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

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

Sh. Yogesh Kumar US, Judicial Member

ITA No. 3243/Del/2023 : Asstt. Year: 2021-22

Saket Kanoi, E-702, Caitriona Apartment, Ambience Island, National Highwa-8, Gurgaon, Haryana-122002	Vs	DCIT, International Taxation, Gurgaon-122001
(APPELLANT)		(RESPONDENT)
PAN No. AFTPK1512M		

Assessee by : Sh. Sunny Jain, CA
Sh. Rajesh Sanghwi, CA
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 14.08.2024		**Date of Pronouncement: 23.10.2024**

ORDER

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

The present appeal has been filed by the assessee against the order dated 29.09.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

> *"1. In the facts and circumstances of the case and in law, the Ld. Assessing Officer (AO) and consequently the Dispute Resolution Panel (DRP) have grossly erred by denying the appellant, the benefit of Article 13(5) and any other benefits under the India-UAE DTAA on capital gains on sale of debt mutual funds of Rs. 1,54,01,166/-, on the premise that an individual (the appellant herein) is excluded from the definition of "person" under UAE Tax Decree of 1969 and that in absence of any existing Income tax law in the UAE on Individuals and in the absence of any actual payment of Income tax and filing of any Income Tax returns in the UAE, the subject capital gains of Rs. 1,54,01,166/- does not get the benefit of any article under the India-UAE DTAA.*

2. In the facts and circumstances of the case and in law, the Ld. Assessing Officer (AO) and consequently the Dispute Resolution Panel (DRP) have grossly erred by concluding that since appellant is not "liable to any taxes" in the UAE and since there are no existing Income tax laws in the UAE applicable on Individuals, the question of giving benefit of the India UAE DTAA to the appellant does not arise.

3. In the facts and circumstances of the case and in law, the Dispute Resolution Panel (DRP) & consequently the Ld AO have grossly erred by concluding that as per Sec 90(1) since the words used are "taxes paid" the benefit of India UAE DTAA cannot be given to the appellant.

4. In the facts and circumstances of the case and in law, the Dispute Resolution Panel (DRP) & consequently the Ld AO have grossly erred by disregarding the case laws as relied upon by the appellant on similar facts/legal issue of various tribunals esp the judgement of ADIT vs Green Emirates Shipping 286 ITR 60 Mum; Mr. Rameshkumar Goenka ITA No. 3562/Mum/2009; K.E. Faizal by Cochin ITAT vide ITA No.423/Coch/2018 which in turn had relied on the observations in the case of Azadi Bachao case of Hon. Supreme court and which were much similar as per the current facts and case of the appellant.

5. In the facts and circumstances of the case and in law, the Ld. AO and consequently the Dispute Resolution Panel, has erred by relying on the Hon. AAR judgements of Cyril Eugene Pereira and Abdul Razak which were treated as not good law by Hon'ble Mumbai IT AT in the case of Rameshkumar Goenka and which case (Cyril) did not persuade even the SC.

6. In the facts and circumstances of the case and in law, the Ld. AO has erred by mentioning about the UAE Tax decree of 1969 whereas there is no such mention in the current India UAE-DTAA entered into force on 22-9-1993.

7. In the facts and circumstances of the case and in law and without prejudice, the Ld. AO has erred by not appreciating that the CBDT Notification No. 282 of 2007 dt : 28-11-2007 made changes amending the India UAE Treaty meaning that taxability in one of the contracting state is not a sine qua non to avail treaty benefits as appreciated by the Hon'ble Mumbai ITAT in Meera Bhatia case dt : 29-10-09."

3. During the scrutiny proceedings, it was noted that the assessee had received capital gains of Rs. 1,54,01,166/- in India, however, the same was not offered to tax relying upon

the Article 13(5) of India-UAE DTAA. It was found that the assessee was not covered by the article 2 of the tax treaty and also, it was not a case of double taxation. The income had not suffered tax anywhere in the world. Accordingly, vide show cause dated 02.12.2022, the assessee was afforded an opportunity to explain as to why tax treaty benefits may not be disallowed. The assessee vide response dated 06.12.2022 submitted the following:

(a) That actual payment of tax in UAE is not required. Right to tax of UAE is sufficient to invoke provisions of the DTAA.
(b) That decisions of Hon'ble Courts/tribunals in the cases of Azadi Bachao Andolan, Ramesh Kumar Goenka vs. IT dept., Assistant Director of income-tax vs. Green Emirates Shipping are applicable in his case.
(c) That claim of the assessee had been allowed in earlier years.
(d) That tax liability also includes future tax liability as well.

4. Response of the assessee has been perused by the AO in the light of facts of the case and relevant provisions of the law. The AO held that,

> "*the assessee contends that he may be allowed benefits of tax treaty and capital gains from sale of mutual funds may not be taxed in India. After considering response of the assessee, the issues for consideration and adjudication are:*

(a) Whether provisions of the double tax avoidance agreement between India and UAE can be invoked even when there is no double taxation?

(b) Can tax treaty impose tax liability when there is no domestic tax law on the matter?

(c) Can tax treaty provisions be invoked when the taxpayer is not covered by taxes to which the DTAA applies?

Before proceeding ahead, it would be pertinent to refer to relevant provisions of the Indian Income-tax Act and provisions of the tax treaty. Section 90 of the Act provides as under:

90. (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as

the case may be, [without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory),] or

From the above, it may be seen that the Government of India may enter into an agreement with the Government of any country for avoidance of double taxation on income chargeable to tax under the Indian Income-tax Act and under the corresponding law in force in that country. Therefore, it is evident that agreement may be signed to grant relief for income which is chargeable to tax under the Indian law and under the corresponding law of the foreign country. Once tax treaty is signed with the above objective, mechanism of avoidance of double taxation provided in the tax treaty is followed.

For reference preamble and relevant articles of India-UAE DTAA are being reproduced:

Preamble: Whereas the annexed agreement between the Government of the United Arab Emirates and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with Respect to taxes on income and on capital has entered into force on the 22nd September, 1993 after the notification by both the Contracting States to each other of the completion of the proceedings required by laws for bringing into

force of the said agreement in accordance with paragraph 1 of Article 30 of the said agreement.

ARTICLE 1
PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2
TAXES COVERED

1. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital including taxes on gains from alienation of movable or immovable property as well as on capital appreciation.

2. The existing taxes to which the Agreement shall apply are;

(a)	*In United Arab Emirates:*
(i)	*Income tax;*
(ii)	*Corporation tax;*
(iii)	*Wealth-tax*

	(hereinafter referred to as "U.A.E. tax")

3. This Agreement shall also apply to any identical or substantially similar taxes on income or capital which are imposed at Federal or State level by either

Contracting State in addition to, or in place of, the taxes referred to in paragraph 2 of this Article. The competent authorities of the Contracting State shall notify each other of any substantial changes which are made in their respective taxation laws.

ARTICLE 3
GENERAL DEFINITIONS

1. In this Agreement, unless the context otherwise requires:

(e)	*The term "person" includes an individual, a company, and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting State;*

ARTICLE 4
RESIDENT

1[1. For the purposes of this Agreement the term 'resident of a Contracting State' means:

(b) in the case of the United Arab Emirates: an individual who is present in the UAE for a period or periods totaling in the aggregate at least 183 days in the calendar year concerned, and a company which is incorporated in the UAE and which is managed and controlled wholly in UAE.

