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THE INCOME TAX APPELLATE TRIBUNAL DELHIBENCH 'D', NEW DELHI

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 976/Del/2022 : Asstt. Year : 2017-18

Sapein Funds Ltd., 3rd Floor, 355 NEX, Rue de Savoir, Cybercity Ebene, Foreign 72201, Mauritius	Vs	CIT(International Taxation), Delhi-3, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAWCS2495N		

Assessee by : Sh. Salil Kapoor, Adv. &
Ms. Ananya Kapoor, Adv.
Revenue by : Sh. Vizay Vasanta, CIT-DR

Date of Hearing: 20.04.2023		**Date of Pronouncement: 08.06.2023**

<u>ORDER</u>

<u>Per Dr. B. R. R. Kumar, Accountant Member:</u>

The present appeal has been filed by the assessee against the order of ld. CIT(IT)-3, New Delhi dated 24.03.2022.

2. Following grounds have been raised by the assessee:

"1. That in view of the facts and circumstances of the case and in law, the impugned notice dated 06.01.2022 issued under Section 263 of the Income Tax Act, 1961 ('the Act'), and the impugned order dated 24.03.2022 passed under Section 263 of the Act is illegal, bad in law, without jurisdiction and liable

2. That the impugned notice dated 06.01.2022 and the impugned order dated 24.03.2022 does not satisfy the jurisdictional requirement for invocation of Section 263 of the Act. The Principal Commissioner of

Income Tax ('PCIT') has erred in not establishing how the Assessing Officer ('AO') committed any error in passing the assessment order dated 24.12.2019 under Section 143(3) of the Act. Therefore, the jurisdiction assumed by the PCIT under Section 263 of the Act is illegal, bad in law, without jurisdiction and liable to be quashed.

3. That the order passed under Section 143(3) of the Act by the AO is neither erroneous nor prejudicial to the interest of the Revenue and as such the impugned order passed by the PCIT under Section 263 of the Act dated 24.03.2022 is illegal and bad in law.

4. That the PCIT failed to appreciate that issue was duly examined during the course of original assessment proceedings and the same was, therefore, outside the scope of revisionary jurisdiction under Section 263 of the Act. The view taken by the AO is a plausible view, hence the order passed under Section 263 is illegal and bad in law.

5. That this is not a case of lack of enquiry as the assessment order dated 24.12.2019 is passed after making the enquiries and after due application of mind.

6. That, during the course of original assessment proceedings, detailed questionnaires were issued from time-to-time which were duly responded to and enquiries were conducted and thereafter the assessment order was passed dated 24.12.2019. Hence, the assessment order is valid and correct in law.

7. That without prejudice, no independent enquiry has been done by the PCIT and in the absence of same the order passed u/s 263 is illegal, bad in law and without jurisdiction.

8. That, in view of the facts and circumstances of the case and in law, the PCIT has incorrectly invoked Section 263 of the Act without appreciating that if

two views are plausible and the AO takes one view, then no revisionary jurisdiction can be exercised.

9. That the impugned notice dated 06.01.2022 and impugned order dated 24.03.2022 passed by the PCIT under Section 263 of the Act is clearly without application of mind. Hence, the impugned notice dated 06.01.2022 and impugned order dated 24.03.2022 passed under Section 263 of the Act is liable to be quashed.

10. That all the facts and circumstances of the case and the material available on record have not been properly considered by the PCIT while passing the impugned order dated 24.03.2022 under Section 263 of the Act. The impugned order is illegal, arbitrary and bad in law.

11. That, even otherwise, specific query was made during original assessment proceedings and the AO accordingly took the view the gains on derivates of Rs.12,14,40,069/- and interest income of Rs. 79,37,500/- is not taxable and the Assessee is a Mauritius based Fund and a tax resident of Mauritius and as such is entitled benefits of India-Mauritius Double Taxation Avoidance Agreement.

12. That, in view of the facts and circumstances of the case and in law, the PCIT has erred in holding that the gains on derivates of Rs. 12,14,40,069/- and interest income of Rs. 79,37,500/- is taxable in law. The same is not liable to tax in India.

13. That, in view of the facts and circumstances of the case and in law, the PCIT has erred in not appreciating that the Assessee is a Mauritius based Fund and a tax resident of Mauritius and as such is entitled benefits of India-Mauritius Double Taxation Avoidance Agreement and the transaction is genuine in nature.

14. That, in view of the facts and circumstances of the case and in law, the PCIT has erred in not appreciating the case of the Assessee. The evidences/documents/material filed and placed on

record has not been judiciously interpreted and considered/appreciated by the PCIT.

