant is in India. Ravi Mehrotra also director of Fortis India. Board*

meetings not held in Singapore as Board Resolutions do not show place of meeting.

- xii. *Tax Residency Certificate is not sufficient to establish tax residency if there is no economic substance in entity. TRC not conclusive in view of the ruling of Hon'ble Supreme Court in the case of Vodafone(para 98).*

5. Point-wise rebuttal for assessee Legal Objections on Tax Avoidance Scheme.

5.1 TRC is not Sufficient to Claim Treaty Benefits:

5.1.1 The assessee has stated that CBDT Circular 789 dated 13/04/2000 should be applicable on it which states that "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." This circular provides a general provision that TRC would constitute sufficient evidence for accepting the status of residence and beneficial ownership. However, in the present case, there is overwhelming evidence (discussed under para 4 above and in AO/DRP orders,) that the assessee company is failing in the principal purpose test, exists only on paper for all practical purposes and the sole purpose of creating this company was to evade taxes. Hence the general provision envisaged by the Circular 789 is not applicable in this case.

5.1.2. The plea of the assessee is that it has been issued a TRC by the Singapore Tax Authority. Whether the TRC is conclusive to decide the tax residency, it was decided in a number of rulings referring to the case of Vodafone BV case , i.e. Tiger Globals (AAR), BID Co, (AAR) and Redington (Chennai High Court). The relevant observations made by the Hon'ble Apex Court in the Vodafone Case , in regard to sufficiency of TRC, at para-98, is reproduced as under:-

Hon'ble Supreme Court in the case of Vodafone Intl. Holding v. Union of India [2012] 17 taxmann.com 202/204 Taxman 408 stated that,

"98. It is to be noted that LOB and look through provisions cannot be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the Tax Department cannot pierce the veil and look at the substance of the transaction. DTAA and Circular No 789 dated 13.04.2000, in our view, it would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritian Company has been interposed as the owner of the shares in India, at the time of disposal of shares to a third party, solely with a view to avoid tax without any commercial substance. Tax Department, in such a situation, notwithstanding the fact that the Mauritian company is required to be treated as a beneficial owner of the shares under Circular No 789 and the Treaty is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Income Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction maybe subjected to tax. In other words, TRC does not prevent enquiry into a tax fraud, for example, where an OCB is used by an Indian resident for round-tripping or any other illegal activities, nothing prevents the Revenue from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of the OCB in the entire transaction."

5.1.3 The recent ruling of the AAR in AB Mauritius (2018) 402 ITR 311 and observations made by the Bombay High Court in Indo star Capital v. CIT also held on similar view based on 'substance over the form' principle.

5.1.4 The place of incorporation argument is based on the premise that form is required to be recognized for deciding taxation issues. The Azadi Bachao Andolan of the Hon'ble Supreme Court is also based on this argument. However, the primacy of form of the taxpayer in deciding tax liability has not been approved under a tax treaty framework. For instance, under a dual residency situation always the economic substance overrides the form. Under the tie breaker rule for tax residency of companies, the country where the "control and management" of the company is situated gets the right to tax and not where the company is incorporated. The "control and management" test for tax residency of companies is basically based on the principle of "substance over form".

5.1.5 The assessee has tried to justify the rationale of establishing a company in Singapore. However, none of the causes mentioned by the assessee justify establishing a paper company with paper directors. It is an undoubtable conclusion derived from the facts of the case that the company was established with the sole and principal purpose of tax avoidance.

5.1.6 It is relevant to consider here that though the tax residency is stated to be established to take benefit of Singapore tax treaty network with various countries and not just India, in effect the entire investment made by the assessee was with India only, in respect of which the benefit of India- Singapore DTAA is being claimed. As is evident from their financial statements filed with the assessee, It had made investment mostly in India. Thus, the real intention of the assessee is to avail the benefit of India- Singapore treaty.

5.2 Look through approach where DTAA contains LOB Clause

5.2.1 The look-through approach: In "look through approach" the real beneficiary of the income is found out. It means to ignore the

corporate structure and look through the realities of the transactions. It may also be called to look into the substance ignoring the legal form. Under this approach, a company will be denied treaty benefits if the company is owned or controlled, directly or through one or more other companies, by a Third-State Resident.

Following provision is suggested in the OECD Commentary for DTAA:

"A company that is a Resident of a Contracting State shall not be entitled to relief from taxation under this Convention with respect to any item of income, gains or profits if it is owned or controlled directly or through one or more companies, wherever Resident, by persons who are not Residents of a Contracting State".

