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

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.2311/DEL/2023
[Assessment Year: 2020-21]

Norwest Venture Partners X-Mauritius, Apex House, Bank Street, Twenty Eight, Cybercity, Ebene, Mauritius	vs	DCIT, Circle International Taxation, Civic Centre, Minto Road, New Delhi
PAN-AACCN4511G		
Assessee		Revenue

Assessee by	Shri Dhanesh Bafna, Ms. Priyanka Agrawal & S hri Hardik Nirmal, CA
Revenue by	Shri Vizay B. Vasanta, CIT-DR

Date of Hearing	**29.02.2024**
Date of Pronouncement	**19.03.2024**

ORDER

PER SAKTIJIT DEY, VP,

The captioned appeal has been filed by the assessee challenging the final assessment order passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act'), in pursuance to the directions of learned Dispute Resolution Panel (in short 'DRP'), pertaining to Assessment Year 2020-21.

2. Though the assessee has raised certain legal issues in grounds no.1 to 4, however, at the very outset, learned counsel appearing for the assessee, on instructions, submitted that he would like to address the Bench *qua* ground no.5, which is on merits. Learned Departmental Representative did not express any objection to the aforesaid submission of the assessee. In view of the aforesaid, we proceed to deal with the issue raised in ground no.5 at the very outset.

3. The issue arising for consideration in ground no.5 relates to rejection of assessee's claim of benefit under Article 13(4) of the India-Mauritius Double Tax Avoidance Agreement (in short 'DTAA) in respect of Long Term Capital Gain arising from sale of shares.

4. Briefly the facts, relating to this issue are, the assessee is a non-resident corporate entity incorporated under laws of Mauritius and is a tax resident of Mauritius in view of Tax Residency Certificate (TRC) issued by Mauritius Revenue Authority. The assessee is a investment holding company and Category -1 Global Business License holder. As an investment holding company, the assessee had invested in shares. The assessee is also registered as a foreign venture capital investor

with Securities and Exchange Board of India (in short 'SEBI'). In connection with its business activity, the assessee had invested in equity shares of various Indian companies. In the previous year relevant to the assessment year under dispute, the assessee had sold shares of certain Indian companies and derived capital gain. In the return of income filed for assessment year under dispute, the assessee offered the Short Term Capital Gain of Rs.15,03,99,442/- to tax, whereas, the Long Term Capital Gain of Rs.3,02,30,69,163/- was not offered to tax by the assessee claiming exemption under Article 13(4) of India Mauritius DTAA.

5. While examining assessee's claim of exemption under Article 13(4) of the tax treaty, the Assessing Officer called for various information and details. While analyzing the facts and details brought on record, he observed the following:-

- The group company's ultimate holding company is in USA and beneficially owned and controlled By the management team operating from the USA. 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.
- Not fulfilling the requirement of Management and Control for Category 1 Global Business entities as per Section 71(4) of the Financial Services Act 2007 as it reported in /TR that 100% beneficially owned by persons who are not Resident of Mauritius.

- 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.

- 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 SANNE Mauritius in Mauritius,

- 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.

- Also, it does not have any Mauritius resident full time Director working for the company

- Control and management examination indicate that important decision like investment and sale of shares of Indian entities were recommended by the holding company and the directors of the company only accept it as recommended and such crucial decisions were not actually taken in Mauritius.

- 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. 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 USA and beneficially owned. Therefore, the assessee's principal decisions are unconnected with Mauritius.

- Real management and control of applicants was not with their respective Board of Directors in Mauritius but with ultimate holding company in USA being the owner and controller of entire group structure and applicant companies were only a'see-through entity.

- The main bank account signatories are not full time directors of the company and some signatories are based in Mauritius and others are based in the USA.

6. From the aforesaid analysis of facts, the Assessing Officer concluded that the assessee was controlled and managed from outside and does not have any commercial substance or real economic activity in Mauritius. He observed, the ultimate parent company of the assessee is beneficially owned by the entity in USA. He observed that under India-USA DTAA, the long term capital gain would have been chargeable to tax. Therefore, to avoid the taxability of long term capital gain, the assessee company was interposed in Mauritius to derive benefit under India-Mauritius tax treaty. He observed that facts and circumstances of the case indicate that the assessee company is a mere shell company or sham arrangement for treaty shopping. Thus, he held that in such circumstances, the TRC is not enough to prove the tax residency of the assessee and substance over form approach has to be adopted. Thereafter, referring to certain judicial precedents, the Assessing Officer ultimately concluded that the assessee being a shell/conduit company is not entitled to avail benefits under India-Mauritius DTAA. Accordingly, he framed the draft assessment order by bringing to tax the income derived from long term capital gain on sale of shares.

7. Against the draft assessment order so framed, the assessee raised objections before learned DRP.

8. While disposing of the objections of the assessee, learned DRP directed the Assessing Officer to factually verify assessee's contention by a speaking and reasoned order. While doing so, learned DRP also directed the Assessing Officer not to conduct any fresh enquiry and to undertake verification of facts on the basis of documents/submissions available in the assessment records.

9. While implementing the directions of DRP, the Assessing Officer retained the addition as was proposed in the draft assessment order.