15. That, in view of the facts and circumstances of the case and in law, the PCIT has erred in cancelling earlier assessment order dated 24.12.2019 and directing the AO to revise the assessment order in view of findings of the PCIT. The said act of the PCIT is illegal and bad in law.

16. That the observations made are unjust, illegal, arbitrary, bad in law, highly excessive and based on surmise conjecture."

3. Heard the arguments of both the parties and perused the material available on record.

4. Sapien 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, the Tax Residence Certificate in this regard has been provided to IT Authorities in India. The registered address of the company is 3rd Floor, 355 NEX, Rue du Savoir Cybercity Ebene 72201, Mauritius. SFL is an independent and distinct corporate legal entity. SFL is managed by Sapien Capital (Mauritius) Limited (SCML). SCML as well as its directors are tax resident of Mauritius.

5. SFL is a Collective Investment Scheme ("CIS"), authorized and regulated by the Financial Service Commission (FSC), Mauritius. The fund Investors are resident of various countries across the globe. None of the investor to the fund is resident of India. SFL is registered with SEBI as a Foreign Portfolio Investor (FPI) and has no establishment in India. VSFL, to undertake transactions in India) is registered with SEBI as FPI

registration number INMUFP251315, certificate dated December 2, 2015 is attached. As per SEBI, the registration of FPI is valid for 3 years. The books of accounts of the fund are maintained outside India in Mauritius. The assessee is managed by the investment management company, Sapien Capital (Mauritius) Limited through its directors, Mrs. Pamela Gopaloodoo and Mr. Nadarajen Anadachee. The fund independently has separate directors – Mr. Ramesh Awatar Sing and Mr. Nowrattan Bhurtun. All the named four personnel are residents of Mauritius.

6. The fund or the Management Company managing the fund have no permanent establishment in India. All substantive and material functioning relating to the fund and management company are carried and situated outside India along with the decision-making process, approvals, control and management in relation thereto. SFL became operational in February 2016. SFL activities in India are restricted to investment in Government Securities (Bonds) and Exchange Traded Cash Equities, trades in Exchange Traded Derivative, Equity and Currency (Future & Options). Investments in GSec and its custody is through ICICI. The investments relating to cash equities are executed through Globe, cleared and customized with ICICI. The trades in Derivatives are executed and cleared through Globe Capital Markets Ltd.

7. The Assessee is a tax resident of Mauritius and had shown income of Rs.12,93,77,569/- as exempt income for A.Y. 2017-18. The case was selected under CASS. The reasons cited for scrutiny were:

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

8. The assessment was completed u/s 143(3) on 24.12.2019 after considering the exempted income accepted the returned income at Rs. Nil.

9. The ld. CIT held that during the assessment proceedings for the year under consideration the AO has not obtained the nature of income claimed as exempt nor verified the claim of Rs.12.93 Cr. The ld. CIT held that the AO has not obtained any explanation whatsoever to ascertain the assessee's contention that such income are not chargeable to tax.

10. The summary of the reasons given by the ld. CIT are as under:

1. The scheme of arrangement employed by the assessee is a tax avoidance through treaty shopping mechanism.
2. The assessee company is just a conduit and the real owner is the shareholders/investors who are tax residents of different countries.
3. The TRC is not sufficient to establish the tax residency if the substance establishes otherwise.
4. The assessee company is also not a beneficial owner of income as control and dominion of fund is not with the company.

5. There is no commercial rationale of establishment of assessee company in Mauritius as the commercial outcomes would be identical irrespective of location of funds.

11. After examination of the details and explanation given by the assessee, the ld. PCIT held that the assessee is not entitled to benefit of Article 11 of the India- Mauritius DTAA. Accordingly, the ld. 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.

12. Aggrieved the assessee filed appeal before us.

13. At the outset, the ld. Counsel for the assessee argued that the case has been taken up for scrutiny for verification of two issues only and expanding the ambit by the ld. CIT is beyond the jurisdiction. He relied on the CBDT instruction Nos. 7/2015, 20/2015 & 5/2016 and also CBDT letter dated 30.11.2017 and also on the decisions of Co-ordinate Benches of Tribunal in the case of Meena Choudhary Vs. PR. CIT in ITA No. 70/RPR/2020 order dated 12.10.2021, M/s Diamond Dealers Pvt. Ltd. Vs. PCIT in ITA No. 3098/Mum/2019 order dated 27.11.2019, Balvinder Kumar Vs. PCIT (2021) 125 Taxmann.com 83 (Del. Trib.) and Hill Queen Investment (P.) Ltd. Vs. PCIT (2021) 127 Taxmann.com 682 (Kol. Trib