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ITAT answers *'ES..SAR!'* on the question on sufficiency of TRC for India-Mauritius Treaty Benefits, emphasises on presence of Board & Board meetings to decide place of control & management

Snapshot

The Hon'ble Bench of Delhi ITAT[1] ruled that two Mauritius-based Essar Group companies were entitled to capital gains tax exemption under Article 13(4) of the India-Mauritius Double Taxation Avoidance Agreement (DTAA) for FY 2012–13. The Tribunal affirmed that the Taxpayers had actual control and management in Mauritius and a valid Mauritius Tax Residency Certificate (TRC) sufficed to claim treaty benefits, in the absence of any Limitation of Benefits (LOB) clause or Principal Purpose Test for the relevant year as these anti-abuse provisions came into effect only from April 2017.

The ITAT highlighted the board meetings and control were genuinely in Mauritius and the Taxpayers were not substance less entities. Hence, the Tribunal distinguished between genuine commercial substance and mere residency, ruling in favor of the companies since Indian tax authorities could not demonstrate Indian control. The Tribunal also pointed out that only the Mauritius Revenue Authority has the authority to determine a taxpayer's residential status under Mauritius law, and that the Indian tax authorities are not empowered to interpret or decide rights and obligations under foreign law.

Background & Context

This case before the Income Tax Appellate Tribunal (Delhi Bench) pertains to the assessment year 2012–13 and involves two Mauritius-based entities of the Essar Group - Essar Com Limited (ECOM) and Essar Communications Limited (ECL)- referred to collectively as 'the Appellants' or 'the Taxpayers'. The principal activity of the Appellants is to make and hold investments. The Appellants hold valid Tax Residency Certificates (TRC) issued by the Mauritius Revenue Authority (MRA) and Category 1 Global Business License issued by the Financial Services Commission, Mauritius since inception of the Taxpayers. Since the issues are common and the appeals are connected, hence the same were heard together and were being disposed off by the common order.

The key dispute centres around the taxability of capital gains arising from the sale of shares in Vodafone Essar Limited (VEL) to Euro Pacific Securities Limited (EPSL), a non-resident entity of the Vodafone Group. The Appellants claimed exemption from capital gains tax in India under Article 13(4) of the India-Mauritius Double Taxation Avoidance Agreement (DTAA), asserting their status as tax residents of Mauritius supported by TRCs issued by MRA.

[1] *Essar Com Limited & Essar Communications Limited vs ACIT [ITA Nos. 339 & 340/DEL/2022- Order dated 30th June 2025]*

The key legal issues of the case are as mentioned below:

- Whether the control and management of the Appellants were situated wholly in India, making them Indian tax residents under Section 6(3) of the Income-tax Act, 1961 (the 'Act').
- Whether the Appellants were entitled to the benefits of Article 13(4) of the India-Mauritius DTAA, which exempts capital gains tax in India for Mauritius residents.
- Whether the Appellants were conduit entities created solely to avail treaty benefits and avoid capital gains tax in India.

Taxpayers' Arguments

The Taxpayers in their arguments heavily relied on their Mauritius incorporation, valid TRCs, and board-level decision-making in Mauritius. They argued that the control and management of their affairs were exercised in Mauritius, not India. The Taxpayers also submitted the letter issued by MRA clarifying that the TRC was issued to them not only on the basis of the incorporation of the company in Mauritius but also on the basis of the control and management of the Taxpayers being in Mauritius. Accordingly, the capital gain arising on sale of shares by a resident in Mauritius would not be taxable in India.

It was further submitted that in the case of *UOI vs. Azadi Bachao Andolan (263 ITR 706) (SC)* wherein the validity of Circular No. 789 dated 13 April 2000 was in question, the Supreme Court has held that the Central Board of Direct Taxes (CBDT) was justified in issuing the aforesaid circular, since the action of the tax authorities bringing to tax the capital gains earned by Mauritian residents was contrary to the provisions of Article 13(4) of India-Mauritius DTAA. Therefore, the Supreme Court held that the CBDT was correct in issuing the aforesaid circular directing the Assessing Officers that wherever the TRC is issued by the MRA, the benefit of India-Mauritius DTAA is available to the taxpayer.

The validity of Circular No. 789 dated 13 April 2000 arose once again before the Supreme Court in the case of *Vodafone International Holdings B.V. vs UOI (341 ITR 1)* wherein the Supreme Court held that the presence of Circular No. 789 and TRC (which proves the residency and beneficial ownership of the person) is adequate/ sufficient for grant of benefits under the India-Mauritius DTAA to a taxpayer. It was further held that the tax department cannot at the time of sale/disinvestment/exit from such investments deny benefits of the DTAA to such Mauritius companies inter alia where such Mauritius company is not a fly by night operator.

It was also argued that with effect from 1 April 2017 amendments have been made to Article 13 of the India-Mauritius DTAA whereby Article 13(3A) has been inserted which provides that capital gain arising on transfer of shares, acquired on or after 1 April 2017, will be taxable in the country in which the company whose shares are sold is resident. Article 13(3B) further provides that the capital gain arising, on shares acquired on or after 1 April 2017 and it is ordinarily taxed in the residence country of the company whose shares are being alienated.

The Taxpayers submitted that the DTAA between India and Mauritius as it was in force for the year under consideration did not contain any Limitation of Benefit (LOB) clause which restricted the benefit available under Article 13(4) of the DTAA nor provided for any condition to be fulfilled for claiming the benefit of Article 13(4) of the DTAA.

Revenue's Arguments

The learned Departmental Representative argued that the capital gains earned by the Appellant on the sale of VEL shares were related to assets located in India in telecommunication sector which derived its value based on the economic activity and value

creation in India. The authorities concluded that the control and management of the Appellants is in India, have held that the agreements and the documents have been executed by employees of other Essar Group entities that are based in India and therefore the control and management of the Appellants is wholly situated in India. Consequently, the Appellants become residents of India in terms of section 6(3) of the Act and held that the entities were shell companies with no real commercial substance. They also argued that transfer of shares to Mauritius was a colourable device aimed at tax avoidance. The tax authorities have raised the allegation that ECL sold the VEL shares which were initially held by an Indian entity and subsequently transferred to ECL by adopting the voluntary liquidation route.

The Revenue accordingly argued that the benefit of Article 13(4) was not available in the case.

Observations and Decision of Hon'ble Bench of ITAT

Core Insights

The ITAT observed that the learned CIT(A) erred in failing to consider explanations / submissions made by the appellant which ought to have been considered (for the sake of brevity a few instances are illustratively summarised hereunder).

- Essar has its presence in Mauritius since 1992 and Essar group sector holding companies majorly operate from Mauritius and accordingly, the Appellant was not incorporated in Mauritius to avail treaty benefits on sale of VEL shares.
- The directors of the Appellant always comprised of people with significant qualifications and experience (as reflected by their profiles submitted), who were non-residents of India, except the nominee director appointed by lenders.
- The board minutes of the Appellant for FYs 2010-11 and 2011-12 had been contemporaneously maintained and shared with BLC Chambers and the report of BLC Chambers which was provided to the Mauritius Revenue Authority.
- The investment in VEL was made through the Appellant for legitimate commercial / business reasons.
- Liquidation cannot be a device to avoid taxation in India since, if taxability was the motive, ECML could have sold shares in the Appellant without undertaking liquidation of Essar Telecom Investments Ltd (ETIL) or the Appellant could have sold shares in ETIL and the benefits of the tax treaty inter alia would have been available and consequently the capital gains would not have been taxable in India on such sale of shares.
- The President of Mauritius, in a speech given on 17 August 2010, has recognised the fact that the Essar Group has made significant investments through Mauritius in various businesses internationally which has helped in the development of its economy.
- Further, it was also considered that the Taxpayer cannot be termed as a "substance less" entity since it is an investment holding company and have been undertaking requisite investment holding activities in Mauritius.

Head and Brain Test

The authorities failed to appreciate the difference between management control and shareholder control. For the purpose section 6(3) of the Act, what was required to be seen was *de facto* control, i.e., where the control and management is actually exercised.

In ITAT's view, the conditions of the control and management of the Taxpayer in India for being

resident in India during the relevant year were not been satisfied for the reasons mentioned below:

- The decisions to purchase VEL shares, to borrow money for purchase and sale of VEL shares have been taken by the board of directors.
- The board meetings of the Appellant have been held at its office in Mauritius since inception.
- The board of directors of the Appellant are residents of Mauritius/non-residents of India except Ms. Dina Wadia who has been appointed by the overseas lenders.
- The employees of the group companies were authorised by the board of directors to execute the transaction. Hence merely executing the transaction based on decisions taken by the board members cannot be perceived as control and management of the taxpayer was in India - this fact was accepted by the Departmental Representatives.
- The Revenue has not brought any material on record to demonstrate that the decisions have not been taken by the board of directors of the Appellants and much less such decisions have been taken in India. Therefore, the control and management is not wholly based in India and the allegation made by the lower authorities was baseless and contrary to evidence on record.