From the above, it may be seen that the tax treaty has been signed for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital. A perusal of the above articles jointly reveals that tax treaty is applicable to an individual who is a resident of UAE for taxes covered under article 2 of the tax treaty. A perusal of article 2 reveal that it covers existing taxes viz. income-tax and corporation tax. Further, it is noted that as per UAE tax decree there are no personal income tax in UAE as on date. The taxation in force in UAE is the UAE Tax Decree of 1969 (for short the "UAE Decree"), which came into force on 1stJanuary, 1969. Clause (4) of article 2 of the UAE Decree defines the term "person" to mean a body corporate wherever established and the expression "person liable", as defined in clause (3) thereof, means a body corporate wherever established which would not be exempt from the responsibility of paying income-tax imposed on it. Thus, it is clear that an 'individual' is excluded from the definition of 'person' under UAE Decree. Thus, in absence of any existing income-tax in UAE, present transactions gets out of ambit of the tax treaty.

The assessee company filed its objections against the draft assessment order passed on the above discussed lines before the the Hon'ble Dispute Resolution Pan 1, New Delhi. The Hon'ble DRP passed its order u/s 144C(5) of the Income Tax 4 1961 dated 22.08.2022 wherein the Hon'ble Panel has given the following directions:

8. DRP's Directions: The Hon'ble DRP has gave its direction on the above said) objections which is reproduced as under:

The only major issue in this objection is regarding applicability of Indo-UAE DTAA the benefit of which was claimed by appellant but was denied by the AO. Attention is drawn to section 90(1) of IT Act which is reproduced below:

"90(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,-

(a) for the granting of relief in respect of-

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in

the said agreement for the indirect benefit to residents of any other country or territory),] or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case maybe, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement".

4.1 The words used are clearly "taxes paid" and hence reliance on various case laws would not help the appellant. The AO has debated the issue in detail with appropriate references to the case laws, the DTAA, and judgements of AAR. He has held as under:

"3.1.9 In view of the foregoing, it is held that the assessee is not eligible for tax treaty benefits. For availing tax treaty benefits, the following conditions should be fulfilled:

(a) There should be an event of double taxation on the same income under corresponding tax laws of both the contracting states.
(b) The assessee should a tax resident of a contracting state.

(c) The double taxation of income should be with respect to taxes governed by the tax treaty.

However in the present case, there is no double taxation on Income from capital gains. Also, double taxation is not with respect to taxes covered by the tax treaty as per article 2 of the tax treaty. Thus, it is held that capital gains from sale of mutual funds is liable to tax in India as per provisions of the Act.

Further, it may also be appreciated that tax treaties are entered into to provide relief from the burden of double taxation which an income suffers in two contracting states under their respective tax laws which are in force. The tax treaty does not contemplate any such relief which a contracting state may levy in future. Tax treaties provide relief from actual taxes paid or liable to be paid in contracting states as per existing tax laws.

The assessee has also taken a plea that his claim was accepted in earlier years, however, the plea is not acceptable as each assessment year is different under the Act. The Hon'ble Supreme Court has held on multiple occasions that rule of res judicata is not applicable to income tax proceedings. Each year's assessment is final to only that financial year and determines the liability of the assessee of that particular financial year. It is open to the authorities to consider the issues and position of the assessee in the subsequent years. Thus, plea of the assessee is not acceptable and the same is hereby rejected.

A perusal of preamble of the tax treaty and relevant background at the time of signing of the tax treaty makes it clear that the objective of the tax treaty is to provide relief from burden of double taxation. The taxes which the UAE government was contemplating to impose on individuals as per recommendations of the IMF, as noted by the Hon'ble AAR in its order in case of Sh. Abdul Razak Memon; and which have not been imposed till date, keeps the individuals excluded from tax treaty. Thus, keeping in view the objective of tax treaty enshrined in the preamble of tax treaty and exclusion of individual tax residents from existing tax laws of UAE as per article 2 of tax treaty, remaining provisions of the tax treaty are not applicable in case of the assessee. Capital gains from sale of mutual funds are covered within scope of income us 5 of the Act. ***Accordingly, capital gains from sale of mutual funds are hereby added to income of the assessee".***

5. Aggrieved, the assessee filed appeal before the Tribunal.

6. The issue before us is whether the assessee is eligible for exemption from tax in India or not when the UAE authorities choose not to tax the assessee owing to DTAA wherein the capital gains are to be taxed by the UAE.

7. On this issue, we are guided by the settled principles laid down by the Tribunal and the Hon’ble High Courts.

8. In the case of Addl. DIT Vs. Frate Line, Dubai in ITA No. 2439/Mum/2008, vide order dated 29.10.2010, the Co-ordinate Bench of ITAT held as under:

"On the facts and in the circumstances of the case and in law, the ld CIT (A) erred in holding that the assessee is entitled to the benefit of Indo-UAE DTAA and directing the Assessing officer to allow relief accordingly despite the fact that Articles 2(3) of Part-1 of Dubai Income tax Decree, 1969 defines "chargeable person" to mean a body corporate only, while the assessee is a proprietary concern."

2. The short issue that we are required to adjudicate in this appeal is whether or not the learned Commissioner (Appeals) was justified in holding that the assessee was entitled to the benefit of Indo-UAE Double Taxation Avoidance Agreement [205 ITR (St) 49]. This issue is set out in a very narrow compass of Assessment year: 2003-04 undisputed facts. The assessee before us is a resident of United Arab Emirates and is fiscally domiciled in the UAE. On this basis, the assessee has claimed protection of Indo-UAE Double Taxation Avoidance Agreement. In terms of Article 8 of Indo-UAE Double Taxation Avoidance Agreement, the profits derived by the assessee, who is engaged in the business of shipping, are taxable in the jurisdiction, in which the assessee is fiscally domiciled. The reason on account of which this claim has been declined by the Assessing Officer is that the assessee is not liable to pay taxes in UAE and since the assessee does not have any tax liability in UAE, according to the Assessing Officer, the assessee is not eligible to claim treaty protection from taxability in India in terms of Indo UAE DTAA. In other words, the AO has proceeded on the basis that the taxability in UAE is sine quo non for claiming the benefits of Indo UAE DTAA by a UAE resident in India. However, when the matter traveled before the

CIT (A), the CIT (A) reversed the action of the Assessing Officer in holding that the assessee is entitled to the benefits of Indo UAE DTAA, as per the decision of the ITAT in the case of ACIT v. Green Emirates Shipping & Travels, 100 ITD 203, wherein, it has been, inter alia, held that the expression 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax but would also cover the cases where other Contracting State has the right to tax such persons-irrespective of whether or not such a right is exercised by the Contracting State. The sole reason adopted by the CIT (A) for giving the impugned relief is that as long as UAE has right to tax the assessee in respect which, whether such right has been exercised or not, the assessee is entitled to benefits of Indo UAE DTAA. The Assessing Officer is aggrieved and is in appeal before us.

