IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.2213/Mum/2018
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

HSBC Bank (Mauritius) Ltd. 6th Floor, HSBC, Centre, 18 Cyber City, Ebene 72201, Mauritius.	**बनाम**/ Vs.	DCIT (International Taxation) 2(2)(2), 16th Floor, Room No. 1606, Air India Buildings, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCH9075N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Nishant Somajya (DR)
Assessee by:	Shri Percy J. Pardiwala/ Niraj Sheth

सुनवाई की तारीख / Date of Hearing: 11.10.2018
घोषणा की तारीख /Date of Pronouncement: 02.01.2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 24.01.2018 passed by the Commissioner of Income Tax (Appeals) - 56, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2013-14.

2. The assessee has raised the following grounds: -

> "Based oil facts and the circumstances of the case and ill the Commissioner of Income Tax (Appeals) - 56, Mumbai [hereinafter referred to as the CIT(A) erred in passing the order dated 24 January 2018 under section 250 of the Income-tax Act. 1961 ('the Act') and

thereby upholding the contentions of the Deputy Commissioner of Income-tax (International Taxation) - 2(2)(2)1 Mumbai [hereinafter referred to as 'the Assessing Officer on the following grounds.

The Appellant's Grounds of Appeal are independent of and without prejudice to one another.

Ground I - Additions in respect of interest income of Rs 3.08,25,79,613/- earned on foreign currency loans given to Indian Corporates Oil facts and circumstances of the case and ill the CIT(A) erred in denying the benefits of Article II (3)(c) of the Double Taxation Avoidance Agreement between India and Mauritius ('India-Mauritius 'Tax Treaty') and upholding the contentions of the Assessing Officer in taxing interest income of Rs.3,08,25,79,6 13 earned oil currency loans on the ground that the interest income is not beneficially owned by the Appellant.

The Appellant prays that the addition made by the Assessing Officer which has been upheld by the CIT(A) in respect of interest income on foreign currency loans be deleted.

Ground 2 - Additions in respect of interest income of Rs 4.96.68.73.353 earned on debt securities.

The CIT(A) erred in setting aside the issue of chargeability of interest income oil securities of Rs 4.96,68,73,353 to the file of the Assessing Officer for fresh adjudication in accordance with a view taken by the Hon'ble Income Tax Appellate Tribunal. Mumbai (ITAT) for the AY 2011-12.

Ground 3 - Levy of interest wider section 234B of the Act of Rs.79.49,35,017

On the facts and circumstances of the case. the CIT(A) erred in uphold in levy of interest under section 234B of the Act of Rs 79,49,35.0 17.

The Appellant prays that the levy of interest under section 234B of the Act by the Assessing Officer he deleted

Ground 4- Initiation of 'penalty proceedings under section 271(1)(c) of the Act

On the fact and in the circumstances of the case, the Assessing Officer erred in initialing penalty proceeding under section 271(1)(c) of the Act.

The Appellant prays that to instruct (lies Assessing Officer to drop the initiation of penalty proceedings. ’’

3. The brief facts of the case are that the draft order u/s 143(3) r.w.s. 144C(1) of the I.T. Act, 1961 was passed on 31.12.2016 which was served upon the assessee. The assessee also filed the reply by virtue of letter dated 02.02.2017. Thereafter, the assessment order was passed assessing the interest income on security taxable u/s 115AD @ 20% to the tune of Rs.4,120,521,236/- and also assessing the interest on T Bills securities taxable u/s 115AD @ 20% of Rs.846,352,117/- and interest on ECB taxable u/s 115A(1)(a)(ii) of the Act of Rs.3,082,579,613/-. The total income of the assessee was assessed to the tune of Rs.8,04,94,52,966/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee but declined the claim of the assessee on the ground mentioned above, therefore, the assessee has filed the present appeal before us.

ISSUE NOS. 1 & 2

4. Under these issues the assessee has challenged the addition of interest income of Rs.3,08,25,79,613/- earned on foreign currency loans given to Indian Corporates. At the very outset, the Ld. Representative of the assessee has argued that these issues have duly been covered in his favour by the decision of Hon'ble ITAT in the assessee's own case for the A.Y. 2011-12 in ITA. No.1708/M/2016 dated 02.07.2018. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. Before going further, we deemed it necessary to advert the finding of the Hon'ble ITAT in the assessee's own case for the A.Y. 2011-12 dated 02.07.2018 on record.: -

"3. The appellant before us is a limited liability company which is incorporated registered and tax resident of year relevant to the assessment year under consideration, assessee had, inter-alia, earned interest income of Rs.94,57,45,856/- from investments in debts securities made in accordance with the SEBI Regulations. In its return interest income was claimed not taxable in India on the strength Article 11(3)(c) of the India-Mauritius Double Tax Avoidance convention thereinafter referred to as 'India-Mauritius Tax Treaty'). The said exemption was denied by the Assessing Officer in the assessment order passed u/s 143(3) r.w.s. 144C(13) of the Act dated 28.01.2016, which was in conformity with the directions of the Dispute Resolution Panel (DRP) Pertinently, the exemption was denied on the ground that the requisite conditions prescribed in Article 11(3)(c) of the India-Mauritius Tax Treaty were not fulfilled by the appellant-assessee inasmuch as - (i) the interest was not "derived" by the assessee; (ii) that interest was not "beneficially owned" by the assessee; and, (iii) that the assessee ought to be carrying on bona fide banking business, which it could not. All the aforesaid issues were taken up by the assessee in appeal before the Tribunal, which vide order dated 16.12.2016 (supra) accepted the pleas of the assessee so far as the first two aforestated conditions were concerned. In other words, the Tribunal held that the interest income in question was derived by the assessee and that it was carrying on bone fide banking business. So however, with regard to the third condition of 'beneficial ownership', the Tribunal remanded the issue to the file of the Assessing Officer with certain directions. This aspect was agitated by the assessee by way of a Miscellaneous Application u/s 254(2) of the Act and vide its order dated 10.01.2018 (supra), the Tribunal recalled its decision so far as it pertained to the issue of 'beneficial ownership'. In this background, the learned representative for the assessee pointed out that the captioned proceeding is to adjudicate the issue of 'beneficial ownership' while evaluating assessee's claim of non-taxability of the aforestated interest income in terms of Article 11(3)(c) of the India-Mauritius Tax Treaty. Insofar as the scope of the present proceeding is concerned, the Id. DR appearing for the Revenue did not dispute the assertions of the assessee and, in fact, our attention was also in affidavits filed by the Assessing Officer dated 21 03 2018 and 5Ofore the Hon'ble Bombay High Court wherein the Revenue took the stand that the order passed by the Tribunal dated 16.12.2016 (supra) was recalled u/s 254(2) of the Act vide order dated 10.01.2018 (supra) only to the extent of the issue of 'beneficial ownership'.

4. In this background, we have heard both the parties on the issue of 'beneficial ownership' under Article 11(3)(c) of the India-Mauritius Tax Treaty quo the interest income of Rs.94,57,45,856/- earned by the assessee. On this aspect, we find that the DRP required the assessee to explain as to how it fulfils one of the requirements of Article 1.1(3)(c) of the India- Mauritius Tax Treaty which prescribes that such interest must be 'beneficially owned' by the assessee. As per the DRP, the aforesaid was one of the pre-requisites before Article 11(3)(c) of the India-Mauritius Tax Treaty could be applied to say that the interest income in question was not taxable in India. The DRP has reproduced the submissions put forth by the assessee wherein assessee asserted that the interest income of Rs.94,57,45,856/- earned from investment in debt securities was beneficially owned by it. Assessee specifically drew attention of the DRP to CBDT Circular no. 789 dated 13.04.2000 which, inter-alia, prescribed that wherever a Certificate of Residence is issued by Mauritian authorities, such Certificate will constitute sufficient evidence for not only accepting the status of residence, but also the beneficial ownership in order to apply the provisions of 1ndia-Mauritius Tax Treaty. Further, in support of such a plea, assessee also relied on the Hon'ble Bombay High Court in the case of DIT vs Universal International Music B.V, (2013) 31 taxman.com 223 which held that a company incorporated under the laws of Netherlands and holding valid Tax certificate issued by the Netherland authorities was to be construed as the beneficial owner of the Royalty income received from the Indian company and was accordingly held entitled to the benefits of Article 12 of the Double Taxation Avoidance Agreement between India and Netherlands. It was pointed out that assessee had obtained Tax Residency Certificate from the Mauritian Revenue authorities, a copy of which was also filed before the DRP. On the aforesaid basis, assessee sought to explain the fulfilment of the condition of 'beneficial ownership'. The DRP, however, rejected the plea of the assessee as according to it, no documents were placed by the assessee to suggest that the interest income in question was beneficially owned by the assessee. As per the DRP, assessee had failed to show the immediate source of funds for making the impugned investment

and also the immediate application of the impugned interest income earned by it. Against such observations of the DRP, assessee is in appeal before us.

5. Before us, the learned representative for the assessee reiterated the reliance on the CBDT Circular no. 789 dated 13.04.2000 (supra) whose validity, according to the learned representative, has also been upheld by the Hon'ble Supreme Court in the case of UOI vs Azadi Bachao

Andolan, [2003] 263 1TR 706 (SC). Furthermore, it is pointed out that the Ministry of Finance vide Press Clarification dated 01.03.2013 clarified that the CBDT Circular no. 789 dated 13.04.2000 (supra) continues to be in force. Another aspect which is brought out by the learned representative is based on the decision of Chennai Bench of the Tribunal in the case of Hyundai Motor India Ltd. Vs. DCIT (2017) 81 taxmann.com 5. In this case, the interest paid by Hyundai Motor India Ltd. to the assessee was disallowed u/s 40(a)(i) of the Act on the ground that the payer therein i.e. Hyundai Motor India Ltd. had not deducted the requisite tax at source. The Tribunal in the aforesaid decision inter alia, examined the provisions of Article 11 of the India Mauritius Tax Treaty and concluded that the assessee was indeed the 'beneficial owner' of such interest income. The relevant extract of the decision referred to reads as under :-

"The doubts expressed by the DRP with regard to beneficial owner of the interest income are devoid of any legally sustainable basis. No case has been made out by the revenue for the beneficial owner of the interest income being entities other than Mauritian entities in question. In terms of article 11(3), interest arising in a Contracting State (i.e. India, in this case) shall be exempt from tax in that State (i.e. India) provided it is derived and beneficially owned by, inter alio, by any bank carrying on a bona fide banking business which is a resident of the other Contracting State (i.e. Mount/us). There is no dispute that Mauritian entities in quest/on were carrying out banking business in Mount/us, and there is nothing on record to show, or even indicate, that the beneficial owner of interest income were not these Mount/an entities.

The protection of article 11(1) cannot, therefore, be declined on the facts of the present case. We are, therefore, of the considered view that the income embedded in these interest payments are not taxable in India. Accordingly, the assessee did not have any tax withholding Obligations, u/s 195, in respect of these payments, and, as a corollary thereto, disallowance u/s 40(a)(i) was not justified."

6. On the aforesaid basis, it is pointed out that following the decision of Chennai Bench of the Tribunal in the case of Hyundai Motor India Ltd. it is, therefore, to be held that assessee was indeed the 'beneficial owner' of the interest come in question also other hand, the Id. DR appearing for the Revenue, has merely reiterated the discussion made by the DRP in its order, which we have already noted in the earlier paras and is not being repeated for the sake of brevity

8. Article 11(3)(c) of the India-Mauritius Tax Treaty, inter-alia prescribes that interest income arising in a contracting state shall be exempt from

tax in that state provided it is derived and beneficially owned by any bank carrying on a bona fide banking business which is resident of the other contracting state. The limited point before us is as to whether assessee, who is a tax resident of Mauritius, beneficially owns the interest income of Rs.94,57,45,856/- in question. The other pre-requisites of Article 11(3)(c) of the India Mauritius Tax Treaty are not for consideration before us as they have already been dealt with by our predecessor Bench in its order dated 16.12.2016 (supra). Be that as it may, in support of the proposition that the impugned interest income is beneficially owned by the it, the appellant has primarily relied on the Tax Residency Certificate issued by the Mauritian Revenue authorities certifying the fact that assessee is a tax resident of Mauritius. Copies of such Certificates have been placed in the Paper Book at pages 268 to 270. Factually speaking, there is no dispute on this aspect. The only controversy is whether such Tax Residency Certificate enables an inference that the interest income in question is beneficially owned by the assessee. In this context, the CBDT Circular no. 789 dated 13.04.2000 (supra) of the CBDT is quite eloquent, whose relevant content reads as under :-

it is hereby clarified that wherever a Certificate of residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as the official ownership for applying the DTAC accordingly."

[underlined for emphasis by us]

Ostensibly, as per the clarification issued by the CBDT, wherever a Certificate of Residency is issued by the Mauritian authority, such Certificate will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the provisions of the India-Mauritius Tax Treaty. Thus, in our considered opinion, the aforesaid clarification by the CBDT supports the assertion of the assessee that based on the Certificate of Tax Residency issued by the Mauritian authority there is sufficient evidence to accept the position that the 'beneficial ownership' of the impugned interest income is with the assessee.

9. At this point, we may note that the CBDT Circular no. 789 dated 13.04.2000 (supra) is specifically in the context of incomes by way of dividend and capital gain on sale of shares. So, however, in our considered opinion, it would equally apply even in the situation before us where the application of the provisions of the India-Mauritius Tax Treaty is sought to be applied for considering the taxability of interest income as per Article 11(3)(c) of the India-Mauritius Tax Treaty. We say so by

drawing strength from the judgment of the Hon'ble Bombay High Court in the case of Universal International Music B.V (supra). The issue before the Hon'ble High Court was relating to the taxability of Royalty income in the context of India-Netherland Double Taxation Avoidance Agreement. In the said decision also CBDT Circular no. 789 dated 13.04.2000 (supra) was held applicable in Royalty income. Thus, in our considered opinion, even in the context of the impugned interest income, Circular no. 789 dated 13.04.2000 CBDT is applicable while applying the provisions of Article of the India-Mauritius Tax Treaty. On this aspect itself we uphold the plea of the assessee that assessee is the 'beneficial owner' of the impugned interest income on the strength of the Tax Residency Certificate issued by the Mauritian authorities.

10. Moreover, in the context of element of interest income earned by the assessee from Hyundai Motor India Ltd., the Chennai Bench of the Tribunal in its decision in the case of Hyundai Motor India Ltd. (supra) has already observed th6t the recipient therein (i.e. the assessee before us), was the 'beneficial owner' of the interest income qua the provisions of Article 11 of the India-Mauritius Tax Treaty. Be that as it may, in view of our aforesaid discussion, we uphold the stand of the assessee that it is the beneficial owner of the interest income of Rs.94,57,45,856/- qua the provisions of Article 11(3)(c) of the India-Mauritius Tax Treaty and thus, such income is not taxable in India."

5. On appraisal of the above mentioned finding, we noticed that the claim of the assessee has also been allowed by Hon'ble ITAT in the assessee's own case for the A.Y. 2010-11 in ITA. No.1086 & 1087/M/2018 dated 30.08.2018. In view of the decision of the Hon'ble ITAT in the assessee's own case (supra) we set aside the finding of the CIT(A)on this issue and allowed the claim of the assessee.

ISSUE NO.3

6. Under this issue the assessee has challenged the levy of interest u/s 234B of the Act of Rs.79,49,35,017/-. The Ld. Representative of the assessee has argued that the payer is under obligation to deduct the tax at source and on account of failure of payer to deduct the tax at source, the

penalty interest u/s 234B cannot be imposed on the payee. In support of this contention, the Ld. Representative of the assessee has relied upon the law settled by Hon'ble Bombay High Court **Director of Income Tax (International Taxation) Vs. Ngc Network Asia LLC (2009) 222 CTR 85 (Bom).** In the instant case also the assessee received the payment without deduction of TDS. No doubt, the payer was liable to be deduct the TDS who failed to do so, therefore, the penalty is not leviable to be payee in view of the law settled in **Director of Income Tax (International Taxation) Vs. Ngc Network Asia LLC (2009) 222 CTR 85 (Bom).** Therefore, in the said circumstances, it is quite clear that the interest and penalty cannot be imposed upon the payer. Accordingly, we decide this issue in favour of the assessee against the revenue.

6. In the result, the appeal filed by the **assessee is hereby ordered to be allowed.**

Order pronounced in the open court on 02.01.2019.

Sd/-	Sd/-
(R. C. SHARMA)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 02.01.2019
Vijay

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**