

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D' : NEW DELHI

BEFORE SHRI R.C.SHARMA, AM AND SHRI GEORGE MATHAN, JM

ITA Nos.4084/Del/2006 & 46/Del/2006
Assessment Years : 2003-04 & 2002-03

M/s SMR Investments Limited, Vs. Dy. Director of Income Tax,
C/o Luthra & Luthra, Circle-2(2),
A-16/9, Vasant Vihar, International Taxation,
New Delhi – 110 057. New Delhi.
PAN No.AAHCS6790D.
(Appellant) (Respondent)

Appellant by : Shri Vikas Srivastava, CA.
Respondent by : Shri Ashwani Kumar, CIT-DR.

ORDER

PER R.C.SHARMA, AM :

These are the appeals filed by the assessee against the order of CIT(A) for the AY 2002-03 and 2003-04.

2. The grievance of the assessee in both the years pertains to taxability of capital gains earned on sale of shares of Indian companies, in India.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a company incorporated in Republic of Mauritius on 21.07.1994. The share holding of the company is as follows:-

Mr. Suresh Rajpal	99 shares
Ms. Mavis Tse Rajpal (W/o Mr. Suresh Rajpal)	01 shares
Total	100 shares

The assessee company has three Directors;

1. Ms. Sheela Khan Itoola
2. Mr. Ashraf Ramtoola
3. Mr. Suresh Rajpal

4. During F.Y. 2001-02, the assessee sold 317,500 shares of M/s HCL Technologies for a sum of Rs.8,87,24,573/-. These shares were purchased by the assessee in FY 1995-96 for Rs.6,35,000/-. The long term capital gain of Rs.8,78,93,419/- on sale of these shares was claimed to be exempt under para 4 of Article 13 of DTAA between India and Mauritius. The assessee has also earned Rs.33,96,111/- from sale of equity shares of BFL Software which has also been claimed to be exempt. Vide questionnaire dated 05.11.2004, the assessee was asked to explain the taxability of capital gains and to explain in detail the basis of treating this income as exempt.

5. The assessee, vide reply dated 07.12.2004, submitted as follows:

“The assessee is a company incorporated under the laws of Mauritius. Due to its incorporation, it is liable to pay taxes in Mauritius. A tax residence certificate has also been issued by the Financial Services Commission, Mauritius confirming that the assessee is a tax resident of Mauritius. Copy of the Residence Certificate issued by Income-tax Department, Mauritius vide Ref. No.25002289/6/93/225/RB/21 is enclosed herewith as Annexure-3 for your kind perusal.

Capital gains

The assessee is a company incorporated under the laws of Mauritius and is also a tax resident of Mauritius. Being a tax resident of Mauritius, it has the option of being governed under the provision of the DTAA between India and Mauritius in case the provisions of the DTAA are more beneficial to the assessee.

Part-4 of Article 13 of DTAA states as under:

“Gains derived by a resident of a contracting state from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of this Article shall be taxable only in that State.”

The assessee is a Tax Resident of Mauritius. Capital gains derived by the assessee from the sale of shares of an Indian Company are not taxable in India, as per para-4 of Article 13 of DTAA. Thus, capital gains derived by the assessee are exempt in India.

6. Vide questionnaire dated 05.11.2004, the assessee was asked to explain whether it has a permanent establishment in India. The assessee, vide reply dated 07.12.2004 submitted as follows:

“The assessee is a Mauritius based company and does not have any office, establishment or place of business in India. All its Board Meeting took place outside India. All important decision concerning the functioning of the company were taken outside India.

As per Article-5 of DTAA, in order to have a PE in India, the place of management of the assessee should be in India or it should have a branch or an office in India. Further, if the assessee acts through an agent working exclusively for its business in India, then the assessee would be said to have PE in India.

From the above mentioned details, it would be appreciated that the business of the assessee is carried from Mauritius. The activities of the assessee are carried out from Mauritius. In India, the stock brokers carry out the instructions of the assessee which is provided from Mauritius. Therefore, the assessee cannot be said to have a PE in India as per Article-5 of the DTAA”.

7. After considering the assessee’s reply, the AO dealt with clause (3) of Article 4 of the DTAA between India and Mauritius. The AO observed that As per the provisions of para-1 of Article 4, the resident of a contracting state means any person who under the laws of the state, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of similar nature. Therefore, the residential status will be determined on the basis of domicile, residence, place of management or any other criterion of similar nature and if because of these criteria a person other than individual is a resident of both the contracting state, then it shall be deemed to be residence of the contracting state in which its place of effective management is situated. Thus, capital gains of the assessee was held to be taxable in India only if it has a permanent establishment in India. In this regard, statement on oath of Shri M.F. Qureshi was recorded on 07.01.2005 who is director of M/s NAK Consultants Pvt. Ltd., the

stock broking company through which all the above shares were sold. The relevant portion of the statement is reproduced below;

Q1 Please identify yourself.

Ans. I am Shri MF Qureshi S/O Shri Abdul Waheed.

Q2 What is your designation in M/s NAK Consultants Pvt. Ltd. and since when are you working in this company?

Ans. I am Director in M/s NAK Consultants Pvt. Ltd. since April 2004. Before that I was the accounts manager in this company from 1999 to 2004.

Q3 Furnish details of share transactions made by M/s NAK Consultants Pvt. Ltd. on behalf of M/s SMR Investments Ltd.

Ans. The details have been furnished vide my reply dated 07.01.2005.

Q4 Since when does the company have share transaction with M/s SMR Investments Ltd.

Ans. The company has made share transaction on behalf of M/s SMR Investments Ltd. only after FY 2001-02.

AQ5 Who approached your company for the first time on behalf of M/s SMR Investments Ltd.?

Ans. Luthra & Luthra, CA firm told us about M/s SMR Investments Ltd. to us for the first time. No employee/director of M/s SMR Investments Ltd. has ever come to our company's office. Since M/s SMR Investments Ltd. was not very well known to us, we insisted them to transfer their shares for sale to our demat account. The shares were sold on behalf of M/s SMR Investments Ltd. only after they had transferred the shares to our demat account. A copy of our demat account in support of our claim will be furnished within one week.

Q6 Explain who placed the order for purchase/sale of shares on behalf of M/s SMR Investments Ltd.?

Ans. Mr. Suresh Rajpal placed the orders for sale/purchase of shares on telephone. The bank account number of M/s SMR Investments Ltd. with HDFC Bank, Connaught Place, New Delhi was known to us and we deposited the sale proceeds in the bank account after deducting our brokerage/commission.

Q7 Explain the procedure for purchase of shares on behalf of M/s SMR Investments Ltd.

Ans. The order for purchase of shares on behalf of M/s SMR Investments Ltd. was placed by Mr. Suresh Rajpal on telephone. First, he would place the order on telephone for purchase of shares. Thereafter he would transfer the

required funds to our bank account with ABN Amro Bank and the shares would then be transferred to the Demat account of M/s SMR Investments Ltd.

Q8 Did anybody other than Mr. Suresh Rajpal place orders for purchase/sale of shares on behalf of M/s SMR Investments Ltd.

Ans. No. The orders for purchase/sale of shares on behalf of M/s SMR Investments Ltd. were placed only by Mr. Suresh Rajpal and nobody else.

8. From the above statement, the Assessing Officer observed that the orders for sale of shares were placed only by Shri Suresh Rajpal on telephone. In case these telephone calls were made from India, then the effective place of management of the company would be in India itself. Hence, the assessee was required to furnish copy of passport of Shri Rajpal for FY 2001-02. The AO stated that Despite being giving adequate opportunities, copy of passport of Shri Suresh Rajpal was not furnished vide questionnaire dated 04.02.2005, the assessee was asked as follows:

“You are required to furnish copy of passport of Shri Suresh Rajpal for F.Y. 2001-02 failing which it will be presumed that he was a resident of India during the period.”

The Assessing Officer stated that despite this final opportunity, copy of passport of Shri Suresh Rajpal was not furnished.

9. In view of the above observation, the AO held that The effective place of management of the company in FY 2001-02 is held to be in India. Following were the reasons for the same:-

- 1) Shri Suresh Rajpal is the owner of 99% shares of the company. All the orders for sale of shares were placed by him. He is not a citizen of Mauritius. In the absence of the assessee company to furnish his passport despite being given adequate opportunities, it is held that he was residing in India when the shares were sold in India and hence effective place of management of the company was in India.
- 2) The assessee company purchased these shares in India in FY 1995-96. In that year, Shri Suresh Rajpal was a resident of India and working as a senior executive with Hewlett Packard. Thus, at the time of investment of

- these shares also, the effective management of the company was in India. Moreover, the source of investment in these shares was also from India.
- 3) Despite making massive investment in purchase of shares in India, the assessee has filed its first return of income only in ASSESSMENT YEAR 2002-03. Hence, the Income Tax Department in India was denied the opportunity of examining the source of investment in these shares in India.
 - 4) The assessee company was registered in Mauritius in 21.07.1994 with the present share holding. It made investment in the above shares in FY 1995-96. During this period, Shri Suresh Rajpal was residing and working in India. In these circumstances, the floating of a company in Mauritius with 99% share holding shows that. The purpose of setting up the company was merely to escape capital gains liability in India since there is no tax on capital gains in Mauritius.
 - 5) Since the purchase of these shares till the date of sale, these shares were held in de-mat account of the assessee with HDFC Bank Ltd., Kamala Mills, Compound, Mumbai. The fact that the shares sold during the year were held by the assessee in India since the last 8 years strengthens the fact that the effective management of the assessee in FY 2001-02 was in India.
 - 6) To substantiate the fact that the fact that the 'effective management' of the company is in India, reliance is placed on the following decisions.

In the case of Unit Construction Company Limited Vs. Bullock (1981) 42 ITR 340 it has been held that it is the actual place of management of a company and not the place where it ought to be managed fixes the residence of a company.

The expression 'control and management' means de facto control and management and not merely the right or power to control and manage. (CIT Vs. Nandlal Gandlal) 40 ITR 1 (SC).

10. The AO also observed that the place of effective management of the assessee in FY 2001-02 was in India. In view of clause-3 of Article-4 reproduced above, where the assessee is a resident of both India as well as Mauritius, it shall be deemed to be resident of the contracting state in which place of effective management is situated i.e. India. Thus, the assessee is held to be a resident of India and its capital gains on account of sale of shares is liable to be taxed as per the Income Tax Act.

11. The learned AR relied on the proposition laid down by the Coordinate Bench in the case of Radha Rani Holding (P) Ltd. – 2007-TIOL-335-ITAT-DEL, order dated 30.5.2007 in ITA No.2094/Del/2006, wherein it was held that in case of non-resident company, since all the meetings of the board of directors were held in Singapore and control and management of the company was situated in Singapore and to support the residency certificate of Singapore government was furnished, the assessee was treated as non-resident in India, therefore not liable to tax. In this regard, the contention of the learned DR was that this case is completely distinguishable insofar as minutes of the board of directors which was held in Singapore has been duly authenticated by the Indian Commission in Singapore, whereas in the instant case before us, there is no such authentication either by the Indian High Commission or by any of the third party. Learned DR also drawn our attention to para 17 of this order wherein categorical finding has been recorded by the Tribunal to the effect that all the board meetings of the assessee company have been held in Singapore and never in India and since the board of directors subject to the overall supervision of the shareholders actually controls and manages the affairs of the company effectively as against the day to day operation of the company, the situs of the board of directors of the company should determine the place of control and management of the company. He stated that in the instant case before us there is no such documentary evidence having been filed to this effect nor there is any such finding either by the AO or the CIT(A). He therefore contended that the case law referred by the learned AR in the case of Radha Rani Holding (P) Ltd. (supra) is distinguishable on facts, therefore cannot be applied to the facts of the instant case. During the course of hearing before us, learned AR also filed copy of passport of former director of the assessee company Shri Ashraf Ramtoola and contended that from the passport of Shri Ashraf Ramtoola, who was very much in Mauritius on 5.12.2001 and 12.3.2003 i.e. the dates on which the board meetings of the assessee company were held, clearly indicate that effective control was in Mauritius. An affidavit of Shri Ashraf Ramtoola was also placed on record. It was stated in the affidavit that

Shri Ashraf Ramtoola was in Mauritius on 5.12.2001 and 12.3.2003 i.e. the dates on which board meetings were held in compliance with Section 70 of the Financial Services Act, 2007. After verifying the signatures of Shri Ashraf Ramtoola which were on various documents, the learned DR raised serious doubts/objections with regard to correctness of the signatures and submitted that sufficient opportunity was given to the assessee for placing all these documentary evidences before the lower authorities, but inspite of the same, nothing was produced. On the other hand, learned AR contended that neither AO nor CIT(A) has been able to substantiate the allegation that the control and management of the assessee is situated in India with any documentary evidence. For this purpose, reliance was placed on the provisions of Section 114 of the Indian Evidence Act, 1872 and it was submitted that as per the said provisions, in case any party rebuts the general presumption that the board meeting of a Mauritius activity would have been held in Mauritius, then the onus to prove such allegation is on the party making the allegation. Further contention of learned AR was that assessee company is incorporated in Mauritius and has its office in Mauritius, hence the general presumption shall be that the board meetings of the assessee were held in Mauritius and the control and management is also in Mauritius. As per learned AR, since the AO and CIT(A) have made an allegation to the contrary, the onus to substantiate such a claim falls on the person making the allegation and since both the lower authorities have miserably failed to discharge this onus, the income earned by a company of Mauritius residence cannot be assessed in India.

12. After considering all the documents which were either placed before the lower authorities or before the Bench for the first time, we find that it is very essential to once again examine the authenticity of the same and their relevance with regard to board meetings held in Mauritius. For this purpose, either third party evidence or evidence by any government agency either situated in Mauritius or in India is required to be brought on record to substantiate assessee's claim. In the interest of justice and fair play, we restore both the appeals to the file of the

AO for deciding the same afresh/de-novo in terms of our observations contained hereinabove.

13. In the result, both the appeals are allowed for statistical purposes.

Decision pronounced in the open Court on 26th March, 2010.

Sd/-

(GEORGE MATHAN)
JUDICIAL MEMBER

Sd/-

(R.C.SHARMA)
ACCOUNTANT MEMBER

Dated : 26.03.2010

VK.

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Deputy Registrar