10. Before us, learned counsel appearing for the assessee reiterated the stand taken before the Departmental Authorities. The learned counsel submitted, assessee was incorporated as company in Mauritius as early as in September, 2006. He submitted that as an investment holding company, the assessee has made investments in not only in India but other jurisdictions such as Mauritius and Singapore. He submitted that the Tax Residency Certificate has been issued to the assessee by the Director General of Mauritius Revenue

Department. He submitted that the Financial Service Commission of Mauritius Government has issued a Category-1 Global Business License in favour of the assessee. He submitted, the assessee is registered as a Foreign Venture Capital Investor with SEBI since July, 2017. He submitted, the assessee had carried out its investment activity in India since 2007 and is still continuing such activity in India even after capital gain on sale of shares became taxable under India-Mauritius DTAA. In fact, he submitted, in the assessment year under dispute the assessee has offered to tax on short term capital gain derived from sale of shares acquired post 01.04.2017.

11. He submitted, since capital gain derived from sale of shares acquired prior to 01.04.2017 is not taxable under Article 13(4) of the India-Mauritius DTTA, the assessee claimed exemption and did not offer it to tax. He submitted, once Tax Residency Certificate is issued by Mauritius Revenue Authority, that is the most authentic evidence to prove the residency of the assessee. In this context, he drew our attention to Circular No.789 dated 13.04.2000 issued by Central Board of Direct Taxes. He submitted, the sanctity of CBDT Circular No.789 dated 13.04.2000 has been upheld by the Hon'ble Supreme

Court in case of UOI vs Azadi Bachao Andolan reported in [2003] 263 ITR 706 (SC). In this context, he drew our attention to various observations of the Hon'ble Supreme Court in the cited decision. He submitted, though, subsequently there was a proposal in the Finance bill to amend section 90 of the Act to the effect that TRC alone may not be a sufficient condition for claiming treaty benefit, however, issue was clarified by the Income Tax Department through a press release dated 01.03.2013 not only reemphasizing that Indian Income Tax Authorities will not go beyond the TRC to question the residential status but also clarified that CBDT Circular No.789 dated 13.04.2000 continues to be in force. Thus, the amendment proposed to section 90 of the Act was not implemented.

12. Thus, he submitted, in terms with CBDT Circular No.789 dated 13.04.2000, TRC is the most authentic evidence to prove the tax residency of the assessee. He submitted, the TRC is issued by the Tax Authority in Mauritius upon fulfilment of various conditions under Mauritius Income Tax Act. He submitted, once the Mauritius Tax Authorities have issued TRC after verifying the residential status of the assessee, the

Assessing Officer cannot question it. He submitted, as per the Financial Service Act of Government of Mauritius, the conditions for issuance of a Global Business License are, the company must carry out its core income generating activities in or from Mauritius as required under the Income Tax Act of Mauritius, be managed and controlled from Mauritius and be administered by a management company. He submitted, upon fulfilment of all these conditions the assessee was given Category-1 Global Business License. Therefore, credibility of the assessee cannot be doubted. He submitted, two of the Directors of the company are located in Mauritius. He submitted, the assessee has registered office in Mauritius and has a bank account in Mauritius. Therefore, it cannot be said that the control and management of the assessee is not in Mauritius.

13. He submitted, only because the parent company provides funds to the assessee for the purpose of investment, that alone cannot be a factor to conclude that the assessee is a shell or conduit company. He submitted, though, the Assessing Officer has held that parent company in USA is beneficial owner of the capital gain, however, under Article 13 of India-Mauritius tax treaty, there is no concept of beneficial ownership, unlike,

some other provisions such as Article 11 and Article 12 of the tax treaty. He submitted, though, the Assessing Officer has referred to paragraph 98 of the judgment of the Hon'ble Supreme Court in case of Vodafone International Holdings B.V. vs UOI (2012) 17 taxmann.com 202 (SC), however, he conveniently overlooked the observations of the Hon'ble Supreme Court in paragraph 97 of the said judgment. In this context, he drew our attention to the decision of the Hon'ble Bombay High Court in case of Bid Services Division (Mauritius) Ltd. vs Authority for Advance Ruling (Income-tax) judgment dated 8th March 2023 in Writ Petition No.713 of 2021. In the said decision, the Hon'ble High Court has observed that though mere holding of TRC cannot prevent any enquiry if it can establish interposed entity was a device to avoid tax, however, the Hon'ble Supreme Court has also held that conclusivity of the TRC cannot be doubted in absence of fraud or illegal activities. He submitted, the Assessing Officer has failed to establish any fraud or illegal activity by the assessee.

14. He submitted, in identical facts and circumstances, the Hon'ble Punjab & Haryana High Court in case of Serco BPO (P.) Ltd. vs Authority for Advance Ruling (2015) 60 taxmann.com

433 (P & H) and the Delhi Tribunal in case of MIH India (Mauritius) Ltd. vs ACIT in ITA No.1023/Del/2022 dated 16.11.2022 and in case of Veg & Table vs DCIT in ITA No.2251/Del/2022 dated 31.10.2023 have upheld the applicability of Article 13(4) of India Mauritius Tax Treaty. He submitted, considering the fact that the assessee is operating since the year 2006 and even after capital gain was made taxable under India-Mauritius tax treaty w.e.f. 01.04.2017, the assessee has made substantial investment in shares of Indian companies, goes to prove that the assessee is not a fly by night operator but a genuine investor. He submitted, the Limitation of Benefit Clause (LOB) under Article 27A of India-Mauritius tax treaty is not applicable to the assessee as the assessee has not claimed any benefit under Article 13(3B) of the treaty. Without prejudice, he submitted, the conditions of shell/conduit company as per Article 27A of the India-Mauritius tax treaty, are not fulfilled. Thus, he submitted, the assessee is entitled to claim exemption under Article 13(4) of the India-Mauritius Tax Treaty.

15. He submitted, while disposing of the objections of the assessee, learned DRP has clearly held that the Assessing Officer

has not properly appreciated the facts submitted by the assessee and accordingly directed the Assessing Officer to pass a speaking and reasoned order after verifying the facts and submissions of the assessee. He submitted, while passing the final assessment order, the Assessing Officer has not implemented the directions of learned DRP in letter and sprit and has simply repeated the additions made in the draft assessment order through a non-speaking order.

16. Strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted that the Assessing Officer has brought enough facts and materials on record to establish that the assessee has no real economic and commercial activity in Mauritius. He submitted, the control and management of the assessee company is completely with the parent company in USA, hence, is not in Mauritius. He submitted, the two resident directors in Mauritius are dummy directors without having any authority. He submitted, while issuing the TRC, Mauritius Tax Authority has not properly verified the facts. Drawing our attention to the Mauritius Income Tax Act, 1955, he submitted, as per definition of resident under section 73 of the Act, the

Company has to be incorporated in Mauritius or has it's central management and control in Mauritius. He submitted, as per section 73A of the Mauritius Income Tax Act, the company shall be treated as non-resident, if central management and control is outside Mauritius. Thus, he submitted, since the control and management of the assessee was outside Mauritius, it cannot be treated as resident of Mauritius. He submitted, the facts and material brought on record by the Assessing Officer clearly reveal that the assessee has been interposed as an entity in Mauritius only for the purpose of availing tax benefit under India-Mauritius tax treaty. Thus, he submitted, the Departmental Authorities were justified in denying assessee's claim of exemption under Article 13(4) of the India-Mauritius tax treaty.

17. We have considered rival submissions in the light of the decisions relied upon and perused the materials available on record. In so far as the factual aspect of the issue is concerned, there is no dispute that the assessee was incorporated as a company in Mauritius on 04th September, 2006 as per the certificate of incorporation issued by the Registrar of Companies, Government of Mauritius, a copy of which is placed at page-1 of

the paper book. The Mauritius Revenue Authorities have also issued TRC in favour of the assessee for the year under consideration. As per section 90 read with rule 21AB, the assessee has furnished Form No.10F for claiming benefit from double taxation before the Indian Income Tax Authorities. There is no adverse observation of the Assessing Officer that the assessee has not complied with the conditions of Rule 21AB. The assessee is also holder of Category-1 Global business license issued by the Financial Services Authorities Mauritius.

18. Thus, as far as the documentary evidences for claiming benefit under Article 13(4) of India-Mauritius Treaty read with section 90 of the Income Tax Act, 1961 are concerned, the assessee has furnished them before the Assessing Officer. The Assessing Officer apparently has rejected assessee's claim by holding that the control and management of the assessee company is entirely vested with the parent company in USA and the assessee has no economic and commercial substance in Mauritius. He has further held that the assessee has been interposed as an entity in Mauritius only for claiming treaty benefit. On a perusal of the draft as well as the final assessment orders, we do not find any conclusive evidence brought on record

by the Assessing Officer to prove the fact that the control and management of the assessee is not in Mauritius, hence, is a shell/conduit company. On the contrary, the evidences brought on record prove otherwise.

19. It is established on record that the assessee was incorporated as a company in Mauritius in 2006. The SEBI, a Government of India agency has issued a certificate to the assessee as a Foreign Venture Capital Investor as early as on 17th July, 2007. A copy of the certificate is placed at page 94 of the paper book. Thus, it has to be accepted that while issuing the certificate of registration to the assessee, the SEBI must have verified the credentials of the assessee as an Investor Company and being satisfied with the genuineness of the assessee, had issued the registration certificate.

20. Undisputedly, after being registered as a Foreign Venture Capital Investor, the assessee had started investing by acquiring shares in Indian companies. It is observed, the assessee is continuing such investment activity in India till date. Capital Gain on sale of shares was originally not taxable under Article 13 of India-Mauritius DTAA. Subsequently, the treaty was amended through protocol with effect from 01.04.2017 and

as per the amended provisions contained under Article 13(3A) of India-Mauritius tax treaty; capital gain became taxable w.e.f. 01.04.2017. However, the treaty provided grandfathering by excluding from taxation capital gain derived from sale of equity shares acquired prior 01.04.2017 in terms with Article 13(4) of the treaty. Factually, the assessee has offered to tax capital gain derived from shares acquired post 01.04.2017. Whereas, he has claimed exemption under Article 13(4) of the treaty in respect of shares acquired prior to 01.04.2017.

