

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 2722/Del/2023
(Assessment Year: 2018-19)**

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| M/s. OHM Juniper Longterm Fund Ltd, 5 th Floor, Ebene Esplanade, 24 Cybercity, Ebene, Mauritius (Appellant) PAN:AACCO2383D | Vs. DCIT, International Taxation- 2(22)(2), New Delhi (Respondent) |
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| Assessee by : | Shri Kanchan Kaushal, Adv |
| Revenue by: | Shri Vizay B. Vasanta, CIT DR Shri Amit Katoch, Sr. DR |
| Date of Hearing | 20/09/2024 |
| Date of pronouncement | 22/10/2024 |

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.2722/Del/2023 for AY 2018-19, arises out of the order of the Assessing Officer/ DCIT, International Taxation, Circle-2(2)(2), New Delhi [hereinafter referred to as 'Id. AO', in short] in Appeal No. ITBA/AST/S/143(3)/2023-24/1053904658(1) dated 23.06.2023.

2. The assessee has raised the following grounds of appeal before us:-

"1. GROUND NO. I-DENIAL OF INDIA-MAURITIUS TAX TREATY BENEFIT

1.1 On the facts and in the circumstances of the case and in law, the learned DCIT has erred in making addition of Rs. 26,74,29,041 by denying the benefits of the India-Mauritius Tax Treaty by applying the test of beneficial ownership for Article 13 of India-Mauritius Tax Treaty and concluding that control and management of the appellate is outside Mauritius

1.2 The learned DCIT's application of beneficial ownership test to Article 13 of India-Mauritius Tax Treaty is concluded that the appellant does not have the requisite beneficial ownership in the capital gains unwarranted and not in accordance with the principles established under international tax law. Also, conclusion of the learned DCIT that the control and management of the appellate is outside Mauritius is based on inadequate and incorrect factual analysis, leading to an erroneous denial of Treaty benefits

2. Ground No. II - MISMATCH IN THE INCOME ASSESSED AS PER ASSESSMENT ORDER AND TAX COMPUTATION SHEET:

2.1 On the facts and in the circumstances of the case and in law, the learned DCIT has added the Short-Term Capital Gain (STCG) of Rs. 33,840 in total income considered for computation of taxes, without any discussion on the same in assessment order.

3. GROUND NO. IV - ERRONEOUS LEVY OF CONSEQUENTIAL INTEREST UNDER SECTION 234B & SECTION 234C

3.1 On facts and circumstances of the case, the learned DRP and DCIT has erred in levying consequential interest under Section 234B and section 234C of the Act, amounting to INR 2,45,25,144 and INR 20,484 respectively."

3. We have heard the rival submissions and perused the materials available on record. The assessee has been incorporated in Mauritius on 16.11.2015 as a private limited company under the Mauritius Companies Act, 2001. The assessee holds Category 1 Global Business license issued by Financial Services Commission, Mauritius (FSC). The assessee is also classified under the Professional Collective Investment Scheme as per Regulation 75(2)(a) of the Securities (Collective Investment Schemes and Closed End Funds) Regulations, 2008 of Mauritius. The assessee holds a Tax Residency Certificate issued by Mauritius Tax Authorities and is thus a tax resident of Mauritius. In India, the assessee is registered as a Foreign Portfolio Investor (FPI) with the Securities and Exchange Board of India (SEBI) as per SEBI (FPI) Regulations, 2014 for making investment in

Indian Capital Market. The assessee accordingly submitted that it is entitled to apply the provisions of India-Mauritius Double Taxation Avoidance Agreement (DTAA) to the extent they are more beneficial vis a vis the domestic tax provisions as per section 90(2) of the Act.

4. The assessee submitted that it was set up as a collective investment vehicle to pool in funds from various investors across the globe (i.e investors from across the globe have invested in assessee company fund through participating shares). It was submitted that the preference by the Global investors through Mauritius was on account of favourable regulatory environment, ease of doing business, ease of repatriation of money invested on account of the abolishment in 1994 of Exchange Control Regulations which facilitated free movement of foreign currency in and out of the country , confidentiality arising out of financial regulations, well developed legal system, political stability and economic policies making a reliable hub for investment activity and strategic location geographically amongst others. The assessee received the funds from various investors in the form of subscription to Class A redeemable participating shares, which were utilized to make investments in India. The assessee had appointed OHM Juniper Fund Management (Holding company) as an 'Investment Advisor' for the assessee company/ fund pursuant to an Investment Advisory Agreement to provide non-binding, non-exclusive investment advice and recommendation to the assessee for a consideration in the form of advisory fees. The Holding company had the license to operate as an Investment Advisor as per the provisions of Securities Act 2005 and the Securities (Licensing) Rules 2007. Also it held 100% stake in the assessee with no right of receiving dividends. All the dividends and profits belonged to the investors of the funds (i.e person subscribed to the Class A participating shares). The Investment Advisor

was responsible for advising the assessee on the purchase, monitoring and selling of securities and other assets, as permitted by and subject to the limitations and policies set forth in the Investment Advisory Agreement under the overall supervision of the Board of Directors of the assessee company.

5. The assessee carried out investment activities in equity shares and derivatives of Indian listed companies and currency derivatives and earned dividend income and capital gains from the same. During the year under consideration, the assessee had reported dividend income of Rs 49,26,155- which was claimed as exempt u/s 10(34) of the Act and Short Term Capital Gains (STCG) of Rs 26,74,29,041/- as under:-

a) STCG earned by the assessee on shares acquired prior to 1.4.2017 on which the assessee claimed the benefit of Article 13(4) of the India – Mauritius Treaty as not taxable – Rs 25,22,54,936/-

b) STCG earned by the assessee on shares acquired post 1.4.2017 which are taxable at the rate of 50% of applicable Indian tax rate as per Article 13(3A) read with Article 13(3B) and Article 27A of India Mauritius Treaty – Rs 1,51,74,105/-

c) The assessee incurred a Short Term Capital Loss (STCL) of Rs 12,53,721/- from derivative transactions which is exempt from tax in India under Article 13(4) of India Mauritius Treaty and accordingly, the same has not been carried forward to subsequent years.

6. The assessee furnished all the details pertaining to the aforesaid transactions together with its company structure, holding structure and holding of bank accounts before the Id. AO. The Id. AO however rejected the claim of the assessee by denying the benefits of Article 13(4) of the India Mauritius Treaty by observing as under:-

"A. TRC is not a sufficient evidence to establish Tax residency in Mauritius. B. 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.

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

D. 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 and it does not fulfill the requirement of management control as per section 71(4) of the Financial Service Act 2007.

E. The appellant does not have any Mauritius resident full time Director working for the company (Directors of assessee company Mr. Boopendradas Sungker and Director Ms. Suzanne Gujadar, who as per their LinkedIn profile are actually working as Director and Managing Director at International Proximity Ltd respectively thus they are not full time directors but rather part time associated with assessee company).

F. No remuneration was paid to the directors of the company who are not even full time directors of the assessee company and instead such remuneration, if any is paid to the companies administrative entity i.e. International Proximity (No full time directors. Those appointed are from International Proximity Ltd.)

G. 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.

H. 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 and so it can be substantiated that there is no effective decision making work done at the level of assessee.

I. 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 International Proximity Ltd in Mauritius.

J. Since there is no fixed asset present from where operation and management of the company was carried, it appears that assessee is not carrying out any commercial/business activity. It is merely a passive entity for giving colour of investment through Mauritius for the sake of taking benefit of the India-Mauritius DTAA.

K. The main bank account signatories are not full time directors of the company.

L. The assessee has failed to provide any document regarding the residential status of Mr. Akshay Sahni.

M. The assessee company can only be treated as a conduit company set up with sole motive of gaining undue tax treaty benefit in Mauritius.”

7. The aforesaid observations of the Id. AO in the draft assessment order were upheld by the learned Dispute Resolution Panel (Id. DRP in short) , pursuant to which, the final assessment order stood passed in the hands of the assessee company reiterating the observations of draft assessment order. Against this final assessment order, the assessee is in appeal before us.

8. We find that the assessee holds a valid Tax Residency Certificate (TRC) issued by Mauritius Revenue Authority and the said certificate is valid for the period 17.11.2015 to 16.11.2021. These certificates are issued year on year by the Mauritius Revenue Authority and are enclosed in Pages 153 to 158 of the Paper Book, which clearly states that the assessee is assessed to tax under the Mauritius Income Tax Act. This certificate is issued after examining the provisions of section 73(1)(b) of Mauritius Income Tax Act, 1955 wherein a company is said to be resident in Mauritius if it satisfies either of below two conditions :-

a) It is incorporated in Mauritius; or

b) has its central management and control in Mauritius

9. The Id AR submitted that the assessee in the instant case satisfies both the above conditions. The control and management of the assessee company from Mauritius is governed by section 71(3)(a) of Mauritius Financial Services Act, 2007 which reads as under:-

A holder of a Global Business Licence shall, at all times –

- (i) Carry out its core income generating activities in, or from, Mauritius, as required under the Income Tax Act;*
- (ii) Be managed and controlled from Mauritius ; and*
- (iii) Be administered by a management company.*

10. As stated earlier, the assessee is holding a valid Category 1 Global Business Licence after examining the fact that business is managed and controlled from Mauritius and administered by a management company. The assessee had appointed a management company i.e. International Proximity as its Administrator in Mauritius. The office of International Proximity is situated in Mauritius. The Id AR also drew our attention to Page 166 of the Paper Book containing the certificate from the Secretary issued by the Company Secretary of International Proximity u/s 166(d) of the Mauritius Companies Act dated 27.9.2018 confirming that the assessee company had duly filed all the statutory returns with Registrar of Companies for the year ended 31.3.2018. It was specifically clarified by the Id AR that assessee company had to comply with the condition of it being administered by a management company in Mauritius and hence it was not obliged to incur operational expenses or hold fixed assets as alleged by the Id AO to deny the assessee the benefit of the Treaty provisions. The management company in terms of its agreement also provides the assessee the competent Board of Directors. The assessee for the year ended 31.3.2018 had incurred an expense amounting to USD 19540 which was paid to the management company for providing

administration services to the assessee. Hence the allegation raised by the Id AO that no remuneration was paid to the Directors of the assessee company is devoid of merit. Apart from this, the assessee on its own had also spent USD 4707592 for the year ended 31.3.2018 as is evident from the financials of the assessee company. Hence the assessee had duly complied with provisions of Article 27A(4)(b) of India Mauritius Treaty.

11. The Directors provided by the management company are residents of Mauritius and had attended all the Board Meetings in Mauritius, which goes to prove that all the decisions were taken by the competent Board of Directors and the Directors were paid by the assessee through the management company. Hence the operation and management of the assessee was in Mauritius. The Id AR also drew our attention to provisions of Section 71(3)(b) of Mauritius Financial Services Act, 2007 which defines the conditions necessary to establish if the conduct of business is being managed and controlled from Mauritius. The Board of Directors retains the responsibility and accountability for the overall management of the assessee company, which includes all administrative services, distribution of securities of the assessee, maintaining accounting records of the assessee, giving investment strategy advice and continuous monitoring of the management of the portfolio of the assessee.

12. The purpose of making investments through Mauritius company was duly explained by the assessee giving the commercial reasons thereon. We find that the assessee had made the following investments as on 31.3.2018 in India:-

| <i>Sr. No.</i> | <i>Scrip Name</i> | <i>Quantity</i> | |
|----------------|---------------------------|-----------------|--------------|
| 1 | BANK OF BARODA | 12,50,000 | 23,27,92375 |
| 2 | BHARAT FINANCIAL INCLUSIO | 6,00,000 | 48,9833,012 |
| 3 | COX AND KINGS LTD | 9,38,992 | 17,67,07327 |
| 4 | DIVIS LABORATORIES LTD | 1,40,000 | 12,19,57,136 |
| 5 | DR. REDDY'S LABORATORIES | 50,000 | 12,05,40,295 |

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|----|---------------------------------------|--------------------|-----------------------|
| 6 | <i>EROS INTERNATIONAL MEDIA LTD</i> | <i>1,54,301</i> | <i>3,43,00,757</i> |
| 7 | <i>HINDUSTAN CONSTRUCTION CO LTD</i> | <i>32,00,000</i> | <i>10,24,64,000</i> |
| 8 | <i>INDIABULLS REAL ESTATE LTD</i> | <i>10,15,000</i> | <i>17,50,00,100</i> |
| 9 | <i>JINDAL STAINLESS LTD</i> | <i>3,00,000</i> | <i>3,04,06,440</i> |
| 10 | <i>JUBILANT FOODWORKS LTD</i> | <i>2,08,837</i> | <i>23,00,48,510</i> |
| 11 | <i>MANPASAND BEVERAGES LTD</i> | <i>3,48,164</i> | <i>12,27,27,810</i> |
| 12 | <i>SHRIRAM CITY UNION FINANCE LTD</i> | <i>62,664</i> | <i>12,90,55,575</i> |
| 13 | <i>SINTEX PLASTICS TECHNOLOGY LTD</i> | <i>5,00,000</i> | <i>3,21,08,060</i> |
| 14 | <i>TV 18 BROADCAST</i> | <i>50,00,000</i> | <i>22,91,52,950</i> |
| 15 | <i>UNITED SPIRITS LTD</i> | <i>75,000</i> | <i>16,46,88,557</i> |
| 16 | <i>VIKAS ECOTECH LTD</i> | <i>8,00,000</i> | <i>2,96,29,120</i> |
| | Total | 1,46,42,958 | 2,42,14,31,924 |

13. The assessee also furnished the computation of income for the subsequent assessment years to prove that it had duly paid capital gains tax in India on sale of investments made in the respective years and placed evidence to that effect vide letter dated 14.6.2024 at the instance of the Bench.

14. The Id AR also made a statement from the Bar that the operations of the assessee company continued in India till 2023 and thereafter the assessee had exited from all the investments in India. The assessee had maintained its principal bank account with Barclays Bank (Mauritius) Ltd at Mauritius. The assessee had maintained proper accounting records in Mauritius as certified by the Independent Auditor in Mauritius and as stated earlier had filed its statutory returns with the Registrar of Companies for the year ended 31.3.2018 in Mauritius as per the requirements of Mauritius Companies Act, 2001. The assessee had submitted the minutes of the Board Meetings on various dates along with the submissions filed before the Id. AO on 7.8.2022 to drive home the point that the two Directors provided by the management company had attended the board meetings at Mauritius and had participated in the various investment and strategic business decisions of the assessee company at Mauritius. The assessee's business plan, legal and beneficial

ownership details and requisite due diligences and checks with respect to the assessee were duly disclosed to the Mauritius regulator at the time of obtaining Category 1 Global Business License. The Id AR vehemently relied on the CBDT Circular No. 682 dated 30.3.1994; Circular No. 789 dated 14.4.2000, Press Release issued by the Finance Ministry dated 1.3.2013 , decision of Hon'ble Supreme Court in the case of Union of India vs Azadi Bachao Andolan and another reported in 263 ITR 706 (SC), decision of Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. reported in 341 ITR 1 (SC), decision of Hon'ble Bombay High Court in the case of CIT vs JSH Mauritius Ltd reported in 297 CTR 275 (Bom) and decision of Hon'ble Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA reported in TS-57-HC-2013 (AP) to drive home the point that Tax Residency Certificate is sufficient proof to recognize residency in a particular country and hence the assessee would be entitled consequentially for the treaty benefits provided in India Mauritius DTAA.

15. We deem it fit to discuss the essence of the various circulars and press release of Finance Ministry. CBDT Circular No. 789 dated 13.4.2000 stipulates that TRC is sufficient evidence to show residence and beneficial interest/ ownership and the revenue cannot at the time of sale/ disinvestment / exit from such FDI, deny benefits of the DTAA. In this regard, while introducing section 90(5) of the Act by the Finance Bill, 2013, the argument of the revenue that TRC shall be a necessary eligibility condition but shall not constitute sufficient evidence of residency and shall not be binding on the authorities, was considered. Serious concerns were expressed by the Foreign Investors with regard to the aforesaid proposed amendment. On 1.3.2013 (i.e the immediate next day of introducing Finance Bill 2013 on 28.2.2013), the Hon'ble Finance Minister vide Press

Release clarified, "The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status". We find that the reliance in this regard placed by the Id AR on the decision of Hon'ble Punjab & Haryana High Court in the case of Serco BPO (P) Ltd vs Authority for Advance Rulings, Delhi reported in 60 taxmann.com 433 (P&H) is very well founded, wherein the Hon'ble High Court after tracing the entire history of CBDT Circulars, legislative amendments and judicial pronouncements held that TRC is sufficient to claim relief under the DTAA. The relevant operative portion of the said judgement is reproduced below:-

"14. The DTAC is itself clear. We are however, saved the exercise of analyzing it in depth on its own terms in view of the circulars issued by the Central Board of Direct Taxes under Section 119 in respect of DTAC which are of crucial importance. Our task is made simpler still in view of the judgment of the Supreme Court in Union of India v. Azadi Bachao Andolan, [2004] 10 SCC 1. We will, therefore, refer to the circulars immediately.

15. (A) Circular No. 682 dated 30-3-1994, issued "Clarification regarding agreement for avoidance of double taxation with Mauritius".

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(B) Circular No.789 dated 13.04.2000 is important and reads as under:—

'Circular No.789, dated 13-4-2000

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26. This brings us to a consideration of Mr. Joshi's submission on merits before us.

Mr. Joshi contended that the real beneficiaries of the transaction do not actually reside and carry on business for gain in Mauritius and therefore, the entire transaction was nothing but a device for taking advantage of the DTAC between India and Mauritius. This he contended was a clear case of treaty shopping. He submitted that Blackstone Mauritius and Barclays cannot be considered to be residents of Mauritius as they have absolutely no business interest in Mauritius. They do not do any business in Mauritius. They have no manufacturing unit in Mauritius. They do not render any services in Mauritius and therefore, they cannot even to be considered to be residents of Mauritius. He submitted that in any event the real beneficiaries are the shareholders of these companies and they do not reside in Mauritius. Therefore, the Residency

Certificate issued in favour of Blackstone Mauritius and Barclays are irrelevant and is of no consequence whatsoever. He further contended that these companies are not liable to pay capital gains tax in Mauritius.

27. *The matter is covered in favour of the petitioner by the provisions of the Income Tax Act, the said Circulars issued under Section 119 of the Act and most important by the judgment of the Supreme Court in Azadi Bachao Andolan (supra).*

28. *The first question is whether Blackstone Mauritius and Barclays are residents of Mauritius. It is important firstly to note that Tax Residence Certificates were issued to Barclay (H&B) Mauritius Limited and Blackstone Mauritius both valid till 10.12.2011.*

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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.*

31.

33. *Sub-section (4) merely requires a certificate of being resident. The newly added sub section (5) requires the person to also provide such other documents and information as may be prescribed. Nothing has been prescribed to date.*

34. *The entire sequence of events namely the Finance Bill, 2013, the clarification issued by the Finance Ministry regarding the Tax Residency Certificate dated 01.03.2013 and the Finance Act, 2013 establish beyond doubt that the Residence Certificate issued by the Mauritius authorities must be accepted provided of course it is established that it has been issued by the appropriate Mauritius Authorities. As we mentioned earlier it is not disputed that the Residence Certificate relied upon by Blackstone Mauritius and Barclays were issued by the Mauritius authorities.*

(EMPHASIS SUPPLIED BY US)”

16. The Id AR made a statement from the Bar that the aforesaid decision has been accepted by the department and not challenged before the Hon'ble Supreme Court.

17. The Id CIT DR before us vehemently relied on the order of the Id. AO and also placed reliance on the recent protocol dated 7.3.2024 amending the India Mauritius Treaty. This was countered by the Id AR by stating that the said protocol is yet to be notified u/s 90 of the Act and hence in view of the recent decision of Hon'ble Supreme Court in the case of Nestle SA reported in 155 taxmann.com 384 (SC), the reliance on the protocol by the Id CIT DR would not advance the case of the revenue.

18. If the aforesaid observations and judicial precedents relied upon hereinabove are applied to the facts of the instant case, the STCG arising in respect of shares acquired prior to 1.4.2017 in the sum of Rs 25,22,54,936/- cannot be subjected to tax in terms of Article 13 of the India Mauritius Treaty. We further find that the very same issue was subject matter of consideration by the Co-ordinate Bench of this Tribunal in the case of Norwest Venture Partners X- Mauritius vs DCIT in ITA No. 2311/Del/2023 for Asst Year 2020-21 dated 19.3.2024 and the relevant operative portion of the said decision is reproduced below:-

"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.

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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.

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."

"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.....”

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28. 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 documents/submissions available on the basis of the assessment records. The ground of objection is disposed of accordingly."

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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."

19. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that assessee would be entitled to treaty benefits under Article 13 of India Mauritius DTAA and accordingly would not be liable to capital gains tax in respect of sale of shares that were acquired prior to 1.4.2017. Accordingly, the Ground Nos. 1.1. & 1.2. raised by the assessee are allowed.

20. The Ground No. 2 raised by the assessee is regarding mismatch in the income assessed as per assessment order and that recorded in the tax

computation sheet. We find from the perusal of the assessment order that there is absolutely no discussion made by the Id AO in the assessment order. Hence the addition of Rs 33,840/- made on account of STCG would be liable to be deleted as devoid of merit. Accordingly, the Ground No. 2 raised by the assessee is allowed.

21. The Ground No. 3 raised by the assessee is challenging interest u/s 234B of the Act which is consequential in nature. It is settled law that interest u/s 234C of the Act could be levied only on the returned income and not on the assessed income. The Id AO is directed accordingly.

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

Order pronounced in the open court on 22/10/2024.

-Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 22/10/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi