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Present: Mr. Anupam Tripathi, Sr. Standing Counsel for the Appellant/Revenue.  
Mr. Ajay Vohra and Ms. Kavita Jha along with Mr. Somnath Shukla, Advocates for the Respondent.

**+ ITA Nos.1000/2011 & 1001/2011**

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It is an undisputed fact that India has entered into a Double Taxation Avoidance Agreement (DTAA) with United Arab Emirates (UAE). It is also an undisputed fact that as per the provision of this agreement, no tax is payable by non-resident on an income earned under short-term capital gain. This is specifically provided in Article 13(3) of the said DTAA between India and UAE. In the instant case, respondent /assessee, who is a resident of UAE, had filed return for the assessment year 2004-05 and declared income at ₹ NIL after claiming short-term capital gain of ₹77,10,248/- accrued to him in India as the same was not taxable in India due to benefits under DTAA between India and UAE invoking article 13(3) of the said treaty. The Assessing Officer, however, disallowed the exemption on the ground that there was no tax regime in UAE and as the assessee was not liable to taxation in UAE, the question of benefit under the said DTAA was not applicable. The assessee preferred an appeal before the CIT(A) which was allowed reversing the order of the Assessing Officer having regard to the judgment of the Apex Court in *Union of India v Azadi Bachao Andolan* (2003) 263 ITR 706. This view is upheld by ITAT in its order dated 24th September 2010 confirming the aforesaid view of CIT(A) and dismissing the appeal of the revenue. Challenging that order, the present appeal is preferred.



The only contention raised by the revenue in this appeal (which was based on the assessment order passed by the Assessing Officer) that in absence of any tax laws in UAE and as the respondent is not liable to pay the tax on the aforesaid short term capital gain in UAE, the provisions of DTAA would not be applicable as there is no question of avoiding payment of double tax in the said case. Howsoever attracted this proposition may be, we are not in a position to accept the same inasmuch as this very contention was negated by the Supreme Court in *Azadi Bachao Andolan* (supra). Interestingly, that was a case where Azadi Bachao Andolan had filed a Public Interest Litigation raising this contention which was accepted by the High Court. However, against that order, the appeal filed by none else than the Union of India itself and had argued that even if tax revenue actually paid by a non-resident in other country with which India has entered into such a treaty, that would be of no consequence and that contention was accepted by the Supreme Court in the following words:

*"The appellants (i.e. Union of India) contend that, acceptance of the respondent's submission that double taxation avoidance is not permissible unless the tax is paid in both countries is contrary to the intendment of section 90. It is urged that clause (b) of the sub-section (1) of section 90 applies to a situation where income-tax has been paid in both the countries, but clause (b) deals with the situation of avoidance of double taxation of income, inasmuch as Parliament has distinguished between the two situation, it is not open to a Court of law to interpret clause (b) distinguished between the two*



*situations, it is not open to a Court of law to interpret clause (b) of section 90 sub section (1), as if it were the same as situations contemplated under clause (a)"*

Having regard to the aforesaid pronouncement of the Apex Court which is binding on us, we are of the view that no question of law much less substantial question of law arises in these appeals. We, therefore, dismiss both these appeals.

A handwritten signature in black ink, appearing to read 'A.K. Sikri'.

**A.K. SIKRI, J.**

A handwritten signature in black ink, appearing to read 'M.L. Mehta'.

**M.L. MEHTA, J.**

**AUGUST 23, 2011**

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