

ITAT: Affirms Mauritius DTAA benefit citing Azadi Bachao, commercial rationale & India's investment/business model

Jul 18, 2024

India Property (Mauritius) Company [TS-514-ITAT-2024(DEL)]

Conclusion

Delhi ITAT allows India Property (Mauritius) Company's (Assessee) appeal holding the transactions entered into by the Assessee to be genuine business activity; Thus, allows the benefit of Article 13(4) of Indo-Mauritius DTAA on long term capital gains of Rs. 152.61 Cr. derived on sale of shares of Indian entities basis holding a valid TRC issued by Mauritian Revenue Authority; While expounding on the facts, ITAT points out that Assessee made investments long back and apart from the disinvestment to earn the capital gain Assessee still holds a good investment; Assessee stated that divestments were made prior to FY 2017-18 on which no such capital gain was alleged by the Revenue and that it still had a considerable holding of approx. 10.06 Cr. as on Dec 31, 2022; Distinguishing the Bombay HC judgment in [Vodafone BV](#) as relied on by the Revenue questioning the TRC of the Assessee, ITAT states that Bombay HC had drawn a conscious distinction w.r.t the companies established for investments and has been interposed as the owner of the shares in India 'at the time of disposal of shares to a third party', solely with a view to avoid tax without any commercial substance; In the present case Assessee held investments for over five years before transfer, was earlier also making investments and divestments and still holds investment in various other companies, thus, could not be called a "fly by night operator" created merely for tax avoidance purposes; ITAT holds that in an investment company such transactions are obvious, observes that "...What is material is to see that for how long the investments were held and whether the investments had commercial expediencies "; While answering on the question of genuineness of the activities of Assessee, ITAT remarks that it is the wisdom and discretion of company as to how the day to day activities are managed and without establishing that administrative activities are being shown on sham basis, Revenue cannot question genuineness of the business operations of an Assessee; ITAT states that presumption of conduit status merely on basis of several transactions cannot be made, the commercial rationale for the existence of the Assessee in Mauritius is thus "not any scheme of tax avoidance but a business model to attract funds from different jurisdictions for investment in India"; Referring to the landmark Apex Court judgment in [Azadi Bachao](#), Tribunal opines "...when the whole endeavor of the Government of India is to procure investment in joint venture and infrastructure projects for the benefit of economy then attributing a malice to investment funds like the assessee is not justified."; ITAT observes that except for suspicion there was no evidence with AO to rebut the statutory evidence of presumption of genuineness of business activity of Assessee on basis of TRC held by the Assessee.:ITAT DEL

Decision Summary

The ruling was delivered by ITAT Bench comprising Shri G.S. Pannu, Vice President and Shri Anubhav Sharma, Judicial Member

Senior Advocate Ajay Vohra, along with Advocate Divyanshu Aggarwal appeared for the Assessee while the Revenue was represented by Vizay B. Vassanta, CIT(DR) and Vivek Vardhan, Sr. DR.

Facts:

The Assessee is a company incorporated in Mauritius and is engaged in the business of investment activities. The Assessee company claimed to be holding valid tax residency certificate ('TRC') and Global Business License-I ('GBL- I License') issued by the Financial Services Commission, Mauritius. During the year under consideration, the Assessee transferred shares of Indian Companies and thereby earned long term capital gains amounting to Rs. 152.61 Cr. on such transfers. In view of the provisions of section 90(2) of the Act, the Appellant claimed the aforementioned capital gains as exempt as per Article 13(4) of the India-Mauritius Tax Treaty. Accordingly, the return of income ('ROI'), was filed on Oct 30, 2018,

declaring NIL income and thereby refund of taxes deducted amounting to Rs. 40 Lacs was claimed in the ROI. Subsequently, the case was selected for scrutiny and in pursuance to the directions of the DRP, the AO, denied the Treaty benefits and passed the final assessment order, assessing the total income at Rs. 152.61 Cr. and raising a tax demand of Rs. 25.76 Cr. (including interest under section 234A and 234B of the Act).

Assessee placed reliance on various judicial precedents including SC in Azadi Bachao Andolan, Delhi HC in Blackstone Capital Partners, etc. to submit that the TRC was sufficient evidence for the purpose of claiming treaty benefits and the Revenue is under obligation to accept the status of residence as well as the beneficial ownership for the treaty benefits. Therefore, the capital gains earned during the year by the Assessee company were not taxable in India in accordance with beneficial provisions of Article 13(4) of Mauritius treaty.

Assessee company was incorporated in the year 2006 and is an Investment Fund, held 100% by India Property Mauritius Company I, (IPM-I) which was formerly known as JP Morgan Indian Property Mauritius Company I. IPM-I pools capital from investors based in multiple jurisdictions through series of fund investor vehicles/ feeder funds and invests in Assessee company by way of equity infusion. The Assessee company, in accordance with its investment objectives, made the impugned investments in Indian entities, being Grandeur Homes Private Limited (Demerged entity: Citadel Homes Private Limited) and ASF Insignia SEZ Pvt Ltd (formerly known as Canton Buildwell Private Limited; on demerger additional shares of Kings Canyon SEZ Private Limited and Grand Canyon SEZ Private Limited received), during the period FY 2007-08 to FY 2011-12, on various dates. These investments were made through proper banking channels, with appropriate Know Your Customer ('KYC') checks in place and in accordance with the FDI Regulations and FEMA. These investments were held as capital assets in its own right and the Assessee was the sole legal and beneficial owner of the shares. Hence, the shares held by the Assessee were in its own name - legally and beneficially, establishing the economic substance of the transactions. After holding these investments for a period of more than 5 years, the impugned shares were transferred and thereby capital gains were earned during the year under consideration.

Assessee has held TRC consistently over the years, since its incorporation and the Mauritius Revenue Authorities (MRA) have laid certain stringent conditions/ parameters, which were fulfilled by the Assessee company to enable it to obtain TRC. It was thus submitted that the Assessee cannot be called as fly by night operator and entering into preordained transactions created for tax avoidance purposes.

Case Law Information

Taxpayer Name

- India Property (Mauritius) Company

Judicial Level & Location

- Income tax Appellate Tribunal Delhi

Appeal Number

- ITA No.1020 /DEL/2023

Date of Ruling

- 2024-07-18

Ruling in favour of

- Assessee

Section Reference Number

- Art 13(4) India-Mauritius Treaty

Nature of Issue

- LTCC

Judges

- G.S. Pannu, Vice-President
- Anubhav Sharma, Judicial Member

Counsel for Tax Payer

- Mr. Ajay Vohra
- Divyanshu Aggarwal

Counsel for Department

- Vizay B. Vasanta
- Mr Vivek Vardhan