Para 14 Article 1 OECD MC Commentary suggest following indicator to infer look through approach:

"The 'look-through approach' underlying the above provision seems an adequate basis for treaties with countries that have no or very low taxation and where little substantive business activities would normally be carried on. Even in these cases it might be necessary to alter the provision or to substitute for it another one to safeguard bona fide business activities"

5.2.2 Thus, to infer look through approach one may look for following indicators:

- a) There is a common management or substantially a common controlling mechanism exercised over the intermediary entity in the Resident State.*
- b) Such controlling mechanism is more than routine guidance and supervision.*
- c) There is very little discretion with the management of intermediary concern and all the major decisions are taken by the controlling company and passed on to the entity.*

- d) *Funds received are immediately transferred to the holding company and funds only to the extent of requirement are remitted by the holding company.*
- e) *There is very little infrastructure or, employees or business activities with the intermediary concern.*
- f) *There is no or very low taxation in the Country of Residence of the intermediary concern.*

5.2.3 *In this regard, it is useful to refer the observations of Hon'ble Apex Court in Vodafone Case at para-67 is very relevant, which is reproduced as under:-*

"67. "It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed Residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling Non- Resident Enterprise (NRE) makes an indirect transfer through "abuse of

organization form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of Non-Resident Holding Company, re characterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise." (Page 61 of 341 ITR: "Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. Legal doctrines like 'limitation of benefits' and 'look through' are matters of policy. It is for the Government of the day to have them incorporated in the Treaties and in the laws so as to avoid conflicting views. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws..."

Further, similar view taken in another landmark case as reproduced below:

"In any view, "look through" provision cannot shift situs of a transaction in the absence of an in-built provision "..... as decided in Federal Commission of Taxation v. Lamesa Holdings BV(LN)[1998] 157 ALR 290".

5.2.4 Thus, to invoke look through approach one has to find the facts which should indicate:

- i. The decision-making process is transferred to the holding company.*
- ii. In Management of intermediary entity is acting as puppet.*
- iii. There is no reasonable business purpose in running the intermediary entity.*

In view of the above, the legal position and based on the facts and circumstances analysis in para-4 above, it is intended to use the legal doctrine of substance.

5.3 Substance Over Form squarely the Doctrine Applicable to assessee:

5.3.1 The doctrine of substance over the form means to brush aside and disregard the deeds, legal structure, the legal rights and liabilities arising under a contract between the parties, and decide the question of taxability and non-taxability independent of rights and the liabilities of the parties what they are in law. Even though significance of legal form of a transaction has been given due importance in several English cases but later a balanced approach was adopted by English Courts where it was held that one has to look at the whole transaction to ascertain the true character of the payment. In Indian cases also importance was earlier given to legal form. However, subsequently the Courts have not hesitated to extract substance over the form as is evident in following cases.

5.3.2 Hon'ble apex Court in Vodafone's case observed about the concept of Substance over the form as under:

"When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structures. In the application of a judicial anti avoidance rule, the Revenue may invoke the "substance over form "principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances' surrounding the transaction that the transaction in question is a sham or tax avoidant."

5.3.3 Doctrine of substance over form: The tax doctrine of "substance over form" is a judicial creation applied in many countries. It is often used by the courts in cases where a taxpayer has constructed a scheme of transactional relationships on documents only or primarily to obtain tax benefits. If the tax motivation outweighs the business purpose and/or profit objective of the transaction, courts will decide that "form"(written contracts and arrangements) does not reflect the "substance"(the real deal/picture) and on that basis may deny the intended tax benefits. This is primarily applicable to the assessee case under consideration.

- (a) In this case, place of effective management is not in Singapore and Control and Management exercised by Ultimate Beneficial Owner of the assessee based under Fortis group outside Singapore.*
- (b) Assessee's submission that it is beneficial owner of capital gain and therefore eligible for India-Singapore Tax treaty is not tenable as discussed in the Assessment Order , therefore control and management of the assessee company is outside Singapore. Hence it is not eligible for India-Singapore DTAA and Capital taxable as per Income Tax Act, 1961.*

5.4 Conduit Company Argument:

Thus as no substance has been demonstrated by the assessee company it can at best be treated as Conduit company based on the arguments made in para 8 to 10. Conduit company i.e. our assessee company merely forwards passive income to persons who are not residents of one of the states that are parties to the treaty in question. On the facts of the current case, when the role of the intermediary i.e. assessee company in question is taken into account, the intermediary should be denied treaty benefits according

to the policy of double tax treaties because it does not satisfy the requirement of being the beneficial owner of the income at issue.

5.4 Beneficial Ownership:

(a) However, in the light of the traditional legalistic view of companies, and of the meaning of "ownership", it seems that foreign courts decided that they were unable to apply the beneficial ownership test literally. As a result, in order to prevent residents of non-contracting states from obtaining treaty benefits by means of the interposition of conduit companies, foreign courts adopted surrogate tests in place of the literal beneficial ownership test. These surrogate tests focus not on ownership of income by the company in question but on some other factual matter such as "dominion".