Residency Determination and Revenue Limits

The Hon'ble ITAT held that residential status of the taxpayer under Mauritius law can be determined only by the Mauritius Revenue Authority and the Revenue is not empowered to administer the same and determine the rights and obligations under foreign law. It also emphasized that it is incorrect on the part of the Revenue to rely on Klaus Vogel commentaries and foreign judgments to suggest that the Indian authorities can determine the residential status of a company under foreign law. In fact, the commentary of Klaus Vogel cited by the Revenue refers to two different views taken by two different countries. The contention of the Revenue is contrary to Circular No.682, 789, the judgments of the Supreme Court in Azadi Bachao (supra) and Vodafone (supra).

Clarification by CBDT

The Finance Bill 2013 had proposed an amendment to section 90 of the Act which provided that a TRC issued by a competent authority of another country is not sufficient to claim benefits of a DTAA notified under section 90 of the Act. The aforesaid amendment would have diluted the benefit available under Circular No. 789 which provides that the TRC issued by MRA is sufficient proof of residency and beneficial ownership for the purpose of Article 13(4) of the DTAA. However, the amendment proposed by the Finance Bill, 2013 was never implemented and on the contrary, a clarification was issued by the CBDT on 1st March 2013 stating that the TRC produced by a resident of a Contracting State will be accepted as evidence that it is a resident of a Contracting State and that tax authorities will not go behind the TRC and question the residential status.

The Principal Purpose Test

The Tribunal took note of fact that the DTAA between India and Mauritius as it was in force for the year under consideration did not contain any LOB clause which restricted the benefit available under Article 13(4) of the DTAA nor provided for any condition to be fulfilled for claiming the benefit of Article 13(4) of the DTAA. The Principal Purpose Test of incorporating the company in Mauritius for capital gain exemption purpose was brought in for the first time by the insertion of the LOB clause w.e.f. 1 April 2017 and, therefore, the capital gain exemption claimed by the Appellants cannot be denied on this ground.

Relevant Judicial Precedents

The judgment of the Delhi High Court in the case of Blackstone Capital Partners (Singapore) VI FDI Three Pte.Ltd.W.P.(C) 2562/2022 & CM APPL. 7332/2022 and the Bombay High Court in the case of Bid Services Division (Mauritius) Ltd. (WP No. 713 of 2021) had reiterated that the tax authorities cannot go behind the TRC issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residential status and legal ownership.

Keeping in view the aforesaid findings, the ITAT ultimately ruled in favor of the Appellants recognizing the commercial rationale behind the transactions and concluded that TRC issued by the MRA (based on incorporation and control and management) was a conclusive proof of beneficial ownership of the shares sold by the assesses. Hence gains from the sale of VEL shares were held as not taxable under Article 13(4) of the India-Mauritius DTAA.

KCM Comments

Courts have at multiple occasions recognised the use of tax efficient SPVs and have held that corporate structures are created for genuine business purposes generally, at the time when investment is being made. Multinational companies develop corporate structures, joint ventures for operational efficiency, tax planning, risk mitigation etc. such that better returns can be offered to their shareholders.

In this ruling, the Bench examined board minutes, director profiles, and decision-making processes and found that the control was indeed exercised from Mauritius and stated that the entities had legitimate business purposes, including investment holding and group financing. In this regard, the Tribunal upheld the legal sanctity of TRCs and referred to the history of CBDT circulars, legislative amendments and judicial pronouncements clarifying that wherever a certificate of residence is issued by the competent authority, such certificate will constitute sufficient evidence for claiming treat benefits (including the aspect of residence, legal ownership and beneficial ownership). However, it is important to note that the case matter of Blackstone Capital Partners (Singapore) is far from settled and we will have to wait for Supreme Court verdict on TRC being sacrosanct and acting as sufficient proof for tax residency, legal ownership and beneficial ownership.

While the Bench has emphasised on the importance of TRC as a valid document to substantiate residency and ownership, the ruling lays equal importance on the facts of the case, on the aspect of who truly controls and manages the company, and whether the transactions serve a genuine commercial purpose to claim tax treaty benefits. The judgment also underlines the need for clear LOB clauses in DTAA to prevent misuse of treaty provisions. Additionally, it

points to the role of judicial anti-avoidance principles in assessing cross-border transactions.

Overall, the ruling reinforces the continued significance of the 'control and management' test as a critical factor in determining the true nature of a transaction, especially in cases involving indirect transfers of business investments. It helps distinguish between legitimate tax planning and aggressive tax avoidance schemes.

For further analysis and discussion, you may please reach out to us.

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