21. Even, the Assessing Officer has not disputed these facts. However, expressing doubt over the TRC issued by Mauritius Tax Authority, the Assessing Officer has held that the assessee, being a shell/conduit company, is not entitled to claim benefit under Article 13(4) of the India-Mauritius tax treaty. To uphold the sanctity of TRC under the India-Mauritius tax treaty, the CBDT issued circular No.789 dated 13.04.2000, stating that TRC issued by Mauritius Tax Authority will constitute sufficient evidence for explaining the residential status as well as beneficial ownership for applying treaty provisions. In paragraph-3 of the said circular, it has been specifically mentioned that the status of resident would also apply in respect

of income from capital gain on sale of shares. The sanctity of aforesaid circular has further been clarified by CBDT through a press release dated 01.03.2013 clearly stating that the Indian Income Tax Authorities will not go beyond the TRC and question the residential status.

22. As per Article 13(4) of India-Mauritius tax treaty, Capital Gain from sale of shares acquired prior to 01.04.2017 is not taxable. Thus, on a plain reading of Article 13(4) of the tax treaty, the Capital Gain derived by the assessee from sale of shares acquired prior to 01.04.2017 is not taxable. It is the case of the Department that TRC is not enough to prove the residence of the assessee. In this context, learned Departmental Representative has submitted that the Mauritius Tax Authorities have issued the TRC without proper verification, whether the assessee has fulfilled the conditions of resident or not. In our view, the income tax authorities sitting in India cannot question the correctness of the TRC issued by the Mauritius Tax Authority. Once, the concerned authorities in Mauritius have issued the TRC and the Category-1 Global business license, it has to be assumed that all facts and evidences were verified by

them and only after being satisfied that the relevant conditions have been fulfilled, the certificates have been issued.

23. The very fact that the assessee has started its operations in India since 2007, indicates that it is a genuine investor. Materials have been placed before us to demonstrate that even after capital gain became taxable under the India-Mauritius treaty post 01.04.2017, the assessee had made substantial investment in India to the tune of US $37,68,86,444. The aforesaid facts clearly indicate that the assessee is not a fly by night operator and made investments in India only for claiming exemption under the treaty provisions. The very fact that the assessee continues to make huge investment in shares of Indian Companies, which are taxable post 01.04.2017, makes it clear that the assessee has not made investment in India only for the purpose of tax exemption under the treaty provisions.

24. Be that as it may, it is proved beyond doubt that the shares on sale of which the assessee derived capital gain were acquired prior to 01.04.2017. That being the case, the assessee being holder of TRC is the beneficial owner of the capital gain, hence, is entitled to benefits under Article 13(4) of the treaty. The denial of the treaty benefits to the assessee clearly runs in

the teeth of CBDT Circular No.789 dated 13.04.2000. In fact, the issue is no more *res integra* in view of ratio laid down by the Hon'ble Supreme Court in case of Union of India vs Azadi Bachao Andolan (supra). The ratio laid down by the Hon'ble Supreme Court in case of Union of India vs Azadi Bachao Andolan (supra) has been reiterated time and again by various High Courts and different benches of the Tribunal. In case of CIT vs JSH Mauritius (supra), the Hon'ble Bombay High Court has held as under:-

> "**7.** The factual matrix that the Respondent is incorporated in Mauritius, holds a Category 1 Global Business License issued by Financial Services Authority of Mauritius and is incorporated on 04/04/1996, is not disputed. It is also not disputed that the Certificate is issued by the Mauritius Revenue Authority to the Respondent evidencing that it is a tax resident in Mauritius during the relevant period. The Respondent had acquired shares of Tata Industries Limited (TIL) in June 1996 is a matter of record. The Respondent sold shares of TIL on 10th July 2009 is also a matter of record.
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> **8.** Section 90(2) of the Act specifically provides that where the Government of India had entered into Double Taxation Avoidance Conveyance (hereinafter referred to as "DTAC" for the sake of brevity) with the Government of any other country for granting relief of tax or any avoidance of double taxation, then in relation to the Assessee to whom said agreement applies, the provisions of Tax Treaty shall apply to the extent they are more beneficial to the Assessee. The Circular dated 30th October 1995 so also above referred Circulars of the year 2003 and 2013 clarifies the said aspect. The Apex Court in a case of *Azadi Bachao Andolan* (referred to supra) has observed as under :

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

9. The Apex Court in the said Judgment further observed that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the Double Tax Avoidance Agreement. When that happens, the provisions of such an agreement with respect to cases to which they apply would operate even if inconsistent with the provisions of Income Tax Act. The Apex Court further observed that the Circulars issued by the CBDT under Section 119 of the Act are binding on all officers and employees employed in the execution of the Act, even if they deviate from the provisions of the Act. The Apex Court in the said Judgment observed that the whole purpose of DTAC is to ensure that the provisions thereunder are available even if they are inconsistent with the provisions of Indian Income Tax Act. The further observation is made by the Apex Court that the principle of piercing the veil of incorporation can hardly apply to a situation as the one before it. The Apex Court further made the following observations :

> "If the court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it would not be permissible for the court to treat the intervening legal steps as non est based upon some hypothetical assessment of the "real motive" of the assessee. In our

> view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o'-the-wisp."
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> "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."

10. In the present matter, it would be relevant to note that the shares were purchased by the Respondent in the year 1996 and were held for long period of 13 years and were sold in the year 2009. This goes to suggest the bona fide of the applicant. The said shares were again invested in the another company of the same group in India and the same are being held by the Respondent. Considering this aspect, it has been observed by the AAR that the Respondent is not a Fly By Night or a Shell Company.........”

25. In case of Bid Service Division (Mauritius) Limited vs AAR (supra), the Hon’ble Bombay High Court has held as under:-

“44. Although paragraph 98 of the *Vodafone International Holdings B.V.* (*supra*) has been quoted in the impugned ruling, however, paragraph 97 which is also relevant, appears to have been missed out by the authority.

45. No doubt mere holding of a TRC cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the Apex Court cited above have clearly upheld the conclusivity of the TRC absent fraud or illegal activities. Nowhere in the impugned ruling the existence of TRC has been denied. In fact in paragraph 2 of the impugned Ruling, the Authority has itself set out the existence of a valid TRC in the name of the Petitioner. Further, except bald allegations, no material has been placed on record to demonstrate or establish that Petitioner was a device to avoid tax or that there was fraud or any illegal activity. There is hardly any discussion in the impugned Ruling on the

applicability of the said Circulars No. 682, 789 or the Press Releases by the CBDT/Ministry of Finance discussed above.

46. From the facts on record it cannot be said that the Indian Authorities were not aware of the change or the introduction of the Petitioner as part of the Consortium. Parties arrange their affairs in a manner as to make their businesses viable and profitable and it is part of that exercise that the Petitioner appears have been introduced into the Consortium with full knowledge of all the authorities concerned. The entire structure as well as the transaction of sale was in the full knowledge of the Indian Authorities including the tax authorities.

47. Reference has been made to article 27A of the Mauritius DTAA on LOB which was inserted by Notification dated 10th August, 2016 by amending the said DTAA pursuant to which shell/conduit companies claiming residence of a contracting State shall not be entitled to the benefits of the convention. The said Article is usefully quoted as under:-

" **ARTICLE 27A**

LIMITATION OF BENEFITS

1. A resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 13(3B) of this Convention.

2. A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention. 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 expenditure on operations in that Contracting State is less than Mauritian Rs. 1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 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 exchange of the Contracting State; or

(*b*) its expenditure on operations in that Contracting State is equal to or more than Mauritian Rs. 1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.

Explanation : The cases of legal entities not having *bona fide* business activities shall be covered by Article 27A(1) of the Convention.

48. It is observed that this Article disentitles benefits of Article 13(3B) if the affairs were arranged for the primary purpose to take advantage of the benefits of Article 13(3B). The Article has been inserted with effect from 1st April 2017. According to this Article, with effect from 1st April 2017, a shell or a conduit company that claims to be a resident of a contracting State shall not be entitled to benefits of Article 13(3B).

49. The Petitioner has also made reference to Press Release dated 29th August 2016 issued by the CBDT post amendment to Mauritius DTAA which was effective from 1st April 2017. The said Press Release is quoted as under:-

"Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

PRESS RELEASE

New Delhi, 29th August, 2016.

Subject: Notification of Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, and for the encouragement of mutual trade and investment between India and Mauritius - regarding

The Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains

between India and Mauritius was signed by both countries on 10th May, 2016. After completion of internal procedures by both countries, the Protocol entered into force in India on 19th July, 2016 and has been notified in the Official Gazette on 11th August, 2016.

The Protocol provides for source-based taxation of capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India with effect from financial year 2017-18. Simultaneously, investments made before 1st April, 2017 have been grandfathered and will not be subject to capital gains taxation in India. Where such capital gains arise during the transition period from 1st April, 2017 to 31st March, 2019, the tax rate will be limited to 50% of the domestic tax rate of India. Taxation in India at full domestic tax rate will take place from financial year 2019-20 onwards.

The benefit of 50% reduction in tax rate during the transition period shall be subject to the Limitation of Benefits Article, whereby a resident of Mauritius (including a shell/conduit company) will not be entitled to benefit of 50% reduction in tax rate, if it fails the main purpose test and *bonafide* business test. A resident is deemed to be a shell/conduit company, if its total expenditure on operations in Mauritius is less than Rs. 2,700,000 (Mauritian Rupees 1,500,000) in the immediately preceding 12 months.

The Protocol further provides for source-based taxation of interest income of banks, whereby interest arising in India to Mauritian resident banks will be subject to withholding tax in India at the rate of 7.5% in respect of debt claims or loans made after 31st March, 2017. However, interest income of Mauritian resident banks in respect of debt-claims existing on or before 31st March, 2017 shall be exempt from tax in India as per existing provisions in the Convention.

The Protocol also provides for updating of the Exchange of Information Article as per the international standard, provision for assistance in collection of taxes, source-based taxation of other income, amongst other changes.

The Protocol will tackle treaty abuse and round tripping of funds attributed to the India-Mauritius treaty, curb revenue loss, prevent double non-taxation, streamline the flow of investment and stimulate the flow of exchange of information between the two Contracting Parties. It will improve

transparency in tax matters and will help curb tax evasion and tax avoidance.

(Meenakshi J Goswami)
Commissioner of Income-tax
(Media and Technical Policy)
Official Spokesperson, CBDT."

50. The said press release expressly provides for grandfathering of capital gains exemption provided under the erstwhile Mauritius DTAA. The protocol provides for source based taxation of capital gains arising from alienation of shares acquired with effect from 1st April 2017 in a company resident in India *viz.* from Financial year 2017-18. Investments made before 1st April 2017 have been grandfathered and will not be subject to capital gains taxation in India.

51. The Authority appears to have clearly missed the clear import of this Circular as the entire sale by Petitioner was prior to 1st April, 2017. The arguments of the Revenue with respect to shell company/conduit can only be considered for investments with effect from 1st April 2017 and not case at hand.

52. Therefore, to say that in the JV, Petitioner is a shell company without any tangible employees, space, assets, etc., incorporated only a few days before bidding or that it has no management experts or financial advisors on its payroll, thereby the Petitioner having no economic or commercial rationale would not be relevant as the concept of LOB in cases of shell company/conduit would become applicable to investments with effect from 1st April 2017 only.

53. Therefore, for the Authority to hold that if Petitioner was not interposed, the Bidvest group in accordance with the Indo-SA DTAA would have to pay capital gains on the share sale as the same is taxable in India is misplaced as not relevant as the investment is by the Petitioner. As noted above, the Petitioner has been incorporated in Mauritius, holds a TRC which is sufficient proof of its residence in Mauritius, which as noted above, cannot be enquired into unless there is a fraud or illegal activity, which in this case, has neither been alleged nor demonstrated. Even if as observed by the Authority that the entire value creation activities are happening in India leading to rise in share valuations, in our view absent any element of

> fraud or illegality that cannot be a reason to hold the Petitioner's investment as a device to evade tax. The suggestions/findings with respect to shell company/conduit, in our view, would apply only in accordance with Article 27A of the Mauritius DTAA which is applicable for investment with effect from 1st April 2017 and not prior to that, and therefore, same would have to be reconsidered in that light.
>
> 54. True that there may have been abuse of tax treaty laws and contracting States have taken corrective measures to prevent abusive transactions by amending the bilateral conventions, however, as noted above, the amendments to the Mauritius DTAA for plugging such transactions have been made effective from 1st April 2017, unless there is a fraud or any illegal activity involved. Infact, as noted above, the investments prior to 1st April 2017 have been grandfathered and are not subject to capital gains taxation in India. The Press Release dated 29th August 2016 quoted above also takes care of the transition period from 1st April 2017 to 31st March 2019 where the tax rate has been limited to 50% of domestic tax rate in India. That taxation in India at full domestic rate is stated to take place from financial year 2019-20 onwards, subject to other conditions."

26. In case of Serco BPO (P.) Ltd. vs AAR (supra), the Hon'ble Punjab & Haryana High Court has held as under:-

> **"30.** In view of the circular, it is incumbent upon the authorities in India to accept the certificates of residence issued by the Mauritian authorities. Circular No. 789 is a statutory circular issued under section 119 of the Act. It is obviously based upon the trust reposed by the Indian authorities in the Mauritian authorities. Once it is accepted that the certificate has been issued by the Mauritian authorities, the validity thereof cannot be questioned by the Indian authorities. This is a convention/treaty entered into between two sovereign States. A refusal to accept the validity of a certificate issued by the contracting States would be contrary to the convention and constitute an erosion of the faith and trust reposed by the contracting States in each other. It is for the Government of India to decide whether or not such a certificate ought to be accepted. Once it is established that it has been issued by the contracting State i.e. Mauritius, a failure to accept the residence certificate issued by the Mauritian

> authorities would be an indication of breakdown in the faith reposed by the Government of India in the Government of Mauritius and the Mauritian authorities reiterated in and evidenced by statutory Circulars issued under section 119 of the Act."

27. In case of MIH India (Mauritius) Limited vs ACT in ITA No.1023/Del/2022, the Co-ordinate Bench of the Delhi Tribunal while dealing with identical issue with more or less identical allegation made by the Assessing Officer to deny treaty benefit, has held as under:-

> "8. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. As far as the factual aspect of the issue in dispute is concerned, it is a fact that the assessee is a resident of Mauritius and the Mauritian Tax Authorities have issued TRC in favour of the assessee. Thus, on the strength of the TRC, the assessee has claimed benefit under Article 13(4) of India – Mauritius Tax Treaty as it existed prior to its amendment. Whereas, the Assessing Officer has held that the assessee is not entitled to claim benefit under the India – Mauritius Tax Treaty. The reason for coming to such conclusion can, more or less, be summed up as under:
>
> • The assessee lacks commercial and economic substance.
>
> • It had no financial strength to invest in the shares of the Indian company and the entire fund was routed through the assessee by the holding company PayU Global B.V. Netherlands
>
> • The effective control and management of the assessee lies with the holding company at Netherlands. The assessee is merely used as a conduit to get benefit of the India –Mauritius Tax Treaty.
>
> • India has deposited ratified MLI with the OECD and it has come into force in India on 1st October, 2019 and the MLI preamble will be added to the India – Mauritius Tax Treaty, if Mauritius signs the MLI and notifies the India – Mauritius Tax Treaty as a Covered Tax Agreement (TCA).

• Once MLI preamble is added to the Tax Treaty, there will be significant change in the legal position established in Azadi Bachao Andolan (supra) as the MLI preamble specifically provides for prevention of opportunities for tax avoidance/evasion through treaty shopping

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

"ARTICLE 13 - Capital gains - 1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.

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

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

4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.

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

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

"ARTICLE 13

CAPITAL GAINS

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

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

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

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

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

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

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

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

12. Having held so, it is necessary now to deal with the reasoning of the Assessing Officer in denying the Treaty benefits to the assessee. The primary objection of the Assessing Officer is to the effect that the assessee is a conduit company having no economic and commercial substance. Therefore, it being a mere case of treaty shopping, benefits under India – Mauritius Treaty cannot be given. Rather, the beneficial owner of capital gain being the holding company at Netherlands, the provisions of India – Netherlands Tax Treaty would apply. It is necessary to examine the validity of the aforesaid reasoning of the Assessing Officer. Undisputedly, the assessee was incorporated in Mauritius in the year 2006. It is not disputed that the assessee had been carrying on investment activity in India as well as other places. The TRC issued by the Mauritian Tax Authorities bears testimony to this fact. Further, audited financial statements of the assessee indicate that not only it had made substantial investments in India, but, proposes to make additional investment to the tune of Rs.665 crores in the year under consideration and subsequent years. Interestingly, PayU India to whom the assessee had sold the shares of Citrus India is a company in India, wherein, the assessee had substantial interest, as, it holds 82.94% shares. It is also a fact that shares of Citrus India sold to

PayU India are still held by PayU India and has not been sold. These facts clearly establish that the assessee is not a fly by night operator or mere conduit company as the Assessing Officer has attempted to make out. Merely because the assessee availed loans from its holding company to invest in shares of Citrus India, ipso facto, cannot be a reason to treat the assessee as a conduit company.

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

> *"It is hereby clarified that wherever a certificate of residency is issued by the Mauritian Authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA accordingly."*

Thus, as per the aforesaid circular issued by CBDT, wherever a certificate of residency is issued by the Mauritian Tax Authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the provisions of India – Mauritius Tax Treaty. The validity of the aforesaid CBDT Circular came up for consideration before Hon'ble Supreme Court in case of Union of India & Another Vs. Azadi Bachao Andolan (supra). Relevant facts relating to this case are, a Public Interest Litigation (PIL) was filed before Hon'ble Delhi High Court challenging the validity of Circular No. 789, dated 13.04.2022 issued by the CBDT. While deciding the Writ Application, the Honble Delhi High Court quashed the circular by holding that the said circular is ultra vires the provisions of section 90 and section 119 of the Act. Interestingly, the aforesaid decision of the Hon'ble Delhi High Court was challenged by the Union of India before Hon'ble Supreme Court. While upholding the validity of the CBDT Circular No. 789, dated 13.04.2000, the Hon'ble Supreme Court specifically dealt with the concept of treaty shopping and observed as under:

> "134. There are many principles in fiscal economy which, though at the first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping in our view, is another. Despite the sound and fury of the respondents over the so-called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when the Indo-Mauritius DTAC was entered? into. Whether it should continue, and, if so, for how long, is a

> matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy. Rule in McDowell"

14. Further, elsewhere in the decision, the Hon'ble Supreme Court accepted the contention put forward by the appellants that the motives with which the residents have been incorporated in Mauritius are wholly irrelevant and cannot in any way affect the legality of the transaction, as, there is nothing like equity in a fiscal statute. Either, the statute applies proprio vigore or it does not. There is no question of fiscal statue by intendment if the expressed words do not apply. We must say, unfortunately, the Assessing Officer has made a desperate and unacceptable attempt to overcome the ratio laid down by the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra) by anticipating a futuristic event of ratification of MLI providing amendment to the preamble of India – Mauritius Tax Treaty by Mauritius Government, which is yet to see the light of the day. In our view, without unreservedly following the binding ratio of the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra), which is the law of the land under Article 141 of the Constitution of India, the Assessing Officer has allowed his mind to be clouded by extraneous considerations and contingent events to deny the benefit of India – Mauritius Tax Treaty to the assessee, which the assessee is legally entitled to on the strength of the TRC issued by the Mauritian Tax Authorities and as per CBDT Circular No. 789, dated 13.04.2000. In view of the aforesaid, we have no hesitation in holding that the gain derived by the assessee on sale of shares of Citrus India to PayU India is not taxable in India as per preamended Article 13(4) of India – Mauritius Tax Treaty. While coming to such conclusion, we have followed the binding ratio of the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra) and CBDT Circular no. 789, dated 13.04.2022.

15. Having held so, for the sake of completeness, it is necessary to examine, in case, we accept Assessing Officer's reasoning that the assessee is not entitled to claim benefit under India – Mauritius Tax Treaty and on the contrary, the holding company at Netherlands being the beneficial owner, the provisions of India – Netherlands Tax Treaty would apply, what would be the position. On a careful reading of Article 13 of India – Netherlands Tax Treaty, which deals

with taxation of capital gain, it becomes clear that the subject transaction would have fallen under Article 13(4) of the Tax Treaty, which reads as under:

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

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

17. That being the position emerging on record, the short term capital gain will not be taxable even under Article 13(4) of the India – Netherlands Tax Treaty. Thus, seen from any angle, the short-term capital gain arising on sale of shares is not taxable in India. In view of the aforesaid, we delete the addition made by the Assessing Officer. Ground nos. 3 and 4 being consequential and premature, do not require adjudication at this stage.