(b) The test of dominion is a surrogate form of reasoning that foreign courts have used to apply the beneficial ownership test in conduit company cases. The word "dominion" is not a term of art. This article uses the word "dominion" to represent an incident that exhibits ownership.

Salmond describes rights and liberties that belong to this incident of ownership as follows:

"The owner normally has the right to use and enjoy the thing owned; the right to manage it, i.e., the right to decide how it shall be used; and the right to the income from it. these rights are in fact liberties: the owner has a liberty to use it, in contrast with others who are under a duty not to use or interfere with it."

(c) The assessee company has not demonstrated dominion over either of the property. It is categorically brought out the bank account cannot be operated independently and neither part time Singapore director has acted independently and the key decisions

which are required to address the share transactions are actually taken by ultimate parent in British Virgin Islands and beneficially owned by Mr. Sandeep Murthy who is claimed to be citizen of USA. Further fund actually pass through Singapore entity without actual retention. Thus the dominion test has not been satisfied by the assessee company claimed to be resident in Singapore.

(c) OECD position on such conduit companies:

Reliance is also placed on the OECD Committee on Fiscal Affairs report titled "Double Taxation Conventions and the Use of Conduit Companies" International Tax Avoidance and Evasion: Four Related Studies, Issues in International Taxation No 1 (OECD, Paris, 1987). In this regard attention invited to page 87at para 4(1) uses the absence of dominion over passive income that it receives as a criterion for determining that a recipient company is not the beneficial owner of the income in question.

6. TAX EVASION SCHEME HIT BY LOB CLAUSE OF SINGAPORE DTAA

6.1. As per the judicial rulings, referred above, a look-through approach is perfectly justified to go to the underlying purpose of a transaction under the tax treaty where there are specific LOB clause in the relevant DTAA. In regard to applicability of the LOB clause to Art 13(5) of DTAA, the assessee argued that the LOB clause of India-Singapore DTAA came into effect from 01.04.2017 onwards and since the subject transaction took place in 2016, thus Revenue does not have a case to look through the transaction for tax evasion for reasons of - substance over form doctrine, Conduit Company rule, Beneficial Ownership and Dominion Rules, and consequently, production of TRC issued by Singapore Tax Authority sufficed the condition to enjoy DTAA benefits by assessee as per sec 90(2) of IT Act read with DTAA.

6.2. However, contrary to insistence of assessee, the LOB clause would squarely apply to the assessee's transaction executed in 2016. Even though the latest amending Protocol of Indo-Singapore DTAA came into effect from 01.04.2017 for applicability of Art 12 (4A) on capital gain income for LOB Clause as stated by the AR of the assessee, but the fact remains that the LOB Clause as introduced in the year 2005, (which was reproduced in new amending Protocol of 2017), being applicable w.e.f. 01.04.2005 continues to operate in respect of income under Article 12, 13, 11 of DTAA.

6.3. The LOB Clause as applicable from 01.04.2005 and as appeared in the Protocol to DTAA is reproduced below for ready reference:

**"AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND
PREVENTION OF FISCAL EVASION WITH FOREIGN COUNTRIES –
SINGAPORE**

Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income has entered into force on 27th May, 1994 on the notification by both the Contracting States to each other of the completion of the procedures required by their respective laws, as required by the said Agreement;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.

Notification : No. GSR 610(E), Dated 8-8-1994 As Amended by Notification No. SO 1022(E), Dated 18-7-2005; No. S.O. 2031(E), Dated 1-9-2011 and No. S.O. 935(E), Dated 23-3-2017

ANNEXURE

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA
AND THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE FOR THE
AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL
EVASION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of India and the Government of the Republic of Singapore, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

Have agreed as follows:

The preamble of India-Singapore DTAA is reproduced as under:

"Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income has entered into force on 27th May, 1994 on the notification by both the Contracting States to each other of the completion of the procedures required by their respective laws, as required by the said Agreement."

.....
.....

Protocol:

3. Article 3 omitted by Notification No. SO 935(E) [No. 18/2017 (500/139/2002-FTD-II), dated 23-3-2017, w.e.f. 1-4-2017. Prior to its omission, said Article read as under:

*" Article 1.....
Article 1.....*

ARTICLE 3

1. *A resident of a Contracting State shall not be entitled to the benefits of Article 1 of this Protocol if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 1 of this Protocol.*

2. *A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 1 of this Protocol. A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.*

3. *A resident of a Contracting State is deemed to be a shell/conduit company if its total annual expenditure on operations in that Contracting State is less than S\$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.*

4. *A resident of a Contracting State is deemed not to be a shell/conduit company if—*

(a) it is listed on a recognized stock exchange³ of the Contracting State; or

(b) its total annual expenditure on operations in that Contracting State is equal to or more than S\$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.

Explanation.—The cases of legal entities not having bona fide business activities shall be covered by Article 3.1 of this Protocol."

[Bold highlights/to lay Emphasis]

[Full text of Protocol of 2005, 2011 and 2017 is reproduced as an Annexure)

6.4. It may be seen from the heading of the DTAA , prevention of tax evasion is one of the main objectives of this Tax Treaty , which further amplified by incorporation of the same phrase in the Preamble as well as in the recital of Annexed text of the Treaty. Therefore, while interpreting a Treaty, the essential object and purpose of the DTAA i.e. prevention of tax evasion must be factored into a subject transaction, but under no circumstances be ignored while applying a DTAA provision.

6.5 This principle is further legally aligned with the "Vienna Convention on the Law of Treaties 1969". For reference, Article 31 of Section-3 is reproduced below:

"SECTION 3. INTERPRETATION OF TREATIES

Article 31: General rule of interpretation

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**

3. *There shall be taken into account, together with the context.*

6.6. *In this background, if the present case of the assessee is examined on the taxability of capital gain income as per Article 12 (5) of DTAA, read with the Preamble of the Tax Treaty and , specifically introduced LOB Clause in the Protocol of 2005 to reinforce the object of the DTAA to prevent tax evasion , it became abundantly clear that the factual matrix of the assessee's case for this AY strongly made out a case for limitation of Treaty Benefits as the main purpose of its business structure and transactions were designed for tax evasion . The same is discussed as under.*

6.7. *From the facts of this case following features of LOB clauses are triggered:*

- *affairs were arranged with the primary purpose to take advantage of the benefits*
- *Explanation.—The cases of legal entities not having bona fide business activities shall be covered by Article 3.1 of this Protocol:*
- *A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business*
- *Annual expenditure on operations in that Contracting State is less than S\$200,000*
- *Thus it shall not be entitled to the benefits of Article 1 of this Protocol*
- *DTAA Preamble on the prevention of fiscal evasion is also violated, and therefore as per Vienna Convention, it breaches the object and purpose of the Treaty. Thus, the assessee by not adhering to the objects of the DTAA in good faith, has thus forfeited to proceed further to avail any benefits of DTAA. Since the DTAA is no more applicable to the assessee, the benefits of*

DTAA automatically do not flow to the assessee. Thus, existence of TRC has no meaning and applicability, as the assessee failed in threshold test of the preamble and object clause of DTAA, thus resulting non-applicability of DTAA which in turn denies the assessee to take any benefit of DTAA.

7. RULINGS BY INDIAN JUDICIARY ON TAX EVASION PRINCIPLES

7.1 In view of the above arguments, it is noted that assessee company in Singapore does not have dominion over any transactions, it is actually by ultimate parent in India and beneficially owned by Fortis who has dominion over such transactions. Therefore, the conduit company i.e. assessee company shall not be provided treaty benefit.

7.2 In India, the McDowell case in 1985 had proceeded on the lines of Ramsay and Burmah Oil and referred to "colourable devices" and "dubious methods" to avoid tax. The McDowell case was effectively the trend setter in Indian jurisprudence to establish that the "ghosts of Fisher and Duke of Westminster" were not existent in India. It was felt then that India would be harsh with tax avoidance and an extremely thin line would run between how tax evasion and tax avoidance could be interpreted and distinguished.

7.3 The Indian Courts have recently decided a number of cases on the basis of principle of "substance over form", particularly when the structure is ascertained as one of tax avoidance. Some decisions are discussed below where the facts are identical to the facts of this case.

(i) "The Hon'ble AAR, New DELHI in the case of Tiger Global International Holdings group reported in [2020] 116 taxmann.com 878 (AAR - New Delhi) held that:-

"Where real control of applicant-Singapore company was with US resident who was beneficial owner of group structure and applicant derived no capital gains by alienation of shares of any Indian company, rather gains arose on sale of a Singapore Company's share, value of which was derived substantially from assets located in India, such arrangement was for avoidance of tax in India; application for advance rulings were to be rejected."

(ii) AAR, MUMBAI in case of Bid Services Division (Singapore) Ltd [2020] 114 taxmann.com 434 held that

"One can claim that holding company will always be predominantly controlling all vital decisions of subsidiary company and that latter may be implementing such decisions. This may be true but if an entity claims treaty benefits it must establish the economy rationale and substance for treaty entitlement. Treaty shopping is well known for international tax planning whereby an entity is interposed in a country with favourable tax laws. Lately, the world over it is reckoned that improper nature of treaty shopping structure is created if the following factors are satisfied i.e., the beneficial owner of the treaty shopping entity does not reside in the country where entity is created; the interposed entity has minimal or no economic activity in the jurisdiction where it is located and lastly its income is subject to minimal tax in the country of location. [Para 62]"

AAR Mumbai further stated that "The doctrine of substance over form mandates taxing transaction pursuant to its economic effect rather than its form and that a valid transaction must have both a substantial purpose apart from reduction of tax liability." Consequently, AAR Mumbai denied the benefits of India-Singapore DTAA to the assessee in this case."

7.4 Hon'ble Madras High Court in the case of Redington India [122 taxmann.com 136] has ruled that tax benefits can be withdrawn if the investment is merely done to circumvent domestic tax laws. Hence the intent or the principal purpose behind such structures need to be analyzed before it can be seen if the purpose was to avoid double taxation or treaty abuse .The revenue can strike down or disallow any benefits permitted under income tax act or tax treaties if the structures do not have substance.

Assessee in its reply has tried to differentiate its facts from the judgment of Hon'ble Madras High Court in case of Redington India. However, what needs to be taken away from the judgment is the broad principal and ratio which is mentioned above cases can be absolutely similar, but the ratio or legal principle to be applied provides a lens through which the facts of the case should be analyzed. Applying the ratio of Hon'ble Madras High Court in the case of Redington India clearly establishes that artificial structures or set-ups created solely for the purpose of tax-avoidance need not be allowed by the tax authorities.

7.5 From the above discussion, it is fairly evident that the applicant company has no commercial substance. Mere possession of a TRC alone is not sufficient proof of control and management of the applicant company in Singapore. Therefore, it may be safely inferred that the applicant company is a mere conduit/shell company. Various recent decisions as cited above including the AB Singapore case, Tiger Holding cases, Bidvest case, Redington India Ltd case of Madras High Court, Indostar Capital case of the Bombay High Court have declined to give treaty benefits merely on the basis of TRC. The courts in India and in all parts of the world have resorted to the doctrine of "substance over form" in deciding upon the taxation of international transactions.

8 RULINGS BY FOREIGN JUDICIARY ON TAX EVASION PRINCIPLES

8.1 In the assessment order, AO as well as DRP have referred to a number of case laws to show the judiciary positions on tax evasion, and as to how assessee's case is covered by principles laid down in those cases. All these rulings have squarely discussed/ referred to the findings of the Hon'ble Apex Court cases relied by the AR of the assessee in the cases of Azadi Bachao Andolan and Vodafone BV, and went on to deal with the issues of tax evasion by laying down the important principles to be followed to deal with such tax evasion cases.

8.2 Further, attention is also invited to the foreign jurisprudence laid out in this regard. Case C-196/04 Cadbury Schweppes Pic. Cadbury Schweppes Overseas Ltd. V. Commissioners of Inland Revenue was adjudicated before UK courts and it was finally referred to (European Court of Justice) wherein the ECJ pronounced the landmark decision and laid down the judicial ratio based on the concept of wholly artificial arrangements with reference to CFC legislation in UK. However, the judicial ratio could be applied here to examine whether assessee company is wholly artificial arrangements. A wholly artificial arrangement does not exist where an assessee company carried on genuine economic activities in the Contracting State. The taxpayer must be given an opportunity to prove such genuine economic activity on the basis of objective factors (e.g. premises, staff and equipment of the assessee company in Contracting State)

8.3 Applying the above judicial ratio it is noted that there is only one employee, no effective resident director or neither any assets apart from meager operation of bank account in Singapore. Further all assets held are in the form of shares primarily located in India without any real intimate connection to Singapore. Further the

dominion over such shares or assets are also not demonstrated by the assessee company to be in Singapore. Thus, the ratio of wholly artificial arrangements laid down by ECJ in Cadbury Schweppes Pic is squarely applicable to the assessee company and it can at best be treated as wholly artificial arrangements without any underlying economic reality.

9. **Conclusion:**

Therefore, in view of above, assessee company made tax arrangement with the dominant purpose to avoid tax in India, and acted as conduit/ wholly artificial arrangements for routing investment through Singapore to get benefit of India- Singapore DTAA. In view of above discussion, it is prayed before the Hon'ble bench that the treaty benefits under India-Singapore DTAA be denied to the assessee on account of fiscal evasion of taxes by means of treaty shopping and the income be taxed as per the provisions of the Income Tax Act, 1961."

Sd/-

(Gangadhar Panda)

Commissioner of Income Tax (DR)
Intl. Taxn. Bench, ITAT, New Delhi

24. Rebuttal of the Authorized Representative of the assessee is as under:

"The funds for investment are sourced substantially from financial institutions or unrelated parties via IPO in the name of RHT. The Assessee was incorporated to make and manage the investments out of the funds raised by RHT and also funds borrowed independently by the Assessee, in accordance with Singapore Business Trust Laws.

In this respect, the Assessee seeks to refer to Explanatory Brief released by Monetary Authority of Singapore ("MAS") at the time of introduction of Business Trust Bill in 2004. Paragraph of Explanatory Brief reads as under:

"The BT Bill is a new piece of legislation which regulates the governance of BTS. BTs are business enterprises set up as a trust structure, as opposed to a corporate structure. They are essentially hybrid structures with elements of both companies and trusts. A BT differs from a company as it is not a legal entity. It is created by a trust deed under which the trustee has legal ownership of the assets of the business enterprise and manages the business for the benefit of the beneficiaries of the trust. Purchasers of units in the BTs, being beneficiaries of the trust, hold beneficial interest in assets of the BT. BTs also differ from other traditional trusts such as a private family trust or a unit trust as they actively undertake business operations. These unique characteristics of BTs call for a new regulatory framework that is set out in the BT Bill."

In accordance with Business Trust Laws in Singapore, the investments of the Assessee Company in health care sector were managed by the Trustee Manager and a substantial fee is paid to trustee manager in this respect. Further, for day to day operations, Assessee has one employee on its payroll. The management consultancy activities were rendered by hiring external consultants directly by the Assessee.

It is submitted that merely because the Assessee has one employee only cannot be a ground to hold that the Assessee has no commercial substance when the Assessee has appointed separate Trustee Manager to make and manage investments, to whom substantial fees is paid. Further, the issue whether the Assessee is a shell/conduit

entity has to be seen in the light of the cumulative circumstances, discussed at pages 9 to 12 of this written submission.

There is no mention in the law that the trustee manager fee paid to the related party cannot be considered as operational expenses. Apart from trustee manager fee also, there are sufficient expenses like interest on borrowings, which are incurred by the Assessee. Even after excluding trustee manager fees, the Assessee company exceed the threshold of S\$ 200,000 in terms of interest paid by it to financial institution for the purpose of raising loans for investments in health care sector. A list of operational expenses incurred by the Assessee in last 24 months from the date of transfer of CCD's is mentioned below:

S. No.	Nature of expenses	October 2014 to	April 2015 to	April 2016 to
		March 2015	March 2016	September 2016
		Amount (SGD)		
1	Employee Benefit Expenses	33,327	50,734	41,213
2	Trustee Manager fees	34,31,098	41,89,711	(Refer Note 1)
3	Professional fees	83,887	18,50,089	7,91,692
4	Realised foreign exchange loss	43,40,757	51,26,604	4,81,588
5	Administrative / Other charges paid to bank etc	27,180	54,354	27,189
6	Interest on Bank	21,42,901	38,04,879	21,73,585
7	Bank Charges	40,318	22,295	(Refer Note 1)

Note 1 these expenses were incurred and booked at the year end and hence not shown separately for the period April 2016 till September 2016. Refer pages 95-102 for such details of the paper book Volume - I.

Even if the Trustee Manager fee is to be excluded as contended by the Ld. CIT DR (which is disputed), then, too the remaining expenses are in excess of the threshold of S \$ 200,000. The Assessee cannot,

therefore, be regarded as shell / conduit entity, not entitled to the Treaty benefit, even going by the argument of the Ld. CIT DR.

DR's Contention - No need to create trust

Assessee's Rebuttal -

As mentioned hereinabove, the group intended to raise funds from institutional investors in order to make investments in the healthcare sector. Accordingly, in 2012 several jurisdictions in Asia region such as Hong Kong, Malaysia, Singapore, Taiwan and South Korea were evaluated for setting up a trust structure. Among these jurisdictions, the maximum number of business trusts were functional in Singapore. Considering the comparative business advantages, Singapore was selected for making investments in healthcare sector.

RHT was set up as a pooling vehicle for attracting funds from institutional investors. Listing of RHT on Singapore Stock Exchange helped raise substantial funds from reputed and large institutional investors, which was invested through the Assessee in various operating entities in the healthcare sector.

The Revenue cannot question the commercial rationale for setting up the trust structure in Singapore, considering the substantial funds mobilized by RHT through the IPO, the investments made by the Assessee out of the funds raised through the IPO by RHT as also the funds borrowed by the Assessee directly, the income earned by the Assessee by way of interest on the CCDs, the surplus generated on disposal of investments and distribution thereof to the unit holders of RHT.

DR's Contention - The Trust as pass through entity not entitled to Treaty benefit

Assessee's Rebuttal -

The setting up of the trust structure as a pooling vehicle for making investments through special purpose vehicles ("SPV") is an accepted trade practice. The trust is only intended to pool resources from various investors, which are invested through the SPV and distributes the surplus through the unit holders from time to time and on liquidation of the trust.

It is internationally accepted that taxes levied at the level of the SPV and in the hands of the unit holders, to the extent applicable under the extant laws of the particular jurisdiction.

In our respectful submission, it is not open to the Revenue to question the commercial rationale of setting up RHT and to suggest that the disposal of investments should have happened at the level of RHT which would not have been entitled to the Treaty benefit, considering that (i) RHT was set up for commercial/business purposes elaborated above; (ii) the investments had to be held by the Assessee company as per the business trust laws of Singapore and (iii) the disposal of investments could only have been done by the Assessee, which held the investments in its own name.

DR's Contention Mr. Ravi Mehrotra also director of Fortis India

Assessee's Rebuttal-

A common director in a foreign company and an Indian Company does not mean that foreign company will become the tax resident in India. To determine the residential status of a foreign company, POEM is to be found out, which has been discussed supra.

Further. Mr. Ravi Mehrotra was a non-executive director of Fortis India, which had more than 30 directors on its Board during the year under consideration. Hence, having a non-executive Board Member in Fortis India will not lead to creation of POEM for Assessee Company

in India, as all its decisions were taken by its own Board of Directors outside India.

DR's Contention - Mr. Gurpreet Singh Dhillon is tax resident in India

Assessee's Rebuttal -

Mr. Gurpreet Singh Dhillon is tax resident of Singapore. The residence of Mr. Dhillon can be proved from the documents submitted at pages 128-134 submitted as Paper-book Volume- 1. From documents, it is clear that he resides outside India and hence not tax resident in India.

Rebuttal to judicial precedents relied upon by Ld. CIT DR-

The Ld. CIT DR relied upon the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India (supra), specifically para 67 of the said judgment for the principle of lifting of corporate veil or the doctrine of substance over form.

*The Assessee, too, is seeking to rely upon the said judgment in extenso. It is further submitted that it is not permissible to read a sentence in a judgment in isolation, de hors the context/the facts in which the judgment was rendered (Refer **CIT vs. Sun Engineering Works P. Ltd.: 198 ITR 297 (SC) @pg 320**)*

The Assessee is seeking to refer to the dictum of the Supreme Court judgment in the case of Vodafone International Holdings B.V. v. Union of India (supra) in the separate, concurring judgments by the Hon'ble Judges in support of its case of availability of Treaty benefit to the Assessee.

The Ld. CIT DR has relied upon the following case laws mentioned by the assessing officer in the assessment order:

- *Tiger Global International Holdings (AAR/04/05/07/2019)*
- *Bid Services Division (Mauritius) Limited (275 Taxman. 244)*
- *AB Mauritius (AAR-402 ITR 311)*

At the outset, it may be pointed out that the decision of the AAR is binding qua the Applicant (before the AAR) and the Revenue, insofar as that Applicant is concerned. The same cannot be regarded as a binding precedent, much less, binding on the Hon'ble Tribunal.

Furthermore, the said decisions are distinguishable on facts. In each of the above cases, the Treaty benefit was denied on the ground that the Applicant was a conduit entity interposed to take advantage of the India substance in Mauritius. - Mauritius Tax Treaty, without any economic/commercial

The foreign case laws on tax planning/tax avoidance mentioned in para 8.4 of the impugned order have been discussed in detail by the Apex Court in the case of Azadi Bachao Andolan (supra). The Hon'ble Supreme Court in that decision, after analysis of foreign jurisprudence held that legitimate tax planning/tax avoidance without the framework of law was permissible. The aforesaid dictum was reiterated in the later decision rendered in the case of Vodafone International Holdings B.V. v. Union of India (supra).

The Ld. CIT DR referred to Article 31 of the Vienna Convention to emphasize the point that tax treaties are entered in order to prevent fiscal evasion.

There is no dispute to the submission made by the Ld. CIT DR. It is the case of the Assessee that the Revenue has failed to make out any case of fiscal evasion, before seeking to deny the Treaty benefit

to the Assessee, a company incorporated in Singapore and having substantial economic/commercial substance in Singapore.

DR's Contention - Board meetings not held in Singapore as Board Resolutions do not show place of meeting:

It was contended by the Ld. CIT DR that the board resolutions placed in the paper book do not specifically show place of the meeting and further that passing of Circular Resolution was not permissible.

Assessee's Rebuttal-

The Board resolutions were signed by the Directors, who resides outside India in accordance with the documents enclosed at pages 128-134 of Paper Book Volume 1. This is sufficient to proof that the Board meetings were held outside India and not in India. In that view of the matter, POEM of the Assessee cannot be said to be in India.

DR's Contention-TRC not conclusive

It was the submission of the Ld. CIT DR that the TRC was issued by the tax authorities in Singapore on the basis of the representation made by the Assessee and was not based on records. In that view of the matter, it was claimed that the TRC cannot be regarded as conclusive. In support thereof, the Ld. CIT DR relied upon para 98 of the Hon'ble Supreme Court judgment in the case of Vodafone International Holdings B.V. v. Union of India (supra).

Assessee's Rebuttal -

Issuance of TRC is an annual exercise done by the revenue authorities across the globe, of the Assessee Company. TRC is issued on an annual basis, considering the past records also and has never been denied to the Assessee. It is, therefore, incorrect to allege that TRC is issued basis only the confirmation from the Assessee. Further,

TRC issued to the Assessee has been duly accepted while concluding the assessment proceedings for the previous assessment years; no doubts were raised on the validity of the TRC while concluding such assessment proceedings in the case of the Assessee.

The arguments raised by the Ld. CIT DR are contrary to the admitted facts of the case and the settled position in law. The same do not merit acceptance. Accordingly, Ground Nos. 2 to 6 raised by the Assessee deserve to be allowed and the Assessee held entitled to the benefit of the Tax Treaty with respect to capital gains earned on sale of CCDs.

RE: GROUND OF APPEAL NO. 7 TO 7.2

The Assessee filed return of income disclosing income by way of interest on CCDs in an amount of Rs.341,50,87,837/- and fees for technical services in an amount of Rs.90,00,000/-. Tax on the aforesaid amounts had been withheld @ 10% under the India Singapore DTAA.

The assessing officer in the draft assessment order accepted the aforesaid incomes as returned, thereby holding that the benefit of the Tax Treaty was admissible with regard to the levy of tax with respect to such incomes.

Since there was no grievance with regard to the treatment of the aforesaid incomes, the Assessee did not file objections before the DRP with respect thereto. Accordingly, no directions were issued by the DRP qua such incomes.

The assessing officer while passing the final assessment order subjected the aforesaid income to tax at the rates provided under the Act, presumably on the basis that the DRP had upheld the finding of the assessing officer in the draft assessment order that the Assessee was not entitled to the benefit of the Tax Treaty.

The action of the assessing officer in levying tax on the aforesaid incomes at the rates provided under the Act is in excess of jurisdiction in as much as the final assessment order is not in consonance/in conformity with the binding directions of the DRP. The assessing officer erred in varying the treatment of the aforesaid incomes in the draft assessment order without any direction in that behalf by the DRP.

Independent of the above, once it is held that the Assessee is entitled to the Treaty benefit, the rate of tax applicable to such incomes would have to be as per the Tax Treaty.

For the aforesaid reasons the order passed by the assessing officer bringing to tax the aforesaid incomes at the rates provided under the Act calls for being reversed.”

25. Heard the arguments of both the parties and perused the material available on record.

26. As per the facts on record, the assessee is a tax resident of Singapore and TRC issued by the Singapore Tax Authorities is on record. The Hon'ble Supreme Court in the judgment of Vodafone International Holdings B.V. vs. Union of India and Anr., has held that Union of India vs. Azadi Bachao Andolan (supra) is correct law and TRC is sufficient evidence to show residence of the contracting state. The valuation of CCDs is not in dispute. Hence, the only issue is according the benefits of India-Singapore Treaty pertaining to exemption under Article 13(4) of the Tax Treaty with regard to the capital gains earned on sale of CCDs. The revenue alleged that there is a scheme of tax avoidance as more than 30% of units in the RHT Trust are held through related parties. While it is a fact that 35.5% of

shares were primarily held by FHIL, the remaining 64% was raised from public and institutional investors. The place of effective managements of the assessee is situated in Singapore owing to the conducting of Board meetings and placing of the Directors at Singapore. With regard to the contention of the revenue that there was no commercial rationale for FHL to incorporate wholly on subsidiary in Mauritius is of no relevance and commercial justification to establish the business trust in Singapore has been duly explained by the assessee. The applicant could demonstrate incurring the expenditure of more than \$ 2,00,000 so as to come out of the allegation of being a shell entity. The circular of CBDT No. 789 dated 13.04.2000 and also the press release of 2013 mentioned above leaves no scope for the revenue to tax the amounts and deny the treaty benefits. It is also point for consideration that the interest on the CCDs has been rightly taxed by the revenue as per the treaty in the earlier years and now revenue cannot turn around and deny the benefits of the treaty in case of sale CCDs. Even considering the Limitations of benefit clause (LOB), the look through approach, doctrine of substance over form as relied by the revenue, the benefit to the assessee at this juncture cannot be denied.

27. To conclude,

The allegations of the revenue that, (refer page no. 38 DAO)

- a. The scheme of arrangement employed by the assessee is a tax avoidance through treaty shopping mechanism- Not proved.

- b. The assessee company is not the real owner of the income so generated from the transaction. Accordingly, it lacks beneficial ownership- Not proved.
- c. The TRC is not sufficient to establish tax residency if the substance establishes otherwise- Sufficient.
- d. The control and management of the assessee company is also not present in Singapore but rather in India- Not proved.
- e. The assessee was listed on Singapore Stock Exchange in 2011 hence it shall not be deemed to be a shell/conduit company and hence the LOB clause of Article 3 (now deleted) 2005 Protocol to the DTAA is not applicable to the assessee.

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

Order Pronounced in the Open Court on 12/05/2023.

Sd/-

(Saktijit Dey)
Judicial Member

Dated: 12/05/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

- 1. Appellant
- 2. Respondent
- 3. CIT
- 4. CIT(Appeals)
- 5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR