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CHARTERED ACCOUNTANTS

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Bombay High Court Allows Capital Gains Exemption to Singapore based FII; Holds Wrongful Application of Limitations of Benefit Clause by AO

Facts

The assessee is registered as a Foreign Institutional Investor (FII) in debt segment with Securities and Exchange Board of India (SEBI). The assessee has been investing in debt securities in India during the relevant A.Y. 2010-2011. On September 30, 2009, the assessee filed its return of income declaring total income of INR 33,99,75,350. Additionally, in its return, the assessee further declared a capital gain of INR 86,62,63,152 on the sale of debt instruments and claimed exemption under Article 13(4) of the INDIA-Singapore Double Taxation Avoidance Agreement (DTAA).

During the assessment, the assessee was asked to explain as to how Article 24 of the DTAA stood complied in order to claim capital gain as exemption in India. The assessee submitted that being an FII, the assessee was liable to tax in Singapore of its worldwide income. The assessee further submitted that the Singapore Revenue Authority had confirmed the taxation on the assessee vide their certificate dated April 4, 2012. Moreover, the assessee submitted that the as the assessee was offering worldwide income to tax in Singapore then remittance of such income to Singapore had no relevance for claiming benefit under DTAA. The AO, however, dismissed such contention of the assessee, holding that for the assessee to avail benefit under the DTAA, the assessee had to fall under the provisions of the DTAA. Instead, the AO held that although Article 13(4) allows for capital gain exemption in India, the provisions of Article 24 of DTAA provides for restriction of exemption on such capital gains in case of repatriation of such income to other country, being Singapore in this case.

Accordingly, the AO rejected the certificate issued by the tax authority in Singapore and opted to interpret the laws of Singapore himself. As such, relying on Article 24, the AO denied the exemption to the assessee. Consequently, the AO filed objections before the Dispute Resolution Panel (DRP), which upheld the draft assessment order of the AO. On the basis of DRP's findings, the AO passed the assessment order.

Aggrieved, the assessee appealed before the ITAT, which ruled in favor of the assessee. Consequently, the revenue filed an appeal before the Hon'ble High Court.

Ruling

The Hon'ble High Court ruled in favor of the assessee. It observed that since the property alienated are debt instruments, the assessee would fall under Article 13(4) of the DTAA, which states that gain from alienation of any property shall be taxable only in Singapore, of the alienator (in this case the assessee) is a resident. Accordingly, the entire capital gain of INR 82,58,83,330.

The court noted that the AO had wrongfully held that the assessee had not produced any evidence to show such required repatriation as mandated by Article 24 of the DTAA.

In the matter of the certificate issued by the Singaporean tax authorities, the court relied on the case of *Commissioner of Income Tax vs. Lakshmi Textiles Exporters Ltd. 245 ITR 522* to support its judgement. It held that when the Singaporean authorities had themselves certified that the capital gain income would be brought to tax in Singapore without reference to the amount received or remitted in Singapore, the "AO could not have come to a conclusion otherwise."

Source: High Court, Bombay in Commissioner of Income Tax (IT) -2 vs. M/s. Citicorp Investment Bank (Singapore) Ltd. vide ITA No. 256 of 2018 dated June 21, 2023

Bombay High Court Upholds ITAT Order; Payment for SAP Access Not Classified as Royalty

Facts

The assessee, Colgate Palmolive Marketing SDN BHD, is an entity incorporated in Malaysia and is engaged in the business of marketing, distribution and sale of household products, fabrics and personal care. Colgate Palmolive (India) Limited (CPI) entered into an agreement dated May 14, 1988 with the assessee for the use of assessee's SAP system.

As per this agreement, the assessee was to charge CPI for the use of the SAP system. CPI was required to make payments towards consideration for the use of the system, consideration towards rendering services comprising of costs of maintenance, up-gradation of the system to keep it functional and fees for training personnel for using the SAP system. For the F.Y. CPI paid to the assessee a sum of USD 11,80,500 for the use of SAP system and a further sum of USD 3,85,000 towards rendering aforementioned services.

During A.Y. 1999-2000, the assessee filed its return of income declaring Nil Income. In the course of assessment proceedings, the AO found out that the assessee had received USD 11,80,500 and USD 3,85,000 as mentioned above. The AO opined that these amounts received on account of use of assessee's SAP system would be classified as royalty under Explanation 2(iii) to Section 9(1)(vi) and proceeded to tax the same. Furthermore, the AO held that the amount received on account of rendering services was covered under fees for technical services and brought the same to tax as well.

Consequently, the assessee appealed before the Commissioner of Income Tax (Appeals), Mumbai [CIT(A)], who dismissed the assessee's appeal. Aggrieved, the assessee preferred an appeal before the ITAT which allowed the appeal in favor of the assessee.

As such, the matter reached the Hon'ble High Court upon appeal filed by the Revenue.

Ruling

The Hon'ble High Court ruled in favor of the assessee. For a comprehensive understanding of the matter, the court analyzed all relevant provisions of the law and held:

Foremostly, the court observed that as per section 90(2), if between the provisions of the DTAA and the Act, the provisions of the Act are more beneficial to the assessee, then the assessee can opt for taxation under the Act.

In this case, the court observed that, *"since, for the Assessment Year 1999-2000, the definition of royalty given in Explanation 2 to Section 9(1)(vi) did not include equipment royalty as Clause (iv a) was inserted into the said Section by the Finance Act 2001* ***only with effect from 1st April 2002, the Assessee was entitled to opt for taxation under the provisions of the Act."***

Therefore, the court held that the ITAT was correct in holding that the payment of USD 11,80,500 could not have been taxed as royalty.

Explanation 2 to Section 9(1)(vi): The court observed that for clauses Explanation 2 to Section 9 to apply, it would have been necessary that there was a transfer of any right in respect of a process or in any of the other things as mentioned such as imparting of information concerning the working or no use of any patent, invention, model, design, secret formula or process or trademark or similar property Since, the assessee only provided access to the SAP system to CPI, none of these conditions were met.

Explanation 6 to Section 9(1)(vi): the court opined that as rightly held by the ITAT, this explanation includes within the definition of process live transmission of programmes such as channel feed and not access of the SAP system of the Assessee as done by CPI, which is a standard facility provided by the Assessee to CPI and is used for input of data and generation of report.

Lastly, the court held that as the assessee does not have a Permanent Establishment in India and in accordance with Article 7 of the DTAA, the payment received by it from CPI would be business profit and hence not taxable in India.

Source: High Court, Bombay in Commissioner of Income Tax (IT)-2 vs. M/s Colgate Palmolive Marketing SDN BHD vide ITA No. 171 of 2018 dated June 21, 2023

Bombay High Court Allows DTAA Benefit to Alibaba Singapore; Revenue's Consideration of TRC and Infomedia as DAPE Rejected

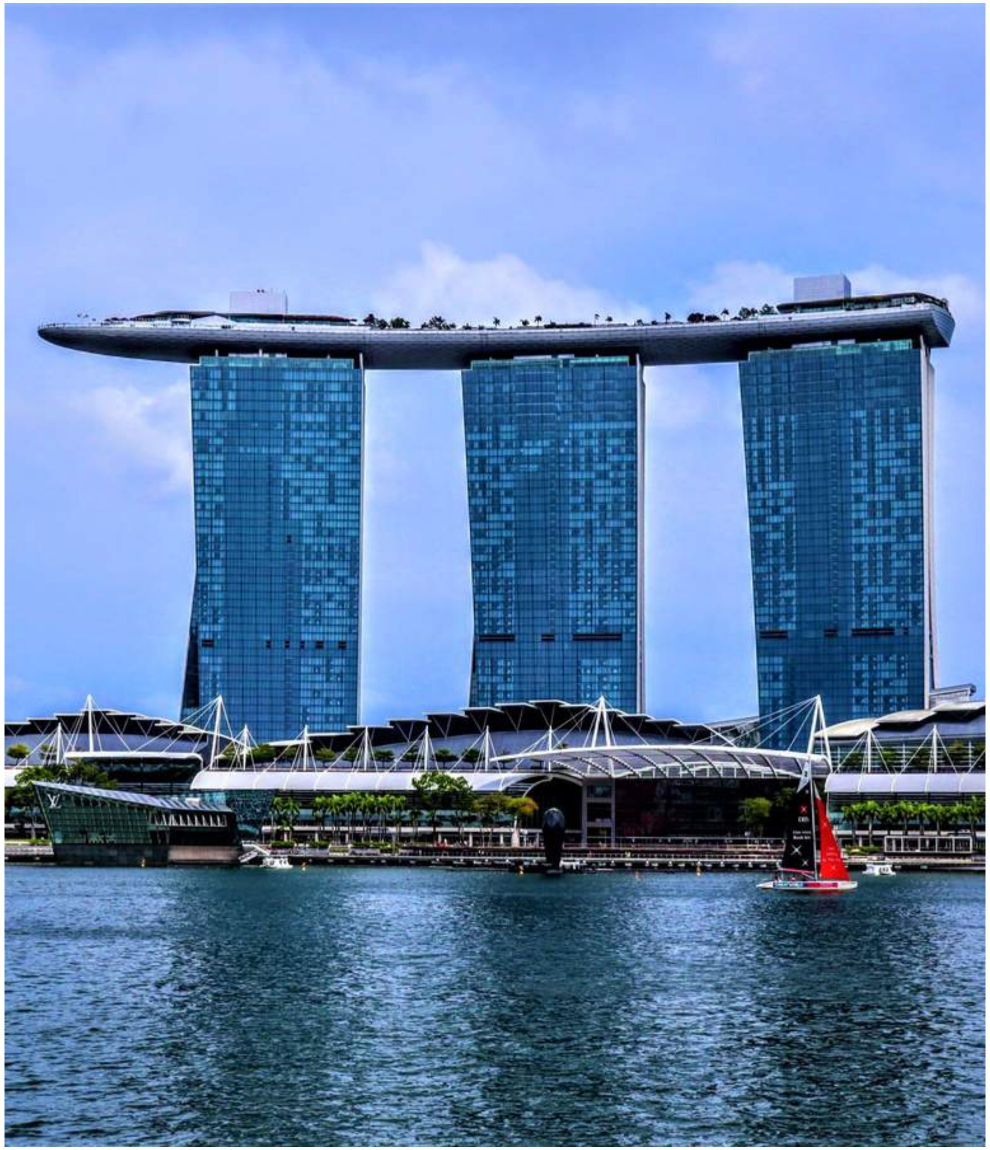
Facts

The Hon'ble High Court adjudged in favor of the assessee by upholding the order of the ITAT in full. It observed that the Tribunal had considered various documentary evidences, including the TRC of assessee. From this examination the Tribunal ascertained that the assessee cannot be considered as non-existent entity or some kind conduit of Alibaba Hong Kong, which was not even the parent company. Aside from the TRC, from the facts the Tribunal concluded that not only is the assessee assessed in Singapore but also the management of the assessee in Singapore. Additionally, the Tribunal found that the there is no connection or contract between Alibaba Hong Kong and the Indian subscribers or assessee's customers in India. Moreover, all the contractual rights, privileges and liabilities of the assessee under the agreement with the Indian subscribers solely lie with the assessee.

From a survey of the facts, the Tribunal noted that the in consideration of the provisions of section 9(1) (i) read with Explanation 2 and the proviso to the explanation, came to a finding that the assessee cannot be reckoned to have any kind of business connection in India in the form of Infomedia.

The ITAT opined that when Infomedia is not a dependent agent, then, in view of the above provisions the income of the assessee cannot be held to be deemed to accrue or arise in India in terms of section 9(1)(i) of the Act. Once the income of the assessee cannot be taxed as business income in India under 9(1)(i) then it is not necessary to go into the DTAA.

Source: High Court, Bombay in The Commissioner of Income International Taxation-1 vs. Alibaba.Com Singapore E. Commerce Private Ltd. ITA No. 212 of 2018 dated June 16, 2023



Ruling

The Hon’ble High Court ruled in favor of the assessee. For a comprehensive understanding of the matter, the court analyzed all relevant provisions of the law and held:

Foremostly, the court observed that as per section 90(2), if between the provisions of the DTAA and the Act, the provisions of the Act are more beneficial to the assessee, then the assessee can opt for taxation under the Act.
In this case, the court observed that, *“since, for the Assessment Year 1999-2000, the definition of royalty given in Explanation 2 to Section 9(1)(vi) did not include equipment royalty as Clause (iv a) was inserted into the said Section by the Finance Act 2001* ***only with effect from 1st April 2002, the Assessee was entitled to opt for taxation under the provisions of the Act.”***

Therefore, the court held that the ITAT was correct in holding that the payment of USD 11,80,500 could not have been taxed as royalty.

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Lastly, the court held that as the assessee does not have a Permanent Establishment in India and in accordance with Article 7 of the DTAA, the payment received by it from CPI would be business profit and hence not taxable in India.

Source: High Court, Bombay in Commissioner of Income Tax (IT)-2 vs. M/s Colgate Palmolive Marketing SDN BHD vide ITA No. 171 of 2018 dated June 21, 2023

ITAT Follows Blackstone Ruling; Holds Assessee Eligible to Claim DTAA Benefits on the Strength of TRC

Facts

The assessee, Sapiens Funds Limited (SFL), is incorporated and registered outside India according to law of Mauritius with permanent establishment in Mauritius and a Tax Residency in Mauritius. It is managed by Sapiens Capital (Mauritius) Limited (SCML), which including its directors is a tax resident of Mauritius.

The assessee is a Collective Investment Scheme (CIS), authorized and regulated by the Financial Service Commission (FSC), Mauritius. It's registered with SEBI as a Foreign Portfolio Investor (FPI) and has no establishment in India.

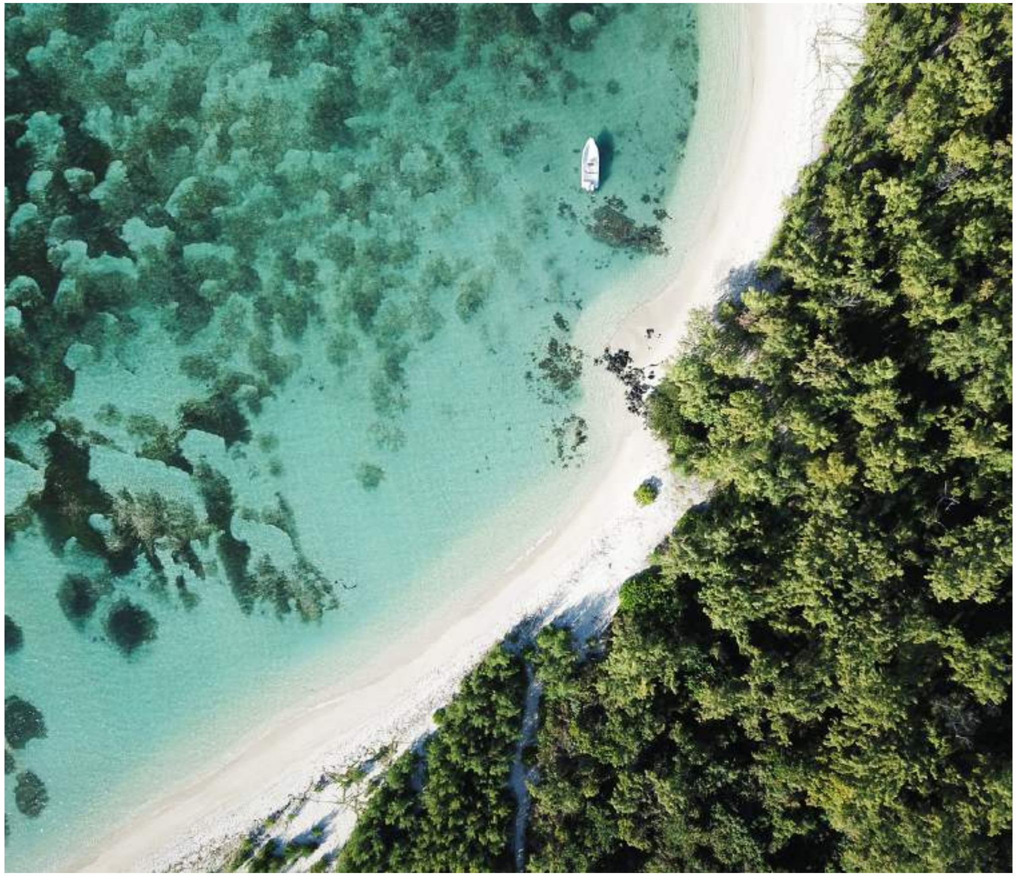
For F.Y. 2017-18 the assessee showed income of INR 12,93,77,569 as exempt income. The case was selected under CASS for the following reasons:

- Foreign Remittances made to person(s) located in low tax jurisdiction countries (assessee being remitter).
- Value of foreign remittances sent by the assessee is higher than the gross total income (assessee being remitter).

The assessment was completed under section 143(3) after considering the exempted income accepted the returned income as Nil.
The CIT held that during the assessment proceedings for the year under the consideration the AO has not obtained the nature of income claimed as exempt nor had he verified the claim of INR 12.93 Cr. The CIT held that the AO has not obtained any explanation to determine the assessee's contention that such income is not chargeable to tax.

The PCIT, after examination of the details and explanation given by the assessee, held that the assessee is not entitled to benefit of Article 11 of the India-Mauritius DTAA. Consequently, the CIT held that the income would be chargeable to tax in India on gross basis at the tax rate as per section 115A of the Income tax Act.

Aggrieved, the assessee preferred an appeal the Tribunal.



Ruling

The Tribunal ruled in favor of the assessee. Through CBDT Circular No. 789, dated 13-4-2000, the Tribunal concluded that the Revenue cannot deny the benefit of India-Mauritius Tax Treaty to the assessee, which the assessee is entitled to on basis of the TRC issued by the Mauritian Tax Authorities. The court relied on the Finance Ministry through a clarification dated March 2, 2013, and the case of *Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. vs. ACIT in CM Appeal 7332/2022* wherein it was established that the TRC produced by a resident of a contracting state would be accepted as evidence of residency in that contracting state and the Income Tax Authorities in India would not go behind the TRC and question the TRC holder's resident status.

From the facts of the case, the Tribunal discerned that in addition to the investments in bonds and exchange traded cash equities, the assessee had a large number of exchange traded derivative transactions. The evidence on record showcased transactions of the assessee on MCX, BSE and NSE. In addition to these investments in India, the assessee had also invested LME, CMX, SSE and DGCX. Therefore, to hold that the income earned by the assessee from derivatives is not business income is incorrect.

In light of the above, the Tribunal adjudicated, *"that the receipt is not taxable in India, hence there is no prejudice caused to the revenue and as the result, the order passed of ld. CIT u/s 263 is liable to be obliterated."*

Source:Tribunal, Delhi in Sapiens Fund Ltd. vs. CIT(International Taxation), Delhi-3 vide ITA No. 976/Del/2022 dated June 8, 2023

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