28. Thus, on a conspectus of ratio laid down in the decisions cited above, the irresistible conclusion one can reach is, since, the capital gain is derived from shares acquired prior to 01.04.2017, they are not taxable in terms with Article 13(4) India Mauritius Tax Treaty. In our view, the Assessing Officer has failed to establish on record that the assessee is a shell/conduit company through proper evidence. Therefore, in our view, assessee remains entitled to treaty benefits. At this stage, we must observe, learned DRP has referred to the LOB clause under Article-27A of the India Mauritius Tax Treaty. In our view, the reference to Article 27A is totally irrelevant as the assessee has not claimed any benefit under Article 13(3B) of India Mauritius Tax Treaty. Even assuming for the sake of argument that Article 27A gets attracted, however, the Department has failed to demonstrate the fulfilment of conditions of shell/conduit company as per Article 27A of the tax treaty. We may further observe, the directions issued by learned Dispute Resolution Panel leaves a lot to be desired. For better appreciation, we reproduce the following observations of learned DRP as under:-

> "4.1.3.1.1 The Panel agrees with the AO's observation on issue of the concept in Limitation of Benefit. Virtually, taxation of cross-national income is complex and in often controversial. In the effort to attract more foreign

investment, developing countries including India extends tax concessions to foreign investors through Double Taxation Avoidance Agreements (DAAs). But a major defect of DTAAS is that companies often exploit the opportuneness/loopholes provided in tax laws of DTAAs to avoid taxes. Several Double Taxation Avoidance Agreements (DTAA) are misused by cross national investors to reduce tax burden. One classic example is the often-quoted India-Mauritius DTAA.

The Govt of India like any other governments in the world, is also not sitting idle and is devising new techniques to counter the misutilization of DTAAs. One such weapon is Limitation of Benefit Clause (LoB). Under the LoB, foreign investors who seek tax exemptions in India should produce documents that he is a resident of the said foreign country (eg Mauritius). The LoB refers to procedural requirements that the concerned beneficiary is a resident of the treaty country. The Limitation of Benefit (LoB) Clause is attached by the treaty parties in their bilateral DTAAs. The benefit of tax concession will be limited to such entities that produces the document (for example, the company proving that its residence is in Mauritius). The LoB is tailored to check a well-known misutilization by foreign investors called, treaty shopping. Under treaty shopping, foreign companies (of UK, USA etc) establishes an office in Mauritius and channelizes their investment into India to claim the tax concession offered under the India-Mauritius DTAA. Hence, the purpose of an LOB provision is to limit the ability of third country residents to obtain benefits under the said treaty.

However, the Panel has observed that there are some points which leave a gap between the facts submitted by the assessee and consideration of the same by the AO creating grounds of disagreement between the assessee and the AO. *Therefore, the Panel is of the view that the AO must factually verify the assessee's contention by passing a speaking and reasoned order and complete the assessment within the ambit of the law. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made on the basis of documents/submissions available on the assessment records. The ground of objection is disposed of accordingly.*

29. As could be seen from the aforesaid observations of learned DRP, apart from referring to the LoB clause under India Mauritius DTAA, the only observation on merits is to the effect that the Assessing Officer needs to factually verify assessee's contention and pass a speaking order. Thus, in sum and substance, without deciding the issue on merits, learned DRP has restored it to the Assessing Officer. On a reading of sub-sections 5, 6, 7 and 8 of section 144C of the Act as a whole, it is quite clear that learned DRP has no power to set-aside the issue to the Assessing Officer. This is so because, as per the scheme of section 144C, once a direction is issued by learned DRP, as per section 144C(13) of the Act, the Assessing Officer shall have to pass the final assessment order in conformity with such directions without providing any further opportunity of being heard to the assessee. Thus, in sum and substance, while disposing of the objections raised by the assessee, learned DRP must decide the issue on merits and issue clear directions to the Assessing Officer to pass the final assessment order.

30. In the facts of the present appeal, learned DRP has not issued any direction on merits but has simply restored the issue to the file of the Assessing Officer. As a result, the assessee

lost its right to represent its case before the Assessing Officer, as, in terms with section 144C(13) of the Act, at the stage of final assessment the assessee cannot be given any opportunity of being heard. This, in our view, is in gross violation of rules of natural justice. Be that as it may, even, learned DRP in its directions has held that the Assessing Officer has not properly appreciated the facts and submissions of the assessee and accordingly had directed the Assessing Officer to pass a speaking and reasoned order after considering the facts and submissions. Whereas, on perusal of the final assessment order, it is quite evident that the Assessing Officer has done nothing more than repeating the draft assessment order. Thus, in our view, whatever directions were issued by learned DRP, have not been implemented by the Assessing Officer in letter and spirit. For this reason also, the impugned assessment order is unsustainable.

31. Thus, on overall consideration of facts and material available on record, we are of the view that the assessee, being entitled to claim exemption under Article 13(4) of India-Mauritius Treaty, the addition made is unsustainable. Accordingly, the Assessing Officer is directed to delete it.

32. In view of our decision on merits, the legal and jurisdictional grounds raised by the assessee have become academic, hence are kept open.

33. In the result, the appeal is partly allowed.

Order pronounced in the open court on 19th March, 2024.

Sd/-	**Sd/-**
[PRADIP KUMAR KEDIA]	**[SAKTIJIT DEY]**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Delhi; Dated: 19/03/2024.
SSK
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi