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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Pavan Kumar Gadale (Judicial Member)]

ITA Nos. 981 and 1725/Mum/2021
Assessment year: 2016-17

Blackstone FP Capital Partners
Mauritius V Ltd ....**Appellant**
Ocorian Corporate Services Mauritius Ltd
6th floor, Tower A, Cyber City, Ebene, Mauritius
[PAN: AACCB9016C]

Vs.

Deputy Commissioner of Income Tax
International Taxation Circle 1(2)(2), Mumbai ....**Respondent**

Appearances by:
Porus Kaka *along-with* **Manish Kanth** *for the appellant*
Sanjay Singh *and* **Sunil Umap** *for the respondent*

Date of concluding the hearing : 18/02/2022
Date of pronouncing the order : 17/05/2022

O R D E R

Per Pramod Kumar VP

1. The assessee has filed two appeals- first, against the original assessment order dated 5th April 2021 passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2016-17, and- second, against the rectification order dated 8th September 2021 under section 154 r.w.s. 143(3) and 144C(13) rectifying the assessment order dated 5th April 2021 as "**on perusal of the** *(said)* **order, it was noticed that various scanned documents mentioned and incorporated in the draft assessment order dated 28.12.2019 could not be incorporated in the final assessment order**….".

2. Learned representatives, however, fairly accept that the core issue in appeal is whether the authorities below were justified in declining the treaty protection, under article 13(4) of the India Mauritius Double Taxation Avoidance Agreement [(1984) 146 ITR Stat 214; **Indo Mauritius tax treaty**, *in short],* to the assessee in respect of the long term capital gains of Rs 904,98,16,345 arising from transfer of shares of CMS Info Systems Ltd, and that is the issue that we are require to adjudicate on in these appeals. We will, therefore, take up this issue first.

3. To adjudicate on this issue, only a few material facts need to be taken note of. The assessee before us is a company incorporated in, and fiscally domiciled in, the Republic of Mauritius. It was incorporated on 8th June 2006 and it holds a global business licence (GBL) issued by the Financial Services Commission, Mauritius. The assessee is also registered as a foreign venture capital investor (FVCI) with the Securities and Exchange Board of India. The assessee has also been issued a 'tax residency certificate' by the Mauritian Revenue Authority. During the relevant previous year, the assssee has sold 8,31,67,132 equity shares of CMS Info Systems Ltd for a consideration of US $ 15,95,02,497 to Sion Investment Holdings Pte Ltd, in furtherance of the share purchase agreement dated 16th February 2015. The cost of acquisition of these shares is stated to be US $ 1,73,21,565, and, accordingly, long term capital gains earned by the assessee are quantified to be US $ 14,21,80,932, which, converted in Indian currency, works out to Rs 904,98,16,345. On these facts, the Assessing Officer held that the said income of Rs 904.98 crores earned by the assessee is in the nature of long term capital gains. To this extent, there is no dispute at all. The dispute, however, arose with respect to treaty protection, in terms of Indo Mauritius tax treaty, in respect of the said long term capital gains. While the Assessing Officer noted that in terms of the provisions of Article 13(4) of the Indo Mauritius tax treaty, capital "**gains derived by the resident of one of the contracting states from alienation of any property, other than that referred to in paragraphs (1), (2) and (3) of this article, shall be taxed only in that State**", he proceeded to make the following observation which is, in our humble understanding, the essence of dispute before us:

> **8.2 Having take note of the above position of law and the provisions of Article 13(4) of the DTAA between India and Mauritius , it would be necessary to understand the real owners of the shares under consideration. In this context, it would be pertinent to reiterate that the information from FT&TR** *(Foreign Tax and Tax Research Division, Central Board of Direct Taxes)* **has been sought from the respective authority of Mauritius and Cayman Islands. On examination of information received from the respective authority of Mauritius and Cayman Islands, and the details furnished by the assessee from time to time, following facts have emerged for deciding the above issues:**
>
> **(i) Real/ Effective owners of the assessee;**
> **(ii) Administrative Control of the assessee;**
> **(iii) Source of investment in the shares;**
> **(iv) Trail of transactions of acquisition of shares and sale thereof; and**
> **(v) Directions issued to carry out transactions of purchase and sale of shares.**

4. The Assessing Officer then proceeded to discuss in detail as to how on these tests the assessee fails inasmuch as the effective ownership of the assessee is with certain Cayman Island based entities, inasmuch as administrative control of the assessee is by these Cayman Island based entities, inasmuch as source of investment in the shares in question is remittance from the entities owning the assessee company which are based in Cayman Islands, inasmuch as the trail

of transactions of sale and purchase lead to dominant involvement of these Cayman Island based entities, and inasmuch as the directions to carry out the transactions in question were issued by the Cayman Island based entities owning the assessee company. The Assessing Officer also held that "**in view of assessee's own admission of the ownership of the Blackstone Group of Cayman Island, in the application form for Category 1 Global Business Licence submitted to Finance Service Commission Mauritius,** ***prima facie*** **itself establishes that the investment in shares was not made by the assessee company but by the entities of Blackstone of Cayman Island, and, accordingly, it is a perfect case for lifting the corporate veil**". The Assessing Officer then elaborately discussed the law laid down by Hon'ble Supreme Court in the case of **McDowell & Co Ltd Vs CTO [(1985) 154 ITR 148 (SC)]** and referred to certain other decisions, namely- Jiyajeerao Cotton Mills Ltd Vs CIT (34 ITR 888), by Hon'ble Bombay High Court in the case of **Navantara G Agarwal Vs CIT [(1994) 207 ITR 639 (Bom)]** and **CIT Vs Akshav Textile Trading Agencies Ltd [(2007) 304 ITR 401 (Bom)].** The Assessing Officer thus concluded that by applying the principles emerging out of these judicial precedents, it is clear that the assessee company is a wholly owned subsidiary of Blackstone FP Capital (Mauritius) VA Ltd Cayman Islands, that it has no independent existence, and that its entire activity was controlled and directed as per the directions of its affiliates. It was thus concluded that the entire scheme of purchase and sale of shares was designed for the benefit of the entities in Cayman Islands and that it was a fit case to lift the corporate veil. On this basis he concluded that " considering totality of facts, I hold that the assessee is not entitled for the benefit of DTAA with Mauritius. We may also note that the Assessing Officer had also relied upon the judgment of Hon'ble jurisdictional High Court in the case of **Aditya Birla Nuvo Limited Vs DDIT [(2011) 12 taxmann.com 141 (Bom)]** and on the ruling given by the Hon'ble Authority for Advance Ruling in the case of **AB Mauritius In Re [(2018) 90 taxmann.com 182 (AAR)]**. It was thus held that the beneficial owner of the shares, on alienation of which the long term capital gains in question have arisen, is not the assessee, and the benefit of article 13(4) of Indo Mauritius tax treaty will not be admissible. This stand of the Assessing Officer has also been confirmed by the Dispute Resolution Panel, and, infact reiterated, rationalized further, rephrased and, in a way thus, fortified. Taking note of the fact that no securities transaction tax (STT) was paid on this transaction of sale of shares, the impugned demand for levy of tax on the long term capital gains has been raised on the assessee by the Assessing Officer. The assessee is aggrieved and is in appeal before us. We may add that, for our purposes and for the reasons we will set out in a short while, it is not necessary to go into the facts set out in the orders of the authorities below, and as discernible from the material on record, any deeper at this stage.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. As we proceed further, it is important to bear in mind the fact that the learned Assessing Officer had finally concluded as follows:

> **15.6 Thus, by applying the above principles, it is apparent that the assessee company is claiming to be a wholly owned subsidiary of Blackstone FP Capital (Mauritius) VA Ltd Cayman Islands, had no independent existence. Its entire activity was controlled and directed as per the directions of its affiliates. The entire scheme of purchase and sale of shares was designed for the benefit of the entities in Cayman Islands of Blackstone Group, in the veil of carrying out transactions through them. Therefore, considering totality of facts, I hold that the assessee is not entitled for the benefit of DTAA with Mauritius.**

[Emphasis, by underlining, supplied by us]

7. Clearly, therefore, the Assessing Officer proceeded on the basis that since beneficial owner of the capital gains in question is an entity based outside Mauritius, the assessee is not entitled to the treaty protection in respect of capital gains in question. The elaborate discussions in the assessment order, which run into almost one hundred pages, is in support of this proposition, but then what this proposition, in our considered view, presupposes, or proceeds on the underlying fundamental assumption, is that the concept of beneficial ownership of the capital gains can indeed be read into the scheme of Article 13 of the Indo Mauritius tax treaty. That is where the fallacy creeps in the reasoning process. In our considered view, that fundamental assumption, underlying the proposition advanced by the Assessing Officer, cannot be taken as granted- as the Assessing Officer has apparently taken it to be. Therefore, rather than putting the elaborate arguments in furtherance of the said proposition to test of judicial scrutiny, in our considered view, we must first put with this fundamental assumption, underlying the proposition, to the test of judicial scrutiny. If this fundamental assumption is found to be incorrect, we will not be required to deal with the question, which would be academic in that case, as to whether the detailed arguments in support of the reasoning adopted by the Assessing Officer to hold the view that the assessee is not the actual or true beneficiary of the transactions leading to capital gains in question.

8. We find that unlike in article 10 or article 11 of the Indo Mauritius tax treaty, which specifically provides for beneficial ownership of interest or dividend in order to be entitled for a treaty protection, there is no such provision in article 13 of the Indo Mauritius tax treaty. Article 10(2), for example, make it a condition precedent for availing treaty protection to dividend income that 'recipient is the beneficial owner of the dividends', and Article 11(4) similarly provides that treaty protection can be availed when interest income is 'derived and beneficially owned' by a person resident of the contracting state. Such rider is however missing in article 13. It would appear to us that the concept of beneficial ownership being a *sine qua non* to entitlement to treaty benefits cannot, in the absence of specific provision to that effect, cannot be inferred or assumed. As a look at the international tax literature shows, such an omission may not be inadvertent or unintentional. In one of the United Nations Committee of Experts on International Cooperation on Tax Matters document, which is freely available in public domain (https://www.un.org/esa/ffd/wp-content/uploads/2014/10/4STM_EC18_2008_CRP2_Add1.pdf),

it is noted that a subcommittee formed by the said Committee of Experts was "requested to carry out further work on the issue of beneficial ownership and it was noted this could include whether or not the concept of beneficial ownership could apply with respect to other articles of Model Convention, such as Article 13 and 21". This subcommittee in turn requested Prof Philip Baker for a consulting paper on this issue, which, *inter alia,* noted the irrelevance of the domestic law meaning of 'beneficial ownership', justifying its 'international fiscal meaning' to adopted, and the fact that there is only limited judicial precedents available elaborating upon that concept (only six at that point of time), and observed that "the inclusion of a beneficial ownership limitation in the capital gains article of specific bilateral conventions is not part of the current tax treaty practice of any State". It concluded that "there was ultimately only limited support for inserting beneficial ownership in article 13". It would thus seem possible that reading a beneficial ownership test, when such a test is not embedded in the treaty provision itself, is rather than a permissible interpretation of the treaty provisions, a rewriting the treaty provision itself. The approach of the authorities below thus seems to be fundamentally altering the criterion under which a person is entitled to the benefits of a treaty provision, thus frustrating and negating the certainty and predictability sought to be achieved by the tax treaty partners. The concept of beneficial ownership, it could possibly be argued, is utterly foreign to the scheme of article 13 of the Indo Mauritius tax treaty. Unless a condition is specifically set out in the treaty provision itself, it cannot possibly be inferred. One must remember that the tax treaties are replete with choices but once these choices are consciously made by two willing partners these choices can not be unilaterally nullified on the basis of perceptions about some underlying notions of what would constitute good public policy. In the context of international tax treaties, respect for negotiated bargains between contracting states is fundamental to ensure tax certainty and predictability and to uphold the principle of *pacta sunt servanda*, which is specifically referred to in Article 26 of the Vienna Convention on the Law of Treaties and which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Any violation of this approach, no matter how well-intended, can only be at a huge cost of tax unpredictability- something tax administrations can ill afford. These discussions clearly demonstrate that the approach adopted by the authorities below in ducking the issue as to whether the provisions of beneficial ownership can be read into the provisions of article 13 and proceeding by taking the position of beneficial ownership as granted in the scheme of Article 13 is unsustainable in law. While on the issue, we may add that although in the context of the application of GAAR in the context of treaty abuse in the context of materially similar Article 13 in Canada Luxembourg Double Taxation Avoidance Agreement, the Hon'ble Supreme Court of Canada has declined to read, by a 6:3 majority view, a requirement of **'sufficient substantive economic connection'** in Article 13 and has categorically observed, even in the minority view, that "**Indeed, beneficial ownership is utterly foreign to art. 13**". [**Her Majesty Vs Alta Energy Luxembourg SARL- [2021 SCC 49- judgment dated 26th November 2021**]. A conscious call, therefore, on the question as to whether the requirements of beneficial ownership is embedded in Article 13, is *sine qua non* before proceeding on the basis.

9. In all fairness, we must take note of the judgment of Hon'ble jurisdictional High Court in the case of **Aditya Birla Nuvo Ltd** *(supra)* which does indeed refer to the beneficial ownership in the context of article 13 of the Indo Mauritius tax treaty. As a careful look at the text of the said judgment would show that it was a case in which the assessee had claimed that "**AT&T Mauritius qualifies as a beneficial owner of the shares in the ICL**" (see para 26 f) and it was thus not even the case of the assessee that the assessee is not required to be a beneficial owner to claim the treaty protection. It was in this backdrop that the matter was proceeded with. In our considered view, therefore, this judgment cannot be an authority for the proposition that the requirements of 'beneficial ownership' can be read into the provisions of Article 13. This decision, therefore, will have no bearing on the said question. As regards the decision of Hon'ble Authority for Advance Ruling in the case of **AB Mauritius In Re** *(supra),* it was noted therein that "**it is the subsequent conduct of the company that casts a shadow on whether it could be said to be the beneficial owner of the shares acquired through the SPA, which was neither signed by it nor mentions any consideration paid or payable by it**" but that this observation proceeds on the assumption that 'beneficial ownership' of the shares in question is condition precedent for availing the treaty protection under article 13- something not borne out of the clear words of the treaty provisions. We are thus not persuaded by this ruling which anyway has no binding precedence value so far as this forum is concerned. We are thus unable to see any merits in reliance of the authorities below on these judicial precedents. The question regarding relevance of 'beneficial ownership' requirement in the scheme of Article 13 thus remains an issue unaffected by these judicial precedents, and these judicial precedents cannot be pressed into service to infer such a requirement implicit in the scheme of Article 13 of the Indo Mauritius tax treaty.

10. In the light of the above discussions, in our considered view, the Assessing Officer has clearly fallen in error in proceeding on the basis that the concept of beneficial ownership is relevant in the context of article 13, without assigning any specific and cogent reasons in support of this inference. We are unable to approve this approach. We, therefore, deem it fit and proper to vacate the impugned assessment order and remit the matter to the file of the Assessing Officer for deciding the fundamental issue as to whether the requirement of beneficial ownership can be read into the scheme of Article 13 of the Indo Mauritius tax treaty, and it is only in the event of the answer being in the affirmative that the question of the beneficial ownership of the assessee, in respect of the shares, can be examined. Of course, there is one more step in the process and which is equally critical and foundational, and that is giving a categorical finding on the connotations of 'beneficial ownership' in the treaty context. There is huge debate globally on the meanings of 'beneficial ownership' in the context of the treaties. As we have seen earlier in this order, the United Nations Committee International Tax Committee has commissioned a report on the use of the beneficial ownership concept in the tax treaty provisions, and this report, which is available in the public domain, has an enlightening discussion about what constitutes beneficial ownership and which meaning of this term, the domestic law meaning or the international fiscal meaning, is to be adopted. There is also OECD Conduit Companies Report 1986 on this issue, and there are several decisions, whatever their utility and relevance, from the

judicial forums abroad. It is not at the whim or fancy of a tax authority to decide as to what constitutes ‘beneficial ownership’; it is absolutely fundamental that as what constitutes ‘beneficial ownership’ must also be examined and categorical findings are given as to how these requirements of beneficial ownership are satisfied in the present case. These reasons are also necessary so that, if necessary, we, as indeed the Hon’ble Courts above, can take a call on the correctness of the stand of the Assessing Officer. Both of these foundational issues, i.e. whether the concept of ‘beneficial ownership’ is inbuilt in the scheme of Article 13 and, if so, what are the connotations of ‘beneficial ownership’ in this context, need to be adjudicated upon by the Assessing Officer. As these fundamental issues are being remitted to the file of the Assessing Officer for adjudication by way of a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee, all other issues raised in the appeal are rendered infructuous as on now. It will be premature, even if at all necessary, to deal with those issues, and very erudite arguments by both the parties on those issues, at this stage. Let these foundational issues be dealt with by the Assessing Officer first- and he must do so by a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee in this regard. Ordered, accordingly. With these observations, the matter stands restored to the file of the Assessing Officer.

11. In the result, the appeals are allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 17th day of May, 2022.

Sd/-
Pavan Kumar Gadale
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 17th day of May, 2022

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai