

ITAT: Not conclusive, but TRC 'statutory' evidence of residency; Shifts burden on AO

Jul 30, 2024

Tiger Global Eight Holdings [TS-543-ITAT-2024(DEL)]

Conclusion

In the case of Tiger Global Eight Holdings, Delhi ITAT holds assessee eligible to claim exemption under Article 13(4) of India-Mauritius DTAA, on sale of shares in Etechaces Marketing and Consulting (operating under brand name of 'Policybazar'), holding the Assessee to be a resident of Mauritius; ITAT notes that the assessee possesses a valid Tax Resident Certificate (TRC) issued by the authorities of Mauritius; While perusing the facts, Tribunal relies on CBDT Circular No. 682 dt. Mar 30, 1994 and [CBDT Circular No.789 dt. Apr 13, 2000](#) and SC judgements in [Azadi Bachao Andolan](#) and [Vodafone](#) and observes that the TRC is a statutory evidence of the residential status and even if it is not considered conclusive evidence, the onus shifts on the Revenue to establish that except for holding the TRC, the entity is a conduit, created and run for treaty shopping; Further, opines that, *"the minuscule percentage of the fund of the assessee, invested in India, as compared to the investments it has made across various economies, rebuts all the inferences drawn by the tax authorities below, questioning the substance over form of assessee and the same cannot be sustained."*; ITAT takes note that the Assessee made significant investments, has an office space in Mauritius where all its accounting records, registers, books of accounts and other statutory records are maintained, contains qualified board of directors and employees based out of Mauritius, prepares financial statements which are regularly audited by Mauritian firm and files the same with Mauritian authorities, files its income tax return and pays taxes in Mauritius, stating the place of central management and control to be in Mauritius; The Assessee has provided the composition of its Board with qualification of directors and it is sufficiently established that the directors are professionals with qualifications and experience to commensurate with the responsibility to manage the funds; Finds that Assessee's board of directors in Mauritius comprises of two directors who are residents of Mauritius and one US resident director and all meetings are physically chaired in Mauritius with majority of its board of directors being the residents of Mauritius; ITAT observes that the key decisions regarding investments and divestments are taken only by assessee's Board of directors and the Board of Directors have the sole authority over assessee's affairs, including the decision to invest into and ultimately sell the shares held in Policybazaar (impugned transaction); Thus Tribunal remarks that the Revenue failed to rebut the statutory evidence of the TRC with cogent evidence, and merely on the basis of suspicion and inferences, the assessee is alleged to be engaged in treaty shopping; ITAT further rejects Revenue's argument that the Assessee does not have any funds of its own and points out that it is due to the nature of its operation as investment platform and certainly when any gain is made out from the dis-investment, the benefit has to be transferred to those who had initially invested trusting the fund management skill of Assessee; Tribunal quips, *"... No doubt, the assessee is a dropdown entity associated with the entities operating in Cayman Island, but that does not taint the genuine activities as investment platform and the doctrine of 'substance over form' cannot be stretched to the extent, that merely because the assessee has associated enterprises operating from the Cayman Island, the investments which were made in a prestigious Indian company, in a initial years of its growth, would also become tainted."*; Thus, allows Assessee's appeal. :ITAT DEL

Decision Summary

The ruling is delivered by the Division Bench of Delhi ITAT comprising Shri G.S. Pannu, Vice President and Shri Anubhav Sharma, Judicial Member.

Senior Advocate Porus Kaka, along with Advocates Manish Kant and Ms Amrita Shenoy & Ms. Hetal Jakharia appeared for the Assessee while the Revenue was represented by Mr. Vizay B. Vasanta, CIT-DR.

Facts

Assessee, a Mauritius based Company, established for the purpose of acting as an investment platform for investing in countries in a regional grouping such as Cayman Islands and Asia, held shares in Etechaces Marketing and Consulting (operating under brand name of 'Policybazar'). In AY 2020-21, out of the total shares the Assessee sold 1581 shares which were acquired on Oct 13, 2017 and offered same to tax @ 10 %. Assessee paid tax of Rs. 40.427 Cr on these shares purchased after Apr 1, 2017. However, the long term capital gain from sale of 9013 shares was not offered to tax, as the same were purchased before April 1, 2017 and was claimed exempt under Article 13(4) of India-Mauritius DTAA. However, Revenue denied the DTAA benefit to the Assessee and held that the Assessee was unable to prove sufficiently that it is a resident of Mauritius, thus the said capital gains to be taxable under Section 112. DRP sustained the disallowance. Aggrieved, Assessee preferred the present appeal.

ITAT notes that the Assessee was established in 2014 and during the year of incorporation, itself made investment of Rs. 4030.087 Cr; Further notes that the Assessee possesses a valid Tax Resident Certificate issued by the authorities of Mauritius; Relies on CBDT Circular No. 682 dt. Mar 30, 1994 and [CBDT Circular No.789 dt. Apr 13, 2000](#) and SC judgements in [Azadi Bachao Andolan](#) and [Vodafone](#) and observes that the TRC is a statutory evidence of the residential status and even if it is not considered conclusive evidence, the onus shifts on the Assessing Officer to establish by evidences that except for holding the TRC, the entity is a conduit, created and run for treaty shopping; Points out that the Revenue considered various aspect such as purpose of investment, organisational set up, operating premises, management of affairs, distribution of gains, to hold the Assessee to be is a conduit, created and run for treaty shopping, thus Assessee cannot claim absolute immunity by merely holding a valid TRC;

Observed that the Assessee came into existence in 2014 as an investment platform for making investments located in various countries and the funds for the investments comes across various jurisdiction which inter alia includes retirement, trusts, schools, colleges, universities, insurance companies. Further observed that the Assessee, during the year of incorporation itself made investment of Rs. 4030.087 Cr and it has an office space in Mauritius, where all its accounting records, registers, books of accounts and other statutory records are maintained. Took note that, in addition to its qualified board of directors, it has employees based out of Mauritius and also filed its return of income in the country of residence i.e. Mauritius, for the relevant AY 2020-21 stating the place of central management and control to be in Mauritius; Found that the Assessee had been preparing the financial statements which are regularly audited by an accounting firm in Mauritius and filed on an annual basis with the Mauritian authorities; Further found that the Assessee files its income-tax return with the Mauritius tax authorities on a year-on-year basis and also paid taxes in Mauritius (USD 12,700 after claiming eligible credits).

Observed that the Assessee is controlled and managed by its board of directors in Mauritius which comprised of two Mauritian resident directors and one US resident director (Steven Boyd) and all meetings are physically chaired in Mauritius with majority of its board of directors being the residents of Mauritius. Observed that Assessee has provided the composition of its Board with qualification of directors and same is sufficiently satisfactory that the directors are professionals with qualifications and experience to commensurate with the responsibility to manage the funds. Found that one of the directors, Mr. Moussa Taujoo, who is a resident of Mauritius, is a qualified Chartered Certified Accountant with Diploma in Public Financial Mangement & Accounting and Chairperson of the Audit Practice Review Panel of the Financial Reporting Council and has been a Deputy Commissioner at the Independent Commission against Corruption and Head of the Supreme Audit Institution of Mauritius, Auditor General of Government of Mauritius and Chief Executive Officer of the Audit Department and Senior Internal Auditor, UNICEF and Director of Supreme Audit Institution of Mauritius. Further noted that another director, Ms. Dilshad Rajabalee, who is also a resident of Mauritius, is also a qualified member of the Association of Chartered Certified Accountants – United Kingdom and Earlier working with pricewater house coopers Mauritius in audit and assurance department. Stated that the US resident director, Mr. Steven Boyd, is a Juris Doctor from Georgetown University Law Centre and Bachelor of Arts.

Finds that key decisions with respect to the investment holding company and divestment decisions are taken only by the Board of directors of the Assessee and the Board of Directors have the sole authority over the affairs of the Assessee and the decision to invest into and ultimately sell the shares held in Policybazaar was taken by the Directors of the Assessee in Mauritius. Takes into account all the board minutes forming part of record before the Revenue which shows that the Assessee was controlled and

managed by its board of directors in Mauritius and all decisions with respect to the affairs of the company were taken by the Board itself in Mauritius. All SPAs for sale / transfer of shares have been executed by the Mauritian resident directors. Remarked that Revenue failed to rebut the statutory evidence of the TRC with cogent evidence, and merely on the basis of suspicion and inferences, the Assessee is held to be engaged in treaty shopping. Notes that the Assessee had no funds of its own was due to the nature of its operation as investment platform and certainly when any gain is made out from the dis-investment, the benefit has to be transferred to those who had initially invested trusting the fund management skill of Assessee.

Opined that, “No doubt, the assessee is a dropdown entity associated with the entities operating in Cayman Island, but that does not taint the genuine activities as investment platform and the doctrine of ‘substance over form’ cannot be stretched to the extent, that merely because the assessee has associated enterprises operating from the Cayman Island, the investments which were made in a prestigious Indian company, in a initial years of its growth, would also become tainted”. Held that the minuscule percentage of the fund of the Assessee, invested in India, as compared to the investments it has made across various economies, rebuts all the inferences drawn by the tax authorities below, questioning the substance over form of Assessee and the same cannot be sustained; Thus allowed Assessee’s appeal.

Case Law Information

Taxpayer Name

- Tiger Global Eight Holdings

Judicial Level & Location

- Income tax Appellate Tribunal Delhi

Appeal Number

- ITA No.2345/Del/2023

Date of Ruling

- 2024-07-26

Ruling in favour of

- Assessee

Section Reference Number

- Article 13(4) of Indo-Mauritius DTAA

Nature of Issue

- TRC

Judges

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

Counsel for Tax Payer

- Mr. Porus Kaka
- Mr. Manish Kant
- Ms Amrita Shenoy

- Ms. Hetal Jakharia

Counsel for Department

- Vizay B. Vasanta