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

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

ITA No. 2289/Del/2022
Assessment Year: 2019-20

Sarva Capital LLC, C/o Dinesh Mehta & Co., CAs, 21, Dayanand Road, Darya Ganj, New Delhi **PAN: AACCL0102B** (Appellant)	Versus	ACIT, Circle 3(1)(2), International Taxation, New Delhi. (Respondent)

Assessee by : Sh. Hiren Mehta, CA &
Sh. Nirbhay Mehta, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing : 15.05.2023
Date of pronouncement: 10.08.2023

ORDER

Captioned appeal has been filed by the assessee challenging assessment order dated 19.07.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment year 2019-20, in pursuance to the directions of learned Dispute Resolution Penal (DRP).

2. Grounds Nos. 1, 3 and 7, being general grounds, do not require adjudication.

3. At the time of hearing, learned counsel appearing for the assessee, on instructions, did not press ground No. 2 along with its sub-grounds. Hence, these grounds are dismissed as not pressed.

4. In ground Nos. 4, 5 and 5.1, the assessee has raised the common issue with reference to applicability of beneficial provisions of India-Mauritius Double Taxation Avoidance Agreement (DTAA) to the income earned under the head 'capital gain'. In addition to the aforesaid grounds, the assessee has raised an additional ground vide letter dated 09.05.2023 on the issue of taxability of long-term capital gain from sale of shares under Article 13(4) of India-Mauritius DTAA. Since, the adjudication of additional ground does not require fresh investigation of facts and can be decided based on the facts already available on record, we are inclined to admit the additional ground.

5. As could be seen, grounds Nos. 4 & 5 of the main grounds as well as the additional ground are on the common issue of taxability or otherwise of capital gain from sale of equity shares under Article 13(4) of India-Mauritius DTAA.

6. Briefly, the facts relating to the issue are, the assessee is a non-resident corporate entity incorporated under the laws of Mauritius and a tax resident of Mauritius. As stated by the Assessing Officer, the assessee was incorporated primarily for the purpose of making investments in India in education space, agriculture, healthcare, microfinance institutions and other financial services. In course of its business activities, the assessee had made investment in Indian companies by way of equity shares. In the year under consideration, the assessee had sold equity shares of two Indian companies, viz., Sewa Gruh Rin Ltd. and Veritas Finance Pvt. Ltd. and derived income under the head 'long-term capital gain'. In the original return of income filed for the impugned assessment year on 13.03.2020, though, the assessee offered the income derived from sale of equity shares as capital gain, however, claimed it as exempt in terms of Article 13(4) of the India-Mauritius DTAA. Subsequently, on 13.03.2022, the assessee filed a revised return of income offering the long-term capital gain derived from sale of equity share of Veritas Finance Pvt. Ltd. under Article 13(3B) of India-Mauritius DTAA. In course of assessment proceedings, the Assessing Officer proceeded to examine assessee's claim of benefit in terms of Article

13(3B)/Article 13(4) of India-Mauritius DTAA. While doing so, he ultimately concluded that the assessee is not entitled for Treaty benefits due to the following reasons :

> "1. The scheme of arrangement employed by the assessee is a tax avoidance through treaty shopping mechanism.
>
> 2. The assessee company is just a conduit and the real owner is the shareholders/investors who are tax residents of different countries.
>
> 3. The TRC is not sufficient to establish the tax residency if the substance establishes otherwise.
>
> 4. The assessee company is also not a beneficial owner of income as control and dominion of fund is not with the company.
>
> 5. There is no commercial rationale of establishment of assessee company in Mauritius as the commercial outcomes would identical irrespective of location of funds."

7. Having denied the Treaty benefits to the assessee, the Assessing Officer brought to tax the entire long-term capital gain under the provisions of domestic law and accordingly, completed the assessment. Against the draft assessment order, so passed by the Assessing Officer, the assessee raised objections before learned DRP. However, learned DRP, in sum and substance, endorsed the views of the Assessing Officer.

8. Before us, learned counsel appearing for the assessee submitted, the assessee is not only incorporated in Mauritius but also a resident of Mauritius, which is demonstrated from the Tax

Residency Certificate (TRC) issued by Mauritius revenue authorities. He submitted, assessee's registered office is situated in Mauritius and it maintains regular books of account and other statutory records in the registered office. He submitted, the key policy decisions, such as, fund flow, investment activities, divestment of investments are taken collectively outside India by assessee's board of directors, who are all non-residents including the resident directors in Mauritius. In this context, he drew our attention to share holding patterns of the assessee company as well as the details of the directors. He submitted, the assessee is continued with its business activities as on date and is holding multiple investments in Indian companies. He submitted, the assessee was primarily incorporated for making investments in microfinance institutions in India and from this very institution, the assessee is making investments in India in more than 15 companies aggregating to US Dollar 58 million approximately. He submitted, all investment decisions have been taken in the board meetings in Mauritius. In this regard, he drew our attention to the details of board meetings held in the year under consideration, as placed in the paper book. Drawing our attention to the audited financial statement of the assessee, learned counsel submitted, the

assessee has incurred substantial operational expenditure in past years, which proves that neither it is a sham entity nor a conduit company, as alleged by the Assessing Officer. He submitted, once, the Mauritius Revenue authorities have issued TRC to the assessee, the residential status of the assessee cannot be doubted by the departmental authorities in view of CBDT Circular No. 789 dated 13.04.2000 and Circular No. 684 dated 30.03.1994. In this context, he also heavily relied upon the decision of Hon'ble Supreme Court in case of Union of India vs. Azadi Bachao Andolan, 132 Taxman 373 (SC). He submitted, even, the Hon'ble jurisdictional High Court in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd. vs. ACIT, 146 taxmann.com 569 (Del) has categorically held that tax authorities cannot go behind TRC, as the TRC issued by the competent authority of another country is sufficient evidence to claim Treaty eligibility, residential status and legal ownership. He also relied upon a decision of the Tribunal in case of MIH India (Mauritius) Ltd. vs. ACIT (ITA No. 1023/Del/2022). Thus, he submitted, in view of the binding judicial precedents, the departmental authorities could not have denied the Treaty benefits to the assessee by holding that the assessee cannot be treated as tax resident of Mauritius despite TRC,

having been issued in favour of the assessee. He submitted, the decision of the departmental authorities in denying the Treaty benefits to the assessee doubting the residency is all the more unacceptable considering the fact that in assessment year 2016-17 and 2017-18, the Assessing Officer, while, completing the assessments under section 143(3) of the Act has allowed Treaty benefits to the assessee in respect of capital gain. Thus, he submitted, rule of consistency has to be applied.

9. In so far as the merits of the issue is concerned, learned counsel submitted, though, the assessee on conservative basis had offered the capital gain from sale of shares of Varitas Finance Pvt. Ltd. under Article 13(3B) of India-Mauritius DTAA, however, capital gain from sale of equity shares is not at all taxable in view of Article 13(4) of the DTAA, as the shares were acquired prior to 01.04.2017 and the amended provisions of Article 13 as well as the limitation of benefit (LOB) clause as provided under Article 27A of the Treaty would not be applicable as it is applicable only with reference to Article 13(3B) of the Treaty.

10. Without prejudice, learned counsel submitted, the conditions of Article 27A are not applicable to the assessee, as the assessee cannot be considered to be a shell / conduit company, as neither the assessee has negligible or nil business operations nor its expenses are below the threshold limit prescribed in Article 27A. Thus, he submitted, the long-term capital gain derived from sale of equity shares is not taxable under any circumstance in case Article 13 of India-Mauritius DTAA is applied. Thus, he submitted, the long-term capital gain wrongly offered to tax in the revised return of income is not taxable under Article 13(4) of the India-Mauritius DTAA.

11. Strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted that the share holders of the assessee company are not based in Mauritius, but are residents of other countries. He submitted, all decisions relating these activities are taken out of Mauritius, as the board meetings are mostly through video conferencing. He submitted, since, the share holders are residents of countries, who have LOB clause incorporated in their respective Treaties in India, they have set up the assessee's company in Mauritius as a conduit for the purpose

of Treaty shopping. He submitted, the assessee does not have any second business activities in Mauritius and its investment activities in India after 01.04.2017 have reduced. Thus, he submitted, these facts suggest that the assessee has set up for availing Treaty benefits. He further submitted, the assessee's income in Mauritius is not taxable and over the years, it has shown loss. Thus, he submitted, the assessee is fiscally transparent entity. He submitted, since, the assessee is not liable to tax in Mauritius, it cannot be treated as a resident of Mauritius in view of Article 4(2) of the Treaty. Thus, he submitted, the long-term capital gain has been rightly brought to tax by applying the provisions of domestic law.

12. As regards, the additional ground, learned Departmental Representative submitted, in the revised return of income, the assessee itself has offered the capital gain to tax under Article 13(3B) of the Treaty. He submitted, the issue now raised was never raised before the departmental authorities. Therefore, the fresh claim made by the assessee should not be entertained.

13. We have considered rival submissions in the light of decisions relied upon and perused materials on record. The core issue arising

for consideration in this appeal is, whether, the assessee is entitled to the benefits of Article 13, more specifically, Article 13(4) of India-Mauritius DTAA *qua* the capital gain income. Undisputedly, the assessee is a tax resident of Mauritius holding valid TRC. However, the Assessing Officer has declined to grant Treaty benefits to the assessee for the following reasons :

(i) That the scheme of arrangement employed by the assessee is tax avoidance through treaty shopping mechanism;

(ii). that the assessee is set up as a conduit company and the beneficial owners of the capital gain income are residents of different countries;

(iii). that the TRC is not sufficient to establish the tax residency;

(iv). that the assessee is not a beneficial owner of income as control and dominion of fund is not with the assessee;

(v). that there is no commercial rationale of establishment of assessee in Mauritius as it has nil or negligible business; that the assessee cannot be a tax resident of Mauritius , as it is not

liable to tax in Mauritius in terms of Article 4(1) of the Treaty. Of course, learned DRP has agreed with the views expressed by the Assessing Officer.

15. Keeping in view the aforesaid observations of the departmental authorities, let us examine the issue at hand.

16. First and foremost, the residential status of the assessee needs to be decided. As discussed earlier, from its very inception, the assessee has been granted TRC by Mauritius tax authorities. Though, the Assessing Officer is conscious of this fact, however, he has brought the theory of substance over form to deny Treaty benefits to the assessee despite valid TRC. In our view, the aforesaid decision of the Assessing Officer cannot be accepted under any circumstance. Now, it is well settled that once the tax resident of Mauritius is holding a valid TRC, the Assessing Officer in India cannot go behind the TRC to question the residency of the entity. In fact, since, there were considerable number of disputes due to non-acceptance of TRC as a valid piece of evidence for tax residency by the departmental authorities, the CBDT issued circular No. 789 dated 13.04.2000, specifically, with reference to India-Mauritius DTAA

clearly stating that once, the TRC has been issued by the competent authority of the other tax jurisdiction, it will be treated as a valid piece of evidence in so far as tax residency status is concerned. The sanctity of the aforesaid circular issued by the CBDT was challenged before the Hon'ble High Court and while, ultimately, deciding the issue, Hon'ble Supreme Court in case of Union of India vs. Azadi Bachao Andolan (supra), not only upheld the validity of Circular No. 789 dated 13.04.2000, but held that once, the TRC has been issued by the competent authority of the other country, it will demonstrate the tax residency of the entity and the concerned entity would be eligible to avail the benefits under India-Mauritius DTAA. The ratio laid down by the Hon'ble Supreme Court as aforesaid, was followed subsequently in a number of decisions and in a recent decision of Hon'ble jurisdictional High Court in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd. vs. ACIT (supra), has reiterated that the tax authorities in India cannot go behind the TRC issued by the competent authority in other tax jurisdiction, as the TRC is sufficient evidence to claim not only the residency and legal ownership but also Treaty eligibility. In case of MIH India (Mauritius) Ltd. vs. ACIT (supra), identical view has been expressed by the

coordinate Bench. Thus, in our view, the Assessing Officer has committed a fundamental error in denying Treaty benefits to the assessee in spite of the fact that the assessee is having a valid TRC.

16. One more objection of the Assessing Officer is that the assessee, being a fiscally transparent entity having no liability to tax in Mauritius due to exemption in capital gain income under the domestic laws of Mauritius, cannot claim benefits of avoidance of double taxation. In our view, this issue has also been addressed by Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra). While dealing with this particular issue, the Hon'ble Supreme Court interpreted the expression "liable to taxation" as used in Article 4 of India-Mauritius DTAA as well as the domestic law of Mauritius and held that merely because tax exemption under certain specified head of income including capital gain from sale of shares has been granted under the domestic tax laws of Mauritius, it cannot lead to the conclusion that the entities availing such exemption are not liable to taxation. The Hon'ble Supreme Court categorically rejected Revenue's contention that avoidance of double taxation can arise only when tax is actually paid in one of the contracting States.

Hon'ble Court held that 'liable to taxation' and 'actual payment of tax' are two different aspects. Thus, keeping in view the ratio laid down by Hon'ble Supreme Court, as aforesaid, the reasoning of the Assessing Officer that since, the assessee is not liable to tax under Article 4 of the India-Mauritius Treaty, it cannot claim benefit of Treaty provisions, is liable to be rejected.

17. In so far as the allegation of the Assessing Officer that the assessee has been set up as a scheme of arrangement for tax avoidance through Treaty shopping, in our view, such allegation of the Assessing Officer is thoroughly misconceived and not borne out from any material/evidence brought on record. Further, the allegation of the Assessing Officer to the effect that the assessee is a conduit company is also not borne out from any cogent evidence or material brought on record by the Assessing Officer. The allegation of the Assessing Officer regarding absence of commercial rationale or substance behind setting up of the assessee company, is also in the realm of imagination, rather than based on any concrete evidence. Moreover, the departmental authorities have miserably failed to establish the fact of the assessee, being a conduit company with

reference to Article 27A of India-Mauritius DTAA (Limitation on Benefit clause). Therefore, having regard to the relevant facts and ratio laid down in the judicial precedents, discussed above, we have no hesitation in holding that the assessee, having been granted a valid TRC, has to be treated as tax resident of Mauritius, hence, eligible to avail benefit under India-Mauritius DTAA.

18. Having held so, now, it is necessary to deal with the issue, whether, capital gain derived by the assessee from sale of equity shares is exempt under Article 13(4) of India-Mauritius tax Treaty. As discussed earlier, in the year under consideration, the assessee has derived capital gain from sale of equity shares of two companies, viz., Sewa Gruh Rin Ltd. and Veritas Finance Pvt. Ltd. In so far as sale of equity shares of Sewa Gruh Rin Ltd. and the resultant capital gain of Rs. 92,28,289/- is concerned, in our view, there cannot be any dispute with regard to assessee's claim of exemption under Article 13(4) of India-Mauritius DTAA, as, undisputedly, the shares were acquired prior to 01.04.2017. Therefore, the gain derived from sale of such equity shares is taxable only in the country of residence of the assessee, i.e., Mauritius and not in India. However, in so far as the

capital gain arising from sale of shares of Veritas Finance Pvt. Ltd. is concerned, the facts are slightly different. Though, in the original return of income, the assessee claimed the resultant capital gain to be exempt under Article 13(4), however, subsequently, the assessee filed revised return of income offering the capital gain to tax under the provisions of Article 13(3A) read with Article 13(3B) of the Treaty by claiming beneficial tax rate under grandfathering clause.

19. Before us, the assessee has raised an additional ground reversing the stand taken in the revised return of income and has claimed exemption under Article 13(4) of the Tax Treaty in respect of capital gain arising from sale of equity shares of Veritas Finance Pvt. Ltd. It is the case of the assessee that it had acquired the cumulative convertible preference shares (CCPS) of Veritas Finance Pvt. Ltd. on 18.03.2016, whereas, the CCPS were converted to equity shares on 04.08.2017. Thus, it is the case of the assessee that the shares of Veritas Finance Pvt. Ltd. were acquired prior to 01.04.2017, hence, it will not be covered under Article 13(3A) and 13(3B), rather, under Article 13(4) of the Treaty. In our considered opinion, assessee's claim is acceptable.

20. Undoubtedly, the assessee has acquired CCPS prior to 01.04.2017, which stood converted into equity shares as per terms of its issue without there being any substantial change in the rights of the assessee. As rightly contended by learned counsel for the assessee, conversion of CCPS into equity shares results only in qualitative change in the nature of rights of the shares. The conversion of CCPS into equity shares did not, in fact, alter any of the voting or other rights with the assessee at the end of Veritas Finance Pvt. Ltd. The difference between the CCPS and equity shares is that a preference share goes with preferential rights when it comes to receiving dividend or repaying capital. Whereas, dividend on equity shares is not fixed but depends on the profits earned by the company. Except these differences, there are no material differences between the CCPS and equity shares. Moreover, a reading of Article 13(3A) of the tax treaty reveals that the expression used therein is 'gains from alienation of **shares'.** In our view, the word '**shares'** bas been used in a broader sense and will take within its ambit all shares, including preference shares. Thus, since, the assessee had acquired the CCPS prior to 01.04.2017, in our view, the capital gain derived from sale of such shares would not be covered under Article 13(3A)

or 13(3B) of the Treaty. On the contrary, it will fall under Article 13(4) of India-Mauritius DTAA, hence, would be exempt from taxation, as the capital earned is taxable only in the country of residence of the assessee. No doubt, the assessee has offered the capital gain under Article 13(3B) of the Treaty in its revised return. However, that will not preclude the assessee from claiming benefit under Article 13(4) of the Treaty when the capital gain clearly falls within the ambit of Article 13(4) of the Treaty. In view of the aforesaid, we allow assessee's additional ground and hold that the capital gain derived by the assessee from the sale of equity shares is not taxable in terms of Article 13(4) of the India-Mauritius DTAA. Grounds are decided accordingly.

21. In the result, appeal is partly allowed.

Order pronounced in the open court on 10/08/2023.

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

Dated:
*aks/-

Copy forwarded to:
1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar
ITAT New Delhi