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

**BEFORE SH. G. S. PANNU, PRESIDENT AND**
**SH. SAKTIJIT DEY, VICE-PRESIDENT**

ITA Nos.365 & 366/Del/2023
(Assessment Years : 2019-20 & 2020-21)
And
Stay Application No.85/Del/2023
(Assessment Year : 2020-21)

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| Leapfrog Financial Inclusion India (II) Ltd., 2nd Floor, C/o Axis Fiduciary Ltd., The Axis 26 Cybercity, Ebene, Mauritius - 72201<br><br>**PAN No. AACCL 8541 Q** | Vs. | ACIT<br>Circle – 2(2)(1)<br>New Delhi |
| **(APPELLANT)** | | **(RESPONDENT)** |

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| Assessee by | Shri Deepak Chopra, Adv.<br>Shri Anmol Anand, Adv.<br>Ms. Priya Tandon, Adv. |
| Revenue by | Shri Vizay B. Vasanta, CIT-D.R. |

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| Date of hearing: | 15.05.2023 |
| Date of Pronouncement: | 11.08.2023 |

**PER SAKTIJIT DEY, VICE-PRESIDENT :**

Captioned appeals have been filed by the assessee challenging the final assessment orders passed u/s 143(3) read with Section 144C(13) of the Income-tax Act, 1961 pertaining to Assessment Years 2019-20 & 2020-21, in pursuance to the directions of Learned Dispute Resolution Panel (DRP).

2. The common issue arising for consideration in these appeals is whether the assessee is entitled for benefit of the Double Taxation Avoidance Agreement ("DTAA") between India and Mauritius with reference to income derived from capital gains on sale of shares.

3. Facts relating to the issue in dispute are more or less common in both the assessment years, except, variation in figure.

4. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Mauritius and is a tax resident of Mauritius. It is a wholly owned subsidiary of another Mauritius entity i.e. Leapfrog Financial Holdings Ltd. As stated by Assessing Officer, the assessee is an investment holding company and holds a Category 1 Global Business License issued by the Mauritius Financial Services Commission. During the assessment year under dispute, the assessee transferred/sold unlisted equity shares of Northern Arc Capital Limited acquired by it during the F.Y. 2015-16 and 2016-17. The resultant capital gain both Short-Term (STCG) and Long-Term (LTCG) derived from sale of such unlisted equity shares were claimed exempt under Article 13 of India-Mauritius DTAA. While examining assessee's claim of exemption under Article 13 of India Mauritius DTAA, the Assessing Officer called for various details relating to the structure of the company, its directors, activities, funds, financial status etc. After verifying the details, the Assessing Officer was of the view that the assessee company lacks commercial substance as it doesn't have any principal business activity. He observed that all decisions relating to investment activities and other management decisions are taken outside Mauritius. Funds for investments were generated from

outside Mauritius and the benefit arising from such investments are also transferred to the real investors on back to back basis.

5. Thus, the Assessing Officer held that the assessee has been interposed as an entity in Mauritius only for the purpose of deriving treaty benefits for the principal purpose of tax avoidance. Thus, he observed that applying the doctrine of substance over form it can be concluded that entire scheme is a tax avoidance arrangement. Thereafter, relying upon various judicial precedents, the Assessing Officer ultimately concluded that assessee is not entitled to claim benefits under the India-Mauritius DTAA. Accordingly, he brought the entire capital gain derived from the sale of unlisted equity shares to tax under the provisions of domestic law. Accordingly, he framed the draft assessment orders for both the assessment years under dispute.

6. Against the draft assessment orders so framed, assessee raised objections before the DRP. While disposing of the objections of the assessee, Learned DRP held that the benefit provided under Article 13(3B) is not available to a shell/conduit company in terms of the Limitation of Benefit (LOB) clause enshrined in Article 27A of India Mauritius tax treaty. Accordingly, they uphold the decision of the Assessing Officer.

7. Before us, Learned Counsel appearing for the assessee submitted that there cannot be any dispute with regard to the residential status of the assessee as the Mauritius tax authorities have issued Tax Residency Certificate (TRC) in favour of the assessee. He submitted, once the assessee holds a valid TRC, it is entitled to

claim benefit under the India Mauritius tax treaty and the departmental authorities cannot question the residential status of the assessee. In support of such contention, Learned Counsel relied upon the decision of the Hon'ble Supreme Court in case of Union of India vs. Azadi Bachao Andolan reported in 263 ITR 703 (SC). He also relied upon the decision of Hon'ble Jurisdictional High Court in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd. vs. ACIT [2023] 452 ITR 111 (Delhi High Court). He submitted, the DRP is totally wrong in applying Article 27A to the transaction as the assessee has never claimed any benefit under Article 13(3B) of the Treaty. He submitted, all along the assessee has claimed exemption under Article 13(4) of India Mauritius DTAA, which is outside the purview of Article 27A.

8. Without prejudice to the aforesaid submissions, Learned Counsel submitted, after codification of General Anti Avoidance Rules (GAAR) under Chapter XA of the Act. The choice of the tax payer to seek treaty benefit, in case it is more beneficial, has been limited by introduction of sub section (2A) to Section 90 of the Act, which overrides sub Section (2) of Section 90 by providing that GAAR shall apply even if such provision is not beneficial to tax payer. In support of such contention, he relied upon the decision of Co-ordinate Bench in the case of Skaps Industries India Pvt. Ltd. vs. ITO in ITA No.478 and 479/Ahd/2018 dated 15.06.2018. He submitted, though Chapter XA is applicable to the assessment years under dispute however, such provisions cannot be pressed into operation for denial of tax benefit, where the case of a taxpayer falls within one of the exceptions set out in the corresponding rules. He submitted, Rule 10U(1)(d) of

the Rules exempts applicability of Chapter XA of the Act to any income accruing or arising from transfer of investments made prior to 01.04.2017. He submitted, since the investments in shares giving rise to the capital gain were made prior to 01.04.2017, Chapter XA would not be applicable. In support of such contention, he relied upon the decision of Co-ordinate Bench in case of Reverse Age Health Service Pte. Ltd. vs. DCIT, [2023] SCC OnLine 115 (Delhi - Tribunal). He submitted, once the parliament has codified the judicial doctrine of substance over form in Chapter XA of the Act and excluded applicability of anti-abuse provision contained in Chapter XA to sale of shares acquired prior to 01.04.2017, it is not open to the Assessing Officer or DRP to apply the judicially developed doctrine of substance over form. Thus, he submitted, the investments giving rise to capital gain having been made prior to 01.04.2017, the resultant income from capital gain is exempt under Article – 13(4) of DTAA.

9. Strongly relying upon the observations of the Assessing Officer and Learned DRP, Learned Departmental representative submitted that the Assessing Officer has established on record that the assessee company having no commercial substance has been set up as a shell/conduit company to derive benefit under India Mauritius DTAA. He submitted, materials have been brought on record by the Assessing Officer to establish that no activity is carried on in Mauritius and all major decisions relating to the company were taken outside Mauritius by the real investors who make investments in India and other countries by using assessee as conduit. He submitted that Assessing Officer has even brought on record the fact that the assessee has no operational expenses. Thus, he submitted, the

assessee not being resident of Mauritius is not entitled to treaty benefits. Hence, capital gain was correctly taxed under the provisions of the Act.

10. We have considered rival submissions and perused the material on record. Undisputed facts are, the assessee is a tax resident of Mauritius and holds a valid TRC issued by the Mauritius tax authorities. It is the claim of the assessee that the sale of shares out of which capital gain arose were acquired prior to 01.04.2017. In fact, the aforesaid factual position has not been disputed by the Assessing Officer as the Assessing Officer himself has stated that the shares sold in these assessment years were acquired by the assessee in F.Ys. 2015-16 & 2016-17. Undisputedly, the assessee has claimed exemption of capital gain under Article 13(4) of the Tax Treaty. The Assessing Officer has declined assessee's claim broadly on the following reasons:

1. *The group company's ultimate holding company is in Bermuda and beneficially owned by Mr. Gary Wayne Herbert who is claimed to be citizen of South Africa Further the structure of assessee company is transparent/pass through without adequate substance the investment pooling vehicles in Mauritius are mere Intermediary holding company of the assessee without actual business operations or adequate substance in Mauritius*

2. *Not fulfilling the requirement of Management and Control for Category 1 Global Business entities as per Section 71(4) of the Financial Services Act 2007as it reported in ITR that more than 10% beneficially owned by persons who are not Resident of Mauritius (reference invited to para 5.5)*

3. *NIL expenses for operational requirements for running a business/commercial venture in Mauritius e.g. employees, salary, rent, electricity, telephone charges, internet charges and other expenses of operations nature. [reference invited to para 8(u)]*

4. *The company do not pay any rent and it does not own any land or building is noted from their financial statements, this indicates that it does not have actual physical office premise in possession or rent. Only a contact address is provided that also belongs to Axis fudiciary Ltd in Mauritius. [reference invited to para 8(u)]*

5. *The assessee company do not have any employees apart from part time directors as wages and salaries as well as other staff cost are nil. [reference invited to para 8(b) and 8(u)]*

6. *Also, it does not have any Mauritius resident full time Director working for the company(Directors of assessee company Mr. Jean Claude Permal and Director Mr. Assad Abdullatiff as per his LinkedIn profile is actually working as Chief Operating Officer at AXIS Fiduciary Ltd and Managing Director, AXIS Fiduciary Ltd respectively thus they are not full time directors but rather part time associated with assessee company) and director remuneration is only petty sum I which is below minimum wages for skilled labour [reference invited to para 8(a)] vages for skilled*

7. *Mauritius part time Company's Director does not have Group-A power to operate bank account or do not have internet banking authorised rights to operate bank account. [reference invited to para 8(g); (h); (i) and (j)]*

8. *Control and management examination indicate that important decision like investment in Indian and sale of investment recommended by holding company and Directors of the company only accept it, as recommended and such crucial decisions were not actually taken in Mauritius except conducting formal minutes or board meetings.. [reference invited to para 8(0);(p): (q):(v): (w) and(x)]*

9. *It may be mentioned that mere formal holding of board meetings at a place would by itself not be conclusive for being located at Mauritius. If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held which is the case in point currently. Key decisions are taken by ultimate holding company in Bermuda and beneficially owned by Mr. Gary Wayne Herbert of South Africa. Therefore asseseee principal decisions are unconnected with the Mauritius. [reference invited to para 8(v)(w) and(x)]*

*10. Real management and control of applicants was not with their respective Board of Directors in Mauritius but with ultimate holding company in Bermuda and beneficially owned by Mr. Gary Wayne Herbert of South Africa who was beneficial owner of entire group structure and applicant companies were only a 'see through entity'. [reference invited to para 8(v)(w) and (x)]*

*11. Bank account analysis indicates only during the sales of the shares there is banking activity and before that bank account was dormant. Generally funds are transferred immediately out of the bank account and thus the bank account acted as mere pass through. Funds for the investment transferred from holding company and sale proceeds transferred back to holding companies. This indicates that there are back to back arrangements without actual commercial or business activity in Mauritius. [reference invited to para 8(m) and(n)]*

*12. Financial analysis indicates that only shares held where those of shares of unlisted equities in IFMR Holding Private Limited and Northern Arc Capital Limited whose share value primarily derive from India. Moreover Company's financial risk was transferred to holding company indicating that no risk is borne by the assessee company.[reference invited to para 8(t)]."*

11. Whereas, Learned DRP has observed that the assessee is not entitled to claim benefit under Article 13(3B) in view of the LOB clause contained under Article 27A of the tax treaty. Keeping in perspective the aforesaid factual position, we proceed to decide the issue of assessee's entitlement under Article 13 of the tax treaty. In this context, we must observe that once the assessee is holder of a valid TRC issued by the component authority in Mauritius, it proves assessee's residential status as a tax resident of Mauritius. Now it is well settled that tax authorities in India cannot go behind the TRC issued by another tax jurisdiction. In fact, the Central Board of Direct Taxes (CBDT) had issued Circular No.789 dated 13.04.2000 clarifying

that TRC shall serve as sufficient evidence of taxpayer's residence and beneficial ownership for applying the DTAA. The aforesaid circular was issued by CBDT in the context of India Mauritius tax treaty. While examining the validity of the aforesaid circular, the Hon'ble Supreme Court in case of Union of India vs. Azadi Bachao Andolan (supra) not only upheld the validity and efficacy of the circular but held that the certificate of residence is conclusive evidence for determining the status of residence and beneficial ownership of asset under the DTAA. The Hon'ble Court observed that the tax authorities were obliged to grant tax treaty benefits to Mauritius entities so long as they are tax residents in Mauritius by virtue of the TRC issued by the Mauritius Revenue Authority. As, this is the only condition required to verify the claim to treaty relief. In a recent decision delivered in the case of Blackstone Capital Partners (supra), the Hon'ble Jurisdictional High Court while deciding the issue of applicability of treaty benefit to a tax residence of other tax jurisdictional holding a valid TRC, relied upon CBDT Circular No.789 dated 13.04.2000 as well as the ratio laid down by Hon'ble Supreme Court in case of Union of India vs. Ajadi Bachao Andolan (supra) and held as under:

> *"73. In the objections dated 28th December, 2021, the petitioner has furnished the details of compliance with the LOB clause to the India-Singapore DTAA. The Assessing officer has not questioned the satisfaction of the LOB clause or the Independent Chartered Accountant certificate at any stage except in the present proceedings. Consequently, the petitioner is a bonafide entity and not a shell/conduit entity as it complies with the LOB clause to the India-Singapore DTAA as the expenditure has been incurred in Singapore and the same has been certified by an independent chartered accountant and accepted by the authorities in Singapore i.e. Income Tax authorities, Monetary Authority of Singapore. Accordingly, the allegation of treaty shopping is irrelevant in the present case as the*

*India-Singapore DTAA has a limitation of benefit clause which the petitioner satisfies RESPONDENT- REVENUE CANNOT GO BEHIND THE TRC*

*74. This Court is in agreement with the argument of learned senior counsel for the petitioner that the entire attempt of the respondent in seeking to question the TRC is wholly contrary to the Government of India's repeated assurances to foreign investors by way of CBDT Circulars as well as press releases and legislative amendments and decisions of the Courts in Union of India v. Azadi Bachao Andolan (supra) Vodafone International Holdings B.V. (supra), Commissioner of Income-tax (International Taxation)-3, Mumbai v. JSH (Mauritius) Ltd., (2017) 297 CTR 275 (Bom) and Sanofi Pasteur Holding SA (supra).*

*75. In fact with the increased expansion of international trade and commerce after the Second World War, the taxation of cross border transactions has been a critical challenge for both Parliament and the Courts.*

*76. It is a fundamental rule of international taxation that every nation has a sovereign right to impose tax on the global income of its residents and on income that accrues or arises within its territorial limits. These twin rights are referred to as residence-based or source-based taxation.*

*77. A combination of the source and residence rules inevitably led to double taxation and this, in turn, led to singing of numerous Double Taxation Avoidance Agreements (for short 'DTAS') which are bilateral treaties that enable tax being levied in any one of the Contracting States.*

*78. The Act recognized and gives effect to the DTAAS. Section 90 (2) of the Act stipulates that in case of a non- resident taxpayer with whose country India has a DTAA, the provisions of the Act would apply only to the extent the same are more beneficial than the provisions of such DTAA. Accordingly, the taxability of income derived by petitioner would governed by the provisions of India-Singapore DTAA to the extent at it is more favorable than the Act.*

*79. Section 90(4) of the Act provides that a non-resident taxpayer to whom a DTAA applies, shall not be entitled to claim any relief under DTAA unless a certificate of it being a resident (i.e. Tax Residency Certificate) of such country is obtained from the Government of that*

*country. Section 90(4) of the Act clarifies that a non-resident taxpayer is eligible to claim DTAA benefits.*

*80. Article 1 of the India-Singapore DTAA states that the tax treaty applies only to one or more person who is a resident of one or more contracting state. Article 3(1)(1) of the said DTAA defines a person to include an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States. The relevant extract of Article 3(1) (j) is provided below: "(1) the term "person" includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States"*

*81. Further, as per Article 3(1)(d) of the India-Singapore DTAA, a Company has been inter-alia defined as "anybody corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting States".*

*82. Article 4 of the India-Singapore DTAA states that the term "resident of a Contracting State" means any person who is a resident of a Contracting State in accordance with the taxation laws of that State. As per Singapore tax laws, a company is resident in Singapore if the management and control of its business is exercised in Singapore.*

*83. The petitioner has a valid TRC dated 3rd February, 2015 from the IRAS Singapore evidencing that it is a tax resident of Singapore and thereby is eligible to claim tax treaty benefits between India and Singapore.*

*84. As early as March 30, 1994, CBDT issued Circular No.682 in which it was emphasised that any resident of Mauritius deriving income from allenation of shares of an Indian company would be liable to capital gains tax only in Mauritius as per Mauritius tax law and would not have any capital gains tax liability in India. This circular was a clear enunciation of the provisions contained in the DTAA, which would have overriding effect over the provisions of Sections 4 and 5 of the Act by virtue of Section 90 of the Act.*

*85. The CBDT vide Circular No. 789 dated 13th April 2000 once again clarified that the TRC shall serve as sufficient evidence of the taxprayer's residence and beneficial ownership for applying the DTAA.*

*86. The Supreme Court, in the case of Union of India v. Azadi Bachao Andolan (supra), upheld the validity and efficacy of the Circular No. 682 dated 30 March 1994 and the Circular No. 789 dated 13th April 2000, issued by the CBDT. The Apex Court further held that the certificate of residence is conclusive evidence for determining the status of residence and beneficial ownership of an asset under the DTAA. The Supreme Court emphasised that the tax authorities were obliged to grant tax treaty relief to Mauritius entities so long as they were tax resident in Mauritius as confirmed by the Mauritius Revenue Authorities and that this was the only condition required to be satisfied to claim treaty relief; that there were no other provisions either in the domestic law or the tax treaty that permitted the tax authorities to exercise any discretion in disregarding the provisions of the treaty. The relevant portion of the Supreme Court judgment in Union of India V. Azadi Bachao Andolan (supra) is reproduced hereinbelow:- "9 Sometime in the year 2000, some of the income tax authorities issued show cause notices to some FIIS functioning in India calling upon them to show cause as to why they should not be taxed for profits and for dividends accrued to them in India. The basis on which the show cause notice was issued was that the recipients of the show cause notice were mostly 'shell companies' incorporated in Mauritius, operating through Mauritius, whose main purpose was investment of funds in India It was alleged that these companies were controlled and managed from countries other than India or Mauritius and as such they were not "residents" of Mauritius so as to derive the benefits of the DTAC. These show cause notices resulted in panic and consequent hasty withdrawal of funds by the FIIS. The Indian Finance Minister issued a Press note dated April 4, 2000 clarifying that the views taken by some of the income-tax officers pertained to specific cases of assessment and did not represent or reflect the policy of the Government of India with regard to denial of tax benefits to such FIIS. Thereafter, to further clarify the situation, the CBDT issued a Circular No. 789 dated 13.4.2000. Since this is the crucial Circular, it would be worthwhile reproducing its full text. The Circular reads as under....*

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*49. As early as on March 30, 1994, the CBDT had issued circular no. 682 in which it had been emphasised that any resident of Mauritius deriving income from alienation of shares of an Indian company would be liable to capita! gains tax only in Mauritius as per Mauritius tax law and would not have any capital gains tax liability in India. This circular was a dear enunciation of the provisions contained in the DTAC, which would have overriding effect over the provisions of sections 4 and 5 of the Income-tax Act, 1961 by virtue of section 90(1) of the Act. If, in the teeth of*

*this clarification, the assessing officers chose to ignore the guidelines and spent their time, talent and energy on inconsequential matters, we think that the CBDT was justified in issuing appropriate' directions vide circular no. 789, under its powers under section 119, to set things on course by eliminating avoidable wastage of time, talent and energy of the assessing officers discharging the onerous public duty of collection of revenue. The circular no. 789 does not in any way crib, cabin or confine the powers of the assessing officer with regard to any particular assessment. It merely formulates broad guidelines to be applied in the matter of assessment of assessees covered by the provisions of the DTAC.....*

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*122. Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants, etc.*

*123. Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the "Mauritius conduit". Although the Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India- Mauritius tax treaty. 124 Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capita and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant*

*compared to the other nontax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses.....*

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*134. We may also refer to the judgment of Gujarat High Court in Banyan & Berry v. CIT (1996) 222 ITR 831/84 Taxman 515 where referring to McDowell & Co. Ltd.'s case (supra), the Court observed:*

*"... The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity." (p. 850)*

*This accords with our own view of the matter.*
*xxx xxx xxx xxx*
*146. We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as, perceived by the respondents."*

*87. It is a settled position of law that the Circulars issued by CBDT are binding on the tax authorities. The Supreme Court of India in UCO Bank v. CIT, 237 ITR 889 (SC) has categorically held that Circulars issued by the CBDT are binding on the revenue authorities. Moreover, the respondent's reliance on the judgment in Tata Teleservices Ltd. (supra) is untenable in law as in the present case, the validity of Circular No. 682, dated 30th March 1994 and Circular No. 789, dated 13th April 2000, has already been upheld by the Supreme Court in Union of India v. Azadi Bachao Andolan (supra).*

*88. Subsequently, the Supreme Court, in Vodafone International Holdings B.V. (supra) reiterated the law in Union of India v. Azadi*

*Bachao Andolan (supra) and held that what is rightly not acceptable is the use of artificial devices to avail treaty benefits, resulting in double non-taxation. The Supreme Court in the said judgment emphasised that in view of Circular No. 789 dated 13th April 2000, the TRC certificate is sufficient evidence to show residence and beneficial interest/ownership and the Revenue cannot at the time of sale/disinvestment/exit from such FDI, deny benefits of the DTAA.*

*89. In the Finance Bill, 2013 as introduced in the Lok Sabha on 28th February, 2013, the Union of India sought to insert sub -Section 5 in Section 90 of the Act to stipulate precisely what the learned counsel for the respondent had argued namely that TRC shall be a necessary eligibility condition but shall not constitute sufficient evidence of residency and shall not be binding on the authorities. SubSection 5 of Section 90 of the Act sought to be introduced by way of proposed amendment is reproduced herein below:-*

> *"21. In section 90 of the Income Tax Act,-(a) to (b) ** (c) after sub-section (4) and before Explanation 1, the following subsection shall be inserted, namely:-*
>
> *"(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in subsection (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."*

*90. However, serious concerns were expressed by the Foreign investors with regard to the aforesaid proposed amendment. On the very next day, namely 1st March, 2013 the Finance Minister vide Press release clarified, "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".*

*91. Consequently, the Government of India vide Press Release dated 1st March, 2013 once again reiterated that TRC shall be treated as a sufficient condition for claiming relief under the DTAA. It is pertinent to mention that Press Release dated 1st March, 2013 was not Mauritius-specific and it clarified beyond doubt that the TRC produced by a resident of a contracting state would be accepted as evidence of tax residency, and the Income Tax authorities in India will not go behind the TRC and question the resident status of the assessee. Moreover, the proposed sub-Section 5 of Section 90 was not inserted in the Act."*

12. Thus applying the ratio laid down in the aforesaid decision, once the assessee holds a valid TRC, the departmental authorities cannot question assessee's residential status and entitlement to treaty benefits. Though, the Assessing Officer has made various allegations in the draft assessment order to conclude that the assessee is a shell/conduit company set up to obtain tax advantage under tax treaty, hence, it is a tax avoidance arrangement. However, after carefully going through the various reasonings of the Assessing Officer, we are of the view that they are not based on cogent evidence brought on record to establish that the assessee is a shell/conduit company and not the beneficial owner under the tax treaty. In fact, though, the Assessing Officer has observed that the transactions can be treated as tax avoidance arrangement, surprisingly, he has not invoked the provisions of Chapter XA. At least, nothing is available or forthcoming either from the draft assessment order or the directions of Learned DRP or any other material on record to indicate that the Assessing Officer has invoked the provisions of Chapter XA i.e. GAAR provisions. When the GAAR provisions are applicable to the assessment years under dispute, if the Assessing Officer was of the view that the capital gain derived from transfer of unlisted equity shares is an impermissible tax avoidance arrangement in terms of Section 95 r.w Section 96 of the Act, he should have proceeded in accordance with Section 144BA r.w Rule 10UB. However, there is nothing on record to suggest that the Assessing Officer has invoked the aforesaid provisions.

13. Thus, in our view, the reasonings of the Assessing Officer to treat the assessee as shell/conduit company to deny the benefits under India Mauritius tax treaty is without any substance as they are not backed by credible evidence. In so far as, the observations of Learned DRP is concerned, undoubtedly, Learned DRP has held that the assessee is not entitled to claim benefit under Article 13(3B) in view of the restrictions imposed under the LOB clause contained under Article 27A. In our view Learned DRP while coming to such conclusion has misconceived the factual position and misconstrued the provisions contained under the treaty. A reading of Article 27A makes it clear that the LOB clause contained therein would apply to a resident claiming benefit under Article 13(3B) of the tax treaty. A reading of Article 13(3A) and 13(3B) of the tax treaty would make it clear that while Article – 13(3A) applies to gain from alienation of shares acquired on or after 01.04.2017, Article 13(3B) permits grandfathering by providing that beneficial tax rate would apply to such capital gain, if arises within period beginning on 1st April, 2017 and ending on 31st march, 2019. Whereas, the specific case of the assessee in the present appeals is, the shares were acquired prior to 01.04.2017, hence, neither Article 13(3A) nor Article 13(3B) would apply. On the contrary, the assessee would be covered under Article 13(4) of the tax treaty. Hence, the entire capital gain would be exempt from taxation. Thus, in our view, applicability of Article 27A to the subject transaction is a misnomer. Therefore, reasoning of Learned DRP in upholding the decision of the Assessing Officer is unacceptable. Thus, in our view, once it is factually found that the unlisted equity shares, on sale of which the assessee derived the

capital gain, were acquired before 01.04.2017, then the assessee is entitled to claim exemption under Article 13(4) of the Tax Treaty.

14. However, at this stage, we must observe, in the written submissions filed before us, Learned Counsel for the assessee has submitted that in assessment year 2019-20, assessee has derived Short Term Capital Gain of Rs.3,60,34,782/- on sale of 2,76,644/- equity shares and claimed benefit under Article 13(3B) of the Tax Treaty. The Assessing Officer is directed to factually verify this aspect and in case he finds that the shares were acquired after 01.04.2017 and sold prior to 31st March 2019, then, benefit under Article 13(3B) of the tax treaty can be given to that extent. We order accordingly.

15. Before parting, we must observe, before us, Learned Counsel for the assessee has advanced arguments with regard to applicability or otherwise of GAAR provisions in view of the exceptions provided under Rule 10U. However, as discussed earlier, there is nothing on record to suggest that the Assessing Officer has either invoked his powers under Section 95 of the Act or has followed the mandate of Section 144BA read with Rule 10UB. Therefore, in our view, this issue is purely academic in nature. Hence, there is no need to deliberate on it. However, we keep the issue open for future.

16. Since, we have disposed of the appeals, the Stay Application, being SA No.85/Del/2023 for A.Y. 2020-21 has become infructuous. Hence, is dismissed.

17. In nutshell, both the appeals filed by the assessee are allowed and Stay Application is dismissed.

**Order was pronounced in the open court on 11.08.2023**

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| **Sd/-** | **Sd/-** |
| **(G. S. PANNU)** | **(SAKTIJIT DEY)** |
| **PRESIDENT** | **VICE-PRESIDENT** |

Date:- 11.08.2023

*Priti Yadav**

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