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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 124/2024

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing Counsel along with Ms. Deeksha Gupta, Adv.

versus

SAIF II-SE INVESTMENT MAURITIUS LTD.

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Dr. Shashwat Bajpai, Mr. Mahir Khanna and Mr. Saransh Bhardwaj, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 19.02.2024

1. The Commissioner of Income Tax, International Taxation -3, has instituted the present appeal seeking to question the validity of the order of the Income Tax Appellate Tribunal [**'ITAT'**] dated 14 August 2023 and proposes the following questions of law for our consideration:-

a) Whether the ITAT has erred in law and in fact by holding that the treaty benefits of India- Mauritius Double Taxation Avoidance Agreement **['DTAA']** are

available to the assessee ignoring that scheme of arrangement employed by assessee is a tax avoidance through treaty shopping mechanism?

b) Whether the ITAT has erred in law by holding that treaty the benefits of India-Mauritius DTAA are available to assessee especially when it is clear from the arrangement that assessee Company is just a conduit and not a beneficial owner of income?

2. We note that the ITAT has on a due consideration of the transactions in question returned the following findings:-

> "16. It is further relevant to observe, assessee's holding company, viz., SAIF II, acquired 5% unlisted equity shares of NSE, being 22,50,000 shares at a price of USD 55.55 per share for a total consideration USD 125 million. At the time of acquisition of shares by SAIF II, the various regulatory authorities of the Government of India, such as, FIPB, SEBI, RBI, NSE India undertook due diligence with regard to the credentials of the assessee by verifying all the documents regarding the corporate structure of the company, beneficial ownership, financial structure and various other factors. While conducting the due diligence all necessary and relevant documents were examined, which clearly disclose the share holding pattern and structure of not only the assessee, but also assessee's holding companies and as also the holding company of SAIF II and SAIF III based in Cayman Island. After thoroughly conducting the due diligence, acquisition of shares by SAIF II was approved and Government of India issued a Press Release disclosing the FDI in relation to 13 entities, including assessee.
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> 17. Assessee's parent company subsequently transferred the shares of NSE to the assessee in the year 2009. At the time of transfer of shares from SAIF II to the assessee, the regulatory authorities again carried out due diligence and approved the transfer of shares. Again at the time of part sale of shares of NSE by assessee in the impugned assessment year, the regulatory authorities carried out the necessary verification as per the laid out procedure and approved the sale. Thus, as could be seen from the aforesaid facts, not only the acquisition of shares by the assessee, but even sale of shares was approved after thorough inquiry by various regulatory authorities in India.
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> 18. Thus, it has to be assumed that while granting approval the regulatory authorities have gone into the share holding and financial structure of the assessee and its parent companies and all other relevant factors. Thus, when the assessee holds a valid TRC all and Category 1

GBL and, moreover, the entire process relating to acquisition of shares of NSE and its sale went through a process of scrutiny and approval by various Government Authorities and Agency, doubt entertained by the Assessing Officer regarding residential and commercial status of the assessee company is quite surprising. The findings of the departmental authorities that the assessee is a conduit company lacking commercial substance runs in the teeth of approval granted by various Government agencies and authorities approving the purchase and sale of shares by assessee. Rather, the observations of the departmental authorities that assessee is a conduit implies that various other Government agencies have approved the purchase and sale of shares by the assessee, that too, of a Government company, without undertaking a reality check. In other words, the Assessing Officer is pointing an accusing finger to other Government agencies. This, in our view, is preposterous, hence, unacceptable.

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20. In case of Black Stone Capital Partners (Singapore) VI FDI Three Pte. Ltd. (supra), the Hon'ble Jurisdictional High Court has again reiterated the legal position that the departmental authorities cannot question the validity of TRC, which proves the residential status of the entity. Thus, applying the ratio laid down in these decisions, it has to be held that once the assessee holds a valid TRC, it proves the residential status of the assessee as resident of Mauritius, hence, it will be eligible to treaty benefits. The various allegations of the Assessing Officer regarding residential status of the assessee, lack of commercial substance etc. are in the nature of vague allegations without backed by substantive evidence, hence, do not deserve consideration. Unfortunately, learned DRP has merely endorsed the view expressed by the Assessing Officer without properly analyzing the facts and evidences brought on record.

21. In our view, the facts and materials available on record clearly establish that not only the assessee is a resident of Mauritius, but being a beneficial owner of the income derived from sale of shares, is entitled to the treaty benefits. Undisputedly, the shares sold by the assessee in the year under consideration were acquired in the year 2009, much prior to 01.04.2017. Therefore, the provisions of Article 13(3A) of the tax treaty would not be applicable. That being the case, the capital gain derived by the assessee from sale of shares would fall within the ambit of article 13(4) of the tax treaty. In that view of the matter, the capital gain, being exempt under the treaty provisions, cannot be brought to tax in India. Therefore, we direct the Assessing Officer to delete the addition. These grounds are allowed."

3. As would be manifest from a reading of the order impugned before us, the ITAT has essentially based its conclusions on the valid Tax Residency Certificate [**'TRC']** which was held by the assessee

and the following principles as laid down by this Court in **Blackstone Capital Partners v. Asst. CIT** [2023 SCC OnLine Del 475] :-

> **"93.** Accordingly, this court is of the view that the respondent-Revenue cannot go behind the tax residency certificate issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residence status, legal ownership and accordingly there is no capital gain earned by the petitioner liable to tax in India. Even the clarificatory press release dated March 1, 2013 issued by the Finance Ministry pursuant to the 2013 amendment makes it clear that a tax residency certificate is to be accepted and the tax authorities cannot go behind it. Further, since on the basis of repeated assurances by the Government of India which have been upheld by the apex court, the petitioner had invested in India, the respondent is estopped from arguing to the contrary."

4. In view of the aforesaid, we find no ground to interfere with the order impugned. The appeal raises no substantial question of law. Consequently, it fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 19, 2024/ RW