3. We have heard the rival contentions and perused the material on record. We find that, as rightly noted by the CIT (A), the issue is covered in favour of the assessee by the decision of the Tribunal in the case of ACIT v. Green Emirates Shipping & Travels,(supra), wherein, on identical facts, the Tribunal has held that the assessee is entitled to the benefits of Indo UAE DTAA. We have also noted that in the case of Meera Bhatia Vs Income Tax Officer, 38 SOT 95(Mumbai), a co- ordinate Bench of this Tribunal, elaborating upon the same issue, has, inter alia, observed as follows:

"3. Learned representatives fairly agree that the issue is covered by the Tribunal ' s decision dt. 30th Nov., 2005, in the case of Asstt. Director of IT vs. Green Emirate Shipping & Travels (2006) 99 TTJ (Mumbai) 988 : (2006) 100 ITD 203 (Mumbai) wherein the Tribunal has held that actual payment of tax in one of the Contracting States is Assessment year: 2003-04 not a condition precedent to avail the benefits of DTAA in the other Contracting States because the tax treaty prevents not only ' current ' taxation, but also "potential '

double taxation. Once the right to tax UAE residents in specified circumstances vests only with principal State of the UAE under a tax treaty, that right, whether that right exercised or not, continues to remain exclusive right of that State. In this case, speaking through one of us (i.e., the AM), the Tribunal further observed as follows :

"..... As noted above, the exemption agreed to under the ' assignment ' or ' distributive ' rule, is independent of ' whether the Contracting State imposes a tax in the situation to which exemption implies ' . In the case of John N. Gladden vs. Her Majesty the Queen 85 TC 5188, which was quoted with approval by the Hon ' ble Supreme Court in Azadi Bachao Andolan ' s case (supra), Federal Court of Canada was observed that ' the non-resident can benefit from the exemption (under the treaty) regardless of whether or not he is taxable on that capital gain in his own country. If Canada or the US were to abolish the capital gains tax completely, while the other country did not, a resident of the country which has abolished the capital gains would still be exempt from capital gains in that country ' . It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other Courts. All that is necessary for this purpose is that the person should be liable to tax in the Contracting State by reason of domicile, residence, place of management, place of incorporation for any other criterion of similar nature which essentially refers to the fiscal domicile of such a person. In other words, if fiscal domicile of a person is that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State. The expression liable to tax ' is not to read in isolation but in conjunction with the words immediately following it i.e., ' by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature ' . That would mean that merely a person living in a Contracting State should not be sufficient, that person

should also have fiscal domicile in that country. These texts of fiscal domicile which are given by way of examples following the expression liable to tax by reason of i.e., domicile, residence, place of management, place of incorporation etc. are no more than examples of locality related attachments which attract, residence type taxation, that ' person ' is to be treated as resident and this status of being a ' resident ' of the Contracting State is independent of the activity of tax on that person. Viewed in this perspective, we are of the considered opinion that being ' liable to tax in the Contracting State by the virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such persons irrespective of whether or not such a right is exercised by the Contracting State."

4. Learned Departmental Representative, however, dutifully relies upon the orders of the authorities below, and urges us to confirm the same. She highlights the reasoning adopted by the CIT(A), relies upon the rulings of the Hon'ble Authority for Advance Rulings Assessment year: 2003-04 followed by the CIT(A), and submits that there is no justification for any interference in the order of the CIT(A).

5. However, we see no reasons to take any other view of the matter than the view so taken by the Co-ordinate Bench in the case of Green Emirate Shipping & Travels (supra). It may result in double non- taxation but then we cannot be oblivious to the fact that double non- taxation is also a fact of life, and tax sparings, which find place in several Indian tax treaties, are also a reality in international taxation. To enter or not to enter in a tax treaty which may leave scope for double non-taxation is a conscious decision of the respective Contracting State, but once such a tax treaty, as may leave scope for double non-taxation, is entered into, judicial forums have to interpret the provisions of tax treaty as they exist. We are in

considered agreement with the views expressed by the Co-ordinate Bench. Respectfully, following the same, grievance of the assessee must be upheld. It would perhaps also be appropriate to add a few lines on the developments post the said decision in the case of Green Emirate Shipping & Travels (supra).

6. The view taken by the Tribunal in the case of Green Emirate Shipping & Travels (supra) of the Tribunal has also been confirmed, a few months later, by a Dutch High Court vide judgment dt. 15th Feb., 2006. We consider it appropriate to reproduce the observations made by late Prof. Klaus Vogel in the Bulletin for International Taxation (Volume 60, No. 6-2006 at pp. 218-219) published by the International Bureau of Fiscal Documentation, Amsterdam. Prof. Dr. Klaus Vogel, after referring to the Tribunal decision in the case of Green Emirate Shipping & Travels (supra), had observed as follows :

An unusual case decided by the Dutch Gerechtsh of Amsterdam Court of appeals on 15th Feb., 2006 confirms this decision. The owners of the Dutch company, XBV emigrated from the Netherlands to Greece in 1995 and advised the Dutch tax authorities that they now exercised management and contract from their new location, as a consequence of which the company became a Greek resident. This was not in dispute in May, 2000, the taxpayers informed the authorities that, since their relocation, they had endeavoured to register the company with Greek tax authorities, but failed to succeed because of the Greek tax authorities, but failed succeed because of the Greek bureaucracy the company had not yet been assessed to the corporate income-tax. These facts were not contested by the Dutch authorities. But in 2004 they assessed the taxpayers for the Dutch corporate income-tax retrospective for the year 1995. The tax Inspector argued for applying art. 4(1) of the Netherlands-Greece tax liability is not sufficient rather a subjective indebtedness" ("een feitelike subjective onderworpnheld") is

required. The however, refuted this argument it pointed out that the tax treaty did not postulate factual taxation: instead a legal obligation to pay tax on worldwide income was called for, which under Greek was established.

7. In legal matters like interpretation of international tax treaties and with a view to consistency in judicial interpretation thereof under Assessment year: 2003-04 different tax regimes, it is desirable that interpretation given by the foreign Courts should also be given due respect and consideration unless, of course, there are any contrary decisions from the binding judicial forums or unless are any other good reasons to ignore such judicial precedents of other tax regimes. The treaties are more often than not based on the models developed by the multilateral forums judicial bodies in the regimes where such models are being used to get occasions to express views on expressions employed in such models. It is only when the views so expressed by judicial bodies globally converge towards a common ground that an international tax language as visualized by Hon ' ble Andhra Pradesh High Court in the case of CIT vs. Visakhapatnam Port (1984) 38 CTR (AP) 1 : (1983) 144 ITR 146 (AP), can truly come into existence, because everyone, using a word, or a set of words, in a language, does not understand it in the manner, that language will make little sense. There is one decision in favour of the assessee this issue by the Dutch Court of appeal and no other country judicial precedent from any judicial forum has been brought to our notice. The view taken by this Tribunal has been followed the aforesaid subsequent Dutch Court of appeal judgment. These things taken together, viewed in perspective discussed above, also persuade us not to take any other view of the than the view so taken by the Tribunal in the case of Green Emirate Shipping & Travels (supra).

8. While concluding the aforesaid decision, the Tribunal had made the following observations :

Before parting with the matter, we may add that instead of allowing such matters, as is the dispute before us, be subjected to confusing signals resulting in uncertainty and prolonged litigation, certainly more desirable for the Government to take a clear-cut stand on the issue or let the be resolved at the level of Governments of the Contracting States. That perhaps is a better solution for quickly resolving the disputes on such a fundamental aspect of a tax treaty as to who will eligible for the benefits of that tax treaty. We hope Government will resolve this matter once and would not allow that uncertainty to last for long.

9. We have noted that a successful initiative has indeed been made to resolve this issue level of the Contracting States. On 6th March, 2007, a protocol, amending the Indo-UAE tax has been entered into. This protocol has since been notified by the Government of India Notification No. 282 of 2007, dt. 28th Nov., 2007 [(2007) 213 CTR (St) 64]. One of amendments made by this protocol is the change in definition of 'resident' in art. 4(1)(b) now provides that for the purpose of the Indo-UAE tax treaty, resident of a Contracting State, the case of the UAE, means "an individual who is present in the UAE for a period or periods aggregating totalling in aggregate at least 183 days in the calendar year concerned, and, company, which is incorporated in UAE and which is managed and controlled wholly in UAE". Amendment in the definition of resident of UAE, thus accepts the broad proposition that taxability in one of the Contracting States is not a sine qua non to avail treaty benefits in the other Contracting Assessment year: 2003-04 State. The fundamental assumption by the AO that "an individual who is not liable to pay tax under the UAE law

cannot claim any relief from the only tax which is payable in India under the agreement" and that "the provisions of DTAAs do not apply to any cases where the same income is not liable to be taxed twice by the existing laws of both the Contracting States" is thus no longer backed by the tax administration itself. As we notice this position, we are alive to the fact that the protocol to the Indo-UAE tax treaty has come into effect from 1st April, 2008 but that is not really relevant in the present context. What is material is the fundamental approach to the availability of treaty benefits to the residents of Contracting States without making it conditional upon dual taxability of same income. This approach is clearly in conformity with the approach adopted by us in the case of Green Emirate Shipping & Travels (supra) and the amendments so brought about by the amendments in the Indo-UAE tax treaty have thus introduced good deal of clarity about the legal position on such fundamental aspects of a tax treaty as to who will be eligible for tax treaty benefits."

4. The view so taken by the Tribunal has also been adopted by the subsequent protocol amending the India UK DTAA, and the approach underlying the stand of the Assessing Officer has been abandoned by the tax administration itself. In view of the above discussions, and following the view taken by the coordinate benches in a large number of decisions including in the cases of Green Emirates Shipping & Travels (supra) and Meera Bhatia (supra), we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

5. In the result, appeal filed by the revenue stands dismissed."

9. In the case of ITO Vs. Shri Ramesh Kumar Goenka in ITA No. 3562/Mum/2009 vide order dated 16.04.2010, the Co-ordinate Bench of ITAT held as under:

"Grounds of appeal raised by the revenue reads as follows :-

1) On the facts and circumstances of the case and in law, learned CIT(A) erred in :

(i) holding that the assessee a resident of UAE, is entitled to the benefits of DTAA between India and UAE.

(ii) Holding that the assessee is not liable to pay any taxon the short term capital gains earned in India.

2) the appellant prays that the order of learned CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.

3. The Assessee is an individual. He is a resident of UAE. During the previous year he earned short term capital gain of RS.5,04,89,379/-. He claimed that the short term capital gain cannot be brought to tax in India in view of Article 13(3) of the Indo-UAE DTAA. Since the Assessee was a Resident of UAE, it is only UAE which has a right to tax capital gain and not India. Article 13 of the agreement for avoidance of double taxation between India and the UAE (hereinafter referred to as 'the India-UAE Treaty') provides an exemption from capital gains tax in India to residents of UAE. It reads as under:-

Article 13 : Capital gains :

1) Gains derived by a resident of a contracting state from the alienation of immovable property referred to in paragraph 2 of Article 6 and situated in the other Contracting State may be taxed in that other state.

2) Gain 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 enterprise) or of such fixed base may be taxed in that other state.

3) Gains from the alienation of any property other than that mentioned in paragraph 1 and 2 shall be taxable only in the contracting state of which the alienator is a resident.

Article 4 of the India UAE DTAA defines resident of a contracting state as any person who under the laws of that State is liable to tax therein. There is no dispute that the Assessee is a resident of UAE.

The AO however rejected the claim of the Assessee on the ground that the assessee 'is not paying taxes in UAE'. The Assessing Officer relied upon the decision of the AAR in the case of Abdul Razack Menon 276 ITR 306 which had considered the decision of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan 263 ITR 706 (sc) and held that the assessee has failed to discharge the onus on it to prove that it is liable to pay tax in UAE. According to the AO it is not sufficient for a person to claim the benefits of Article 13(3) to be just a "Resident of the other contracting State", but he must also have paid tax on the income in respect of which the benefit of Article 13(3) is claimed. In UAE the capital gain in question was admitted not charged to tax.

4. On appeal by the Assessee, the CIT(A) held that the Assessee was entitled to the benefits of Article 13(3) of Indo-UAE treaty and therefore capital gain cannot be brought to tax in India. In doing so

he followed the decision of the Mumbai Bench of the Tribunal in the case of Assistant Director of Income-tax (International Taxation), Range 1(2) vs. Green Emirate Shipping & Travels 100 ITD 203 (Mum) ITAT. In the case of Assistant Director of Income-tax (International Taxation), Range 1(2) vs. Green Emirate Shipping & Travels 100 ITD 203 (Mum) ITAT, the Mumbai Tribunal had an occasion to deal with an identical case. The facts of the case were that the assessee was a shipping line based in United Arab Emirates. In the relevant previous year, the assessee had a taxable income of Rs. 28,35,628 from shipping operations. The assessee's claim was that in terms of article 8 of the Indo-UAE Double Taxation Avoidance Agreement, the assessee's income was liable to tax only in the country of domicile i.e., UAE, but this contention was rejected by the Assessing Officer on the ground that the assessee 'is not paying taxes in UAE'. The Assessing Officer relied upon the decision of the AAR in the case of Cyril Eugene Pereria, In re [1999] 239 ITR 6501 in support of the proposition that the provisions of the DTAA do not apply to any case which the 'same income is not liable to be taxed twice by the existing laws of both the Contracting States'.

5. The Tribunal firstly disagreed with the view expressed by the AAR in the case of Cyril Eugene Pereria (Supra) on the ground that the said decision was held to be not laying down the correct law by the Hon'ble Supreme Court in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 7061, at page 742. The tribunal held that:-

6. Undoubtedly, in Cyril Eugene Pereria's case (supra), Hon'ble Authority for Advance Ruling, deviating from the stand taken by it in the earlier rulings including ruling in Mohsinally Alimohammed Rafik, In re [1995] 213 ITR 3171, concluded that "an individual who is not liable to pay tax under the UAE law cannot claim any relief from the only tax on income which is payable in India under the agreement" and that "the provisions of the Double Taxation Avoidance

Agreement do not apply to any case where the same income is not liable to be taxed twice by the existing laws on both the Contracting States". However, in Azadi Bachao Andolan's case (supra), Their Lordships of Hon'ble Supreme Court, after referring to the said ruling and after elaborate discussions on the various aspects of this issue, concluded that "it is . . . . not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States". The reasoning given by Their Lordships included the following:

"According to Klaus Vogel "Double Taxation Conventions establishes an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible. In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other Contracting State either entirely or in part. Contracting States are said to waive 'tax claims' or more illustratively to divide 'tax sources', 'taxable objects', amongst themselves". Double taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rule', the German jurists called it 'the distributive rule' (Verteilungsnorm). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the Contracting State imposes a tax in the situation to which the exemption applies, and irrespective of whether the State actually levies the tax. Commenting particularly on the German Double Taxation Convention with the United States, Vogel comments: "Thus, it is said that the

treaty prevents not only 'current' but also merely 'potential' double taxation". Further, according to Vogel, "only in exceptional cases, and only when expressly agreed to by the parties, is exemption in one of the Contracting States dependent upon whether the income or capital is taxable in the other Contracting State, or upon whether it is actually taxed there."

It is, therefore, not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States."

6. The Tribunal also held that the decision of the Authority for Advance Ruling in the case of Abdul Razak A. Menon, In re [2005] 276 ITR 306 was also not good law.

7. The Tribunal dealt with the argument of the Learned Departmental Representative that as non-corporate entities are not taxable entities under the UAE Tax Treaty such non-corporate entities, even though based in UAE, cannot be treated as 'resident' for the purposes of the India-UAE DTAA as follows:

"Our attention is also invited to the learned Assessing Officer's observations to the effect that "the provisions of the DTAA do not apply to any case which the same income is not liable to be taxed twice by the existing laws of both the Contracting States" and that "since the assessee has failed to prove that it is paying taxes in UAE, the DIT relief sought by the assessee is rejected" but it is the very proposition underlying these observations which was rejected by the Hon'ble Supreme Court holding that "it is . . . . not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States". As we have noted earlier also, the revenue is on record to have opposed the very argument that the

revenue has taken in the present case, as evident from the Hon'ble Supreme Court's following observation :

"The appellants (i.e., Union of India) contend that, acceptance of the respondent's submission that double taxation avoidance is not permissible unless the tax is paid in both countries is contrary to the intendment of section 90. It is urged that clause (b) of subsection (1) of section 90 applies to a situation where income-tax has been paid in both the countries, but clause (b) deals with the situation of avoidance of double taxation of income. Inasmuch as Parliament has distinguished between the two situations, it is not open to a Court of law to interpret clause (b) of section 90 – subsection (1) as if it were the same as situations contemplated under clause (a)."

The very contention which has been raised by the revenue in this case was successfully challenged by the Union of India before the Hon'ble Supreme Court. It cannot be open to us to take any other view of the matter than the view so taken by the Hon'ble Supreme Court."

8. The Tribunal then dealt with the question as to whether existing liability to pay taxes in UAE is a sine qua non to avail the benefit of India-UAW tax treaty in India as follows:

"8. Although the Assessing Officer's objection to applicability of India-UAE tax treaty was only on the ground that the provisions of double taxation avoidance agreements do not come into play unless it is established that the assessee is paying tax in both the countries in respect of the same income, in the grounds of appeal before us it is also contended that the assessee-company failed to produce any evidence to the effect that it was 'liable to pay taxes' in UAE. The question then arises whether an existing liability to pay taxes in UAE is a sine qua non to avail the benefit of India-UAE tax treaty in India. On this issue also, we find guidance from the judgment of

Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra). Referring to the Klaus Vogel's Commentary on Double Taxation Conventions, Their Lordships, inter alia, observed as follows:

"In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other Contracting State either entirely or in part. Contracting States are said to waive 'tax claims' or more illustratively to divide 'tax sources', 'taxable objects', amongst themselves. Double taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rule', the German jurists called it 'the distributive rule' (Vertei-lungsnorm). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the Contracting State imposes a tax in the situation to which the exemption applies, and irrespective of whether the State actually levies the tax. Commenting particularly on the German Double Taxation Convention with the United States, Vogel comments : 'Thus, it is said that the treaty prevents not only 'current' but also merely 'potential' double taxation'." [Emphasis supplied]

It is thus clear that a tax treaty not only prevents 'current' but also 'potential' double taxation. Therefore, irrespective of whether or not the UAE actually levies taxes on non-corporate entities, once the right to tax UAE residents in specified circumstances vests only with the Government of UAE, that right, whether exercised or not, continues to remain exclusive right of the Government of UAE. As noted above, the exemption agreed to under the 'assignment' or 'distributive' rule, is independent of 'whether the Contracting State imposes a tax in the situation to which exemption implies'. In the

case of John N. Gladden v. Her Majesty the Queen 85 TC 5188, which was quoted with approval by the Hon'ble Supreme Court in Azadi Bachao Andolan's case (supra), Federal Court of Canada was observed that "the non-resident can benefit from the exemption (under the treaty) regardless of whether or not he is taxable on that capital gain in his own country. If Canada or the US were to abolish the capital gains tax completely, while the other country did not, a resident of the country which has abolished the capital gains would still be exempt from capital gains in that other country". It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other country. All that is necessary for this purpose is that the person should be 'liable to tax in the Contracting State by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature' which essentially refers to the fiscal domicile of such a person. In other words, if fiscal domicile of a person is in a Contracting State, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State. The expression 'liable to tax' is not to read in isolation but in conjunction with the words immediately following it i.e., 'by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature'. That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that country.

These tests of fiscal domicile which are given by way of examples following the expression 'liable to tax by reason of' i.e., domicile, residence, place of management, place of incorporation etc. are no more than examples of locality related attachments that attract residence type taxation. Therefore, as long as a person has such locality related attachments which attract residence type taxation,

that 'person' is to be treated as resident and this status of being a 'resident' of the Contracting State is independent of the actual levy of tax on that person. Viewed in this perspective, we are of the considered opinion that being 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by the virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such persons - irrespective of whether or not such a right is exercised by the Contracting State. In our humble understanding, this is the legal position emerging out of Hon'ble Supreme Court's judgment in Azadi Bachao Andolan's case (supra). The plea taken by the revenue that the assessee was not 'liabile to tax', which was anyway not taken by the Assessing Officer or before the CIT(A), is also not sustainable in law either.

9. Aggrieved by the order of CIT(A), the revenue is in appeal before the Tribunal. We have heard the submissions of learned Departmental Representative who relied on the order of the Assessing Officer. In our view decision in the case of Green Emirate Shipping & Travels (supra) is squarely applicable to the facts of the present case. As held in the aforesaid case, expression 'liable to tax' in the contracting state as used in Article 4(1) of Indo-UAE-DTAA does not necessarily imply that the person should actually be liable to tax in that contracting state and that it is enough if other contracting state has right to tax such person, whether or not such a right is exercised. In the light of the ratio laid down in the aforesaid decision, which has been followed by CIT(A), we find no grounds to interfere with the order of CIT(A). We therefore confirm the order of CIT(A) and dismiss the appeal by the revenue."

10. In the case of DCIT Vs. Shri K. E. Faizal in ITA No. 423/Coch/2018 vide order dated 08.07.2019, the Co-ordinate Bench of ITAT held as under:

"2. The grounds raised read as follows:-

"1. The order of the learned Commissioner of Income Tax (Appeals)-II, Kochi is contrary to the law and facts of the case.

2. The learned Commissioner of Income Tax (Appeals)-II Kochi erred in holding that the units of equity oriented Mutual Funds and equity shares cannot be held to be the same.

3. The learned Commissioner of Income Tax (Appeals)-II Kochi ought to have considered the fact that the underlying instrument of any equity oriented Mutual Fund is nothing but a share and hence the gains arising from the sale of the underlying instrument, being the equity share results in Capital Gains.

4. The learned Commissioner of Income Tax (Appeals)-II Kochi erred in holding that as per the provisions of the India-UAE Double Taxation Avoidance Agreement the gain can be taxed only in the country of residence which is UAE.

5. The learned Commissioner of Income Tax (Appeals)-II Kochi ought to have considered the fact that the Equity Share being the underlying instrument, the gains from the alienation of Units of an Equity oriented Mutual Fund is thus taxable under Article 13(4) of the India-UAE Treaty in India i.e. the contracting State in which the company, whose share / units have been transferred, is a resident.

6. The learned Commissioner of Income Tax (Appeals)-II Kochi erred in relying on the decision of the Mumbai Bench of ITAT without considering the fact that the decision of the Mumbai Bench of ITAT is not binding on the Income-tax authorities of Kerala Charge.

7. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned Commissioner of Income Tax (Appeals)-II Kochi may be cancelled and that of the AO may be restored."

3. Brief facts of the case are as follows:

The assessee, an individual, is non-resident for the relevant assessment year, viz., A.Y. 2012-2013. The assessee Sri.K.E.Faizal.

had sold units of equity oriented mutual funds during the relevant assessment year and derived short term capital gains (STCG) on the same amounting to Rs.1,34,99,407. For the assessment year 2012-2013, the return of income was filed on 31.07.2012 by claiming the short term capital gain amounting to Rs.1,34,99,407 as exempt to tax in India by virtue of Article 13(5) of India-UAE Treaty. The assessment was completed u/s 143(3) of the I.T.Act vide order dated 30.03.2015. The Assessing Officer held that the underlying instrument of any equity oriented mutual funds is nothing but a `share', and therefore, as per Article 13(4) of the Treaty, STCG would be taxable in India. Accordingly, he added a sum of Rs.1,34,99,407.

4. Aggrieved by the above said addition under the short term capital gains, the assessee preferred an appeal to the first appellate authority. The assessee raised various contentions before the first appellate authority and the same was reproduced at pages 6 to 10 of the impugned order (portion of para 4.3 of the CIT(A) order). The CIT(A) decided the issue in favour of the assessee by holding that the short term capital gains derived by the assessee on account of sale of units of equity oriented mutual funds are not taxable in India. The CIT(A) was of the view that the equity oriented mutual funds are not `shares' and therefore the case was governed by para 5 of Articled 13 of the India-UAE Treaty. In taking the above view,

the CIT(A) also relied on the order of the Mumbai Bench of the Tribunal in the case of ITO (IT) v. Satish Beharilal Raheja [(2013) 37 taxmann.com 296 (Mumbai-Trib.)].

5. The Revenue being aggrieved by the order of the CIT(A) has filed this appeal before the Tribunal. The learned Departmental Representative strongly relied on the grounds raised. The learned AR, on the other hand, has filed a paper book comprising of 49 pages enclosing the income tax return, the statement showing capital gains / loss incurred during the relevant assessment year, submissions made before the Income-tax authorities etc. The learned AR reiterated the submissions made before the Income-tax authorities.

6. We have heard the rival submissions and perused the material on record. The assessee admittedly is a non-resident Indian for the relevant assessment year. The tax residency certificate issued to the assessee stating he has a valid residency in UAE is on record (pages 27 to 29 of the paper book filed by the assessee). The Assessing Officer also admits that the assessee is a NRI during the relevant assessment year. For the relevant assessment year the assessee sold equity linked mutual funds and derived STCG. As per section 5(2) r.w.s. 9(1)(i) of the I.T.Act, transfer of a capital asset situated in India shall be deemed to accrue or arise in India. The income from transfer of units of an equity-oriented mutual funds situated in India is deemed to accrue or arrive in India and therefore is taxable in India even in the case of a non-resident. However, taxation in the case of non-resident is subject to the provisions of the relevant Treaty between India and the State of residency of the assessee. In the instant case, the provisions of India- UAE Treaty would be applicable. Section 90(2) of the I.T.Act states that the provisions of the Treaty shall apply to the extent they are more beneficial to the

assessee as compared to the corresponding provisions of the Act. The Assessing Officer also does not state that the assessee is not entitled to the beneficial provisions of the DTAA entered between India and UAE. The Assessing Officer negated the assessee's contention by holding Article 13(4) of the Treaty would apply and not Article 13(5) of the Treaty. To understand the issue in controversy, it is necessary to reproduce Article 13 of the India-UAE Tax Treaty and the same reads as follow:-

"ARTICLE 13 : CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in paragraph (2) of Article 6 and situated in the other Contracting State may be taxed in that other State.

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 fixed base may be taxed in that other State.

3. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.

4. Gains from the alienation of shares other than those mentioned in paragraph 3 in a company which is a resident of a Contracting State may be taxed in that State.

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

(Emphasis supplied] 6.1 As per Article 13(5) of the Tax Treaty, income arising to a resident of UAE from transfer of property other than shares in an Indian company, are liable to tax only in UAE. On the other hand, Article 13(4) of the Tax Treaty provides that income arising to a resident of UAE from transfer of shares in an Indian company other than those specifically covered within the ambit of provisions of other paragraph of Article 13 may be taxed in India. Article 13(4) of the Tax Treaty covers within its purview capital gains arising from transfer of `shares' and not any of the property. Therefore, Article 13(4) of the Tax Treaty cannot be applied in the instant case unless the units of mutual funds transferred by the assessee qualify as shares for the purpose of Tax Treaty.

6.2 The term "share" is not defined under the tax treaty. As per Article 3(2) of the tax treaty, any term not defined under the tax treaty shall, unless the context otherwise requires, have the meaning which it has under the laws of the country whose tax is being applied. Therefore, the term "share" would carry the meaning ascribed to it under Act, and if no meaning is provided under the Act, then the meaning that the term carries under other allied Indian laws would need to be applied. The Act does not define the term "share". However, section 2(84) of the Indian Companies Act, 2013

defines the term "share" to mean "a share in the share capital of a company and includes stock". Further, the term "company" has been defined to mean a "company incorporated under the Companies Act, 2013 or under any previous company law". Under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1995, mutual funds, in India can be established only in the form of "trusts", and not "companies". Therefore, the units issued by Indian mutual funds will not qualify as "shares" for the purpose of Companies Act, 2013. Further, under the Securities Contract (Regulation) Act, 1956, a security is defined to include inter alia -

(a) shares, scrips, stocks, bonds, debentures, debenture stock or other body corporate; and

(b) units or any other such instrument issued to the investors under any mutual fund scheme.

6.3 From the above definition of "securities", it is clear that "shares" and "units of a mutual fund" are two separate types of securities. Applying the above meaning to the provisions of the tax treaty, the gains arising from transfer of units of mutual funds should not get covered within the ambit of Article 13(4) of the tax treaty, and should consequently be covered under Article 13(5) of the tax treaty. Therefore, the assessee, who is a resident of UAE for the purposes of the tax treaty, STCG arising Sri.K.E.Faizal.

from sale of units of equity oriented mutual funds and debt oriented mutual funds should not be liable to tax in India in accordance with the provisions of Article 13(5) of the tax treaty.

6.4 Reliance is also placed on the decision of the Mumbai Bench of the Tribunal in the case of Income-tax Officer v. Satish Beharilal Raheja [(2013) 37 taxmann.com 296],

wherein on similar facts and in the context of the Treaty between India and Switzerland, the Tribunal held as under:

"In our view in the absence of any specific provision under the Act to deem the unit as shares, it could not be considered as shares of companies and therefore, the provisions of Article 13(5)(b) (of the Indo-Swiss Treaty) cannot be applied in case of units. We agree with the findings of the Commissioner (Appeals) that provisions of Article 13(6) (of the Indo-Swiss Treaty) are applicable in case of units as per which capital gains cannot be taxed in India. "

6.5 The Mumbai Tribunal came to above conclusion by relying on the judgment of the Hon'ble Supreme Court ("SC") in the case of Apollo Tyres Ltd v CIT [2002J 122 Taxman 562 (SC), wherein the Hon'ble Apex Court held as under:

"Even though the said section (Section 32(3) of the UTI Act, creates a fiction to make UTI as a deemed company and distribution of the income received by the unitholder as deemed dividend, by virtue of these deeming provisions it cannot be said that it a/so makes the unit of UTI a deemed share. A deeming provision of this nature, as found in Section 32(3) (of the UTI Act) should be applied for the purposes for which the said deeming provision is specifically enacted, which in the instant case was confined only to deeming the UTI as a company, and the income from the units as a dividend. If as a matter of fact, the Legislature had contemplated making the unit as also a deemed share, then it would have stated so. In the absence of any such specific deeming in regards to units as shares, it would be erroneous to extend the provisions of Section 32(3) of units of UTI for the purpose of holding that the unit is a share."

6.6 In view of the aforesaid reasoning and the judicial pronouncement cited supra, we are of the view that the CIT(A) is

justified in deleting the addition of Rs.1,34,99,407 as short term capital gain. It is ordered accordingly.

7. In the result, the appeal filed by the Revenue is dismissed."

11. In the case of ADIT Vs. Green Emirate Shipping and Travels (286 ITR 60) (Mum.) vide order dated 30.11.2005, the Co-ordinate Bench of ITAT held as under:

"1. The only grievance raised by the Revenue in this appeal is as follows :

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the AO to allow the benefit of DTAA merely on production of the xerox copy of the tax residency certificate issued by the Ministry of Finance and Industry in UAE without appreciating the fact that the assessee-company failed to produce any evidence that it was liable to pay taxes or paying taxes in UAE and that the provisions of the Double Taxation Avoidance Agreement did not apply to any person where the income was not liable to be taxed twice by the existing laws of both the Contracting States.

2. The short factual matrix, in which this issue arises, is this. The assessee is a shipping line based in United Arab Emirates. In the relevant previous year, the assessee had a taxable income of Rs. 28,35,628 from shipping operations. The assessee's claim was that in terms of Article 8 of the Indo-UAE DTAA [(1994) 205 ITR (St) 49], the assessee's income was liable to tax only in the country of domicile, i.e., UAE, but this contention was rejected by the AO on the ground that the assessee 'is not paying taxes in UAE'. The AO relied upon the decision of the AAR, in the case of Cyril Eugene Pereira, In re in support of the proposition that the provisions of the DTAA do not apply to any case which 'the same income is not liable

to be taxed twice by the existing laws of both the Contracting States. The AO also noted that 'the assessee has failed to furnish proof/evidences in support of claim of being eligible for benefit of India-UAE DTAA, and, consequently, the assessee has failed to discharge the onus on it to prove that it is liable to pay tax in UAE'. It was in this backdrop that the assessee's claim for non-taxability of shipping income in India was rejected by the AO. Aggrieved, assessee carried the matter in appeal before the CIT(A). The CIT(A) reversed the action of the AO by a rather brief operative order which is reproduced below for ready reference :

I have considered submissions of the appellant counsel and pursued the order made by the AO. The appellant has not been allowed the benefit of DTAA only because the appellant had not produced any evidence before the AO that he is a tax resident of UAE. As appellant has submitted the xerox copy of the tax residency certificate issued by the Ministry of Finance & Industry in UAE, the AO is directed to allow the benefit of DTAA to the appellant for the asst. yr. 1998-99.

Aggrieved by the order of the CIT(A), Revenue is in appeal before us.

3. We have heard the learned Departmental Representative but none appeared for the assessee. We have also perused the material on record and duly considered the applicable legal position and factual matrix of the case.

4. The impugned order passed by the CIT(A) takes a rather superficial view of the matter and has conveniently ducked the core issue really required to be adjudicated upon. It has simply brushed aside the real objection raised by the AO which was that in order to avail benefits of the India-UAE DTAA, a person need not only be resident of one of the Contracting State but should also be 'liable to tax' therein. Then, there is next question about the connotations of

the expression 'liable to tax'. Does it mean liability at present or does it also cover a potential future liability? A residency certificate, by itself, does not decide the matter one way or the other because what, according to the AO, is important is whether the assessee was liable to tax in UAE or not. Therefore, whether the assessee was resident in UAE or not would not have really mattered from the point of view of the AO. For this reason, we are unable to approve the reasoning and stand of the CIT(A). Having held so, the next question that we are required to address ourselves to is whether or not the AO was justified in raising the objection that he did. Is it really the liability to pay tax in UAE which is sine qua non to avail the benefits of the India-UAE DTAA or a fiscal domicile or residency in UAE per se will be sufficient for an assessee to claim the benefits of the India-UAE DTAA ? Is it taxation liability at present which is material for this purpose or is it even prospect of future tax liability which is sought to be prevented by the said DTAA ?

5. As for the AO's reliance on ruling given by the Authority for Advance Ruling in Cyril Eugene Pereiria's case (supra), we deem it necessary to reproduce the following extracts from the judgment of Hon'ble Supreme Court in the case of Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC), at p. 742 wherein Their Lordships of Hon'ble Supreme Court had an occasion to deal with the said AAR ruling :

The respondents placed great reliance on the decision by the Authority for Advance Rulings constituted under Section 245-0 of the IT Act, 1961, in Cyril Eugene Pereira's case . Section 245S of the Act provides that the Advance Ruling pronounced by the Authority under Section 245R shall be binding only :

(a) on the applicant who had sought it;

(b) in respect to the transaction in relation to which the ruling had been sought; and

(c) on the GIT and the IT authorities subordinate to him, in respect to the applicant and the said transaction.

It is, therefore, obvious that, apart from whatever its persuasive value, it would be of no help to us. Having perused the order of the Advance Ruling Authority, we are not persuaded. (emphasis, italicised in print, supplied by us now).

The judgments of Hon'ble Supreme Court are binding on us under Article 141 of the Constitution of India; the rulings of Authority for Advance Rulings, whatever be their persuasive value, are not. The words of Hon'ble Supreme Court are clear, categorical and unambiguous. Once Hon'ble Supreme Court declines to be persuaded by the ruling given by the Authority for Advance Rulings in Cyril Eugene Pereira's case (supra), it cannot be open to us to follow the said ruling. In the case of Asstt, Collector of Central Excise v. Dunlop India Ltd. , Hon'ble Supreme Court has, inter alia, observed as follows :

We desire to add and as was said in the Cassel & Co. Ltd. v. Broome (1972) AC 1027 (HL), we hope it will never be necessary to say so again that 'in the hierarchical system of Courts' which exists in our country, 'it is necessary for each lower tier'... 'to accept loyally the decisions of the higher tiers', 'it is inevitable in a hierarchical system of Courts that there are decisions of the supreme Tribunal which do not attract unanimous approval of all the members of the judiciary.... But judicial system works only if someone is allowed to have the last word and that last word, once spoken is loyally accepted'. (See observations of Lord Hallsham and Lord Diplock in Broome v. Cassett). The wisdom of the Court below has to yield to the higher wisdom of the Court above.

We respectfully follow the higher wisdom of the Courts above and decline to approve AO's reliance upon the ruling given by the Authority for Advance Rulings in Cyril Eugene Pereira's case (supra).

6. Undoubtedly, in Cyril Eugene Pereira's case (supra), Hon'ble Authority for Advance Rulings, deviating from the stand taken by it in the earlier rulings including ruling in Mohsinally Alimohammed Rafik, In re (1995) 213 ITR 317 (AAR), concluded that, "an individual who is not liable to pay tax under the UAE law cannot claim any relief from the only tax on income which is payable in India under the agreement" and that "the provisions of the Double Taxation Avoidance Agreement do not apply to any case where the same income is not liable to be taxed twice by the existing laws on both the Contracting States". However, in Azadi Bachao Andolan's case (supra), Their lordships of Hon'ble Supreme Court, after referring to the said ruling and after elaborate discussions on the various aspects of this issue, concluded that "It is... not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States". The reasoning given by Their Lordships included the following :

According to Klaus Vogel, 'Double Taxation Convention establishes an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible. In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other Contracting State either entirely or in part, Contracting States are said to 'waive' tax claims or more illustratively, to divide 'tax sources', 'taxable objects', amongst themselves'. Double taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League

of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rules', the German jurists called it 'the distributive rules' (Verteilungsnormi). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the other Contracting State imposes a tax in the situation to which the exemption applies and irrespective of whether the State actually levies the tax. Commenting particularly on the German Double Taxation Convention with the United States, Vogel comments: "Thus, it is said that the treaty prevents not only 'current' but also merely 'potential' double taxation". Further, according to Vogel, "only in exceptional cases and only when expressly agreed to by the parties, is exemption in one of the Contracting States dependent upon whether the income or capital is taxable in the other Contracting State, or upon whether it is actually taxed there.

It is, therefore, not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States.

Clearly, therefore, there is no meeting ground between the ruling given by the Authority for Advance Rulings in Cyril Eugene Pereira's case (supra) and the judgment delivered by the Hon'ble Supreme Court in Azadi Bachao Andolan's case (supra). The choice, however, poses no difficulty in the light of the elementary legal position that the judgments of Hon'ble Supreme Court have binding force on all of us. Much as we respect the Hon'ble Authority for Advance Rulings, we regret our inability to follow the ruling which, in our humble understanding, has been clearly disapproved by the Hon'ble Supreme Court. It is not even open to us, even in a case in which our understanding of the issue on merits concurs with that of the Hon'ble

Authority for Advance Rulings in Cyril Eugene Pereira's case, to follow that school of thought.

7. Learned, Departmental Representative has invited our attention to the ruling given by the Authority for Advance Rulings in the case of Abdul Razak A. Meman, In re which supports the case of the Revenue and is said to be on exactly the same material facts. We are, however, unable to accept this plea and we decline to treat this as a sort of, to use the phraseology employed in legal parlance, a covered matter. As Hon'ble Supreme Court has duly taken (note) of in Azadi Bachao Andolan's case (supra), a ruling given by the Authority for Advance Rulings is not even binding on the CIT and authorities subordinate thereto, in any case except in the case of that very assessee in which such a ruling is given and even in such a case it is binding in respect of transaction in respect of which the ruling is given. Whatever be the respect and deference judicial authorities indeed have for the rulings given by the Authority, the Authority for Advance Rulings, not being a part of the judicial hierarchy, cannot lay down a binding precedent for anyone-the Revenue, the assessees or the appellate authorities. By no stretch of logic, therefore, a ruling given by the Hon'ble Authority of Advance Rulings, has any precedence value in general. Therefore, learned Departmental Representative's reliance on the ruling given in Abdul Razak A. Meman 's case (supra) by itself is not sufficient to decide the matter one way or the other. Learned Departmental Representative's contention is that as noncorporate entities are not taxable entities under the UAE Tax Decree 1969, such non-corporate entities, even though based in UAE, cannot be treated as 'resident' for the purposes of the India-UAE DTAA. Our attention is also invited to the learned AO's observations to the effect that "the provisions of the DTAA do not apply to any case which the same income is not liable to be taxed twice by the existing laws of both the Contracting

States" and that "since the assessee has failed to prove that it is paying taxes in UAE, the DIT relief sought by the assessee is rejected"; but it is the very proposition underlying these observations which was rejected by the Hon'ble Supreme Court holding that "it is... not possible for us to accept the contentions so strenuously urged by the respondents that the avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States". As we have noted earlier also, the Revenue is on record to have opposed the very argument that the Revenue has taken in the present case, as evident from the Hon'ble Supreme Court's following observation :

The appellants (i.e., Union of India) contended that, acceptance of the respondent's submission that double taxation avoidance is not permissible unless the tax is paid in both the countries is contrary to the intendment of Section 90. It is urged that Clause (b) of Sub-section (1) of Section 90 applies to a situation where income-tax has been paid in both the countries, but Clause (b) deals with the situation of avoidance of double taxation of income, inasmuch as Parliament has distinguished between the two situations, it is not open to a Court of law to interpret Clause (b) of Section 90, Sub-section (1) as if it were the same as situations contemplated under Clause (a).

The very contention which has been raised by the Revenue in this case was successfully challenged by the Union of India before the Hon'ble Supreme Court. It cannot be open to us to take any other view of the matter than the view so taken by the Hon'ble Supreme Court

8. Although the AO's objection to applicability of India-UAE tax treaty was only on the ground that the provisions of DTAAs do not come into play unless it is established that the assessee is

paying tax in both the countries in respect of the same income, in the grounds of appeal before us it is also contended that the assessee-company failed to produce any evidence to the effect that it was 'liable to pay taxes' in UAE. The question then arises whether an existing liability to pay taxes in UAE is a sine qua non to avail the benefit of India-UAE tax treaty in India. On this issue also, we find guidance from the judgment of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra). Referring to the Klaus Vogel's Commentary on Double Taxation Conventions. Their Lordships, inter alia, observed as follows :

In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other Contracting State either entirely or in part. Contracting States are said to waive 'tax claims' or more illustratively to divide 'tax sources', 'taxable objects', amongst themselves". Double 'taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rule', the German jurists called it 'the distributive rule' (Verteilungsnormi). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the Contracting State imposes a tax, in the situation to which the exemption applies and irrespective of whether the State actually levies the tax. Commenting particularly on the German Double Taxation Convention with the United States, Vogel comments: "Thus, it is said that the treaty prevents not only 'current' but also merely 'potential' double taxation.

It is thus clear that a tax treaty not only prevents current' but'also potential' double taxation. Therefore, irrespective of whether or not the UAE actually levies taxes on non-corporate entities, once the right to tax UAE residents in specified circumstances vests only with the Government of UAE, that right, whether exercised or not, continues to remain exclusive right of the Government of UAE. As noted above, the exemption agreed to under the 'assignment' or 'distributive' rule, is independent of 'whether the Contracting State imposes a tax in the situation to which exemption implies'. In the case of John N. Gladden v. Her Majesty the Queen 85 Tax Cases 5188, which was quoted with approval by the Hon'ble Supreme Court in Azadi Bachao Andolan's case (supra), Federal Court of Canada has observed that the non-resident can benefit from the exemption (under the treaty) regardless of whether or not he is taxable on that capital gain in his own country. If Canada or the US were to abolish the capital gains tax completely, while the other country did not, a resident of the country which has abolished the capital gains would still be exempt from capital gains in that other country". It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other country. All that is necessary for this purpose is that the person should be 'liable to tax in the Contracting State by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature' which essentially refers to the fiscal domicile of such a person. In other words, if fiscal domicile of a person is in a Contracting State, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State. The expression 'liable to tax' is not to read in isolation but in conjunction with the words immediately following it,

i.e., 'by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature'. That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that country. These tests of fiscal domicile which are given by way of examples following the expression liable to tax by reason of, i.e., domicile, residence, place of management, place of incorporation, etc., are no more than examples of locality-related attachments that attract residence type taxation. Therefore, as long as a person has such locality-related attachments which attract residence type taxation, that 'person is to be treated as resident and this status of being a 'resident' of the Contracting State is independent of the actual levy of tax on that person. Viewed in this perspective, we are of the considered opinion that being 'liable to tax' in the Contracting State does not necessarily imply'that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such persons irrespective of whether or not such a right is exercised by the Contracting State. In our humble understanding, this is the legal position emerging out of Hon'ble Supreme Courts judgment in Azadi Bachao Andolan's case (supra). The plea taken by the Revenue that the assessee was not 'liable to tax', which was anyway not taken by the AO or before the CIT(A), is also not sustainable in law either.

9. For the reasons set out above and even though we do not approve the reasoning adopted by the CIT(A), we approve the conclusion arrived at by the CIT(A). His having arrived at right conclusion may have been fortuitous but what is material is

that he reached the right conclusion. We approve his conclusion and decline to interfere in the matter.

……."

12. Hence, keeping in view, the parity of the facts, the judicial proposition laid down and in the absence of any contrary judgments brought to our notice, we hold that the assessee is eligible to get benefit of the India-UAE DTAA.

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

Order Pronounced in the Open Court on 23/10/2024.

Sd/-	**Sd/-**
(Yogesh Kumar US)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 23/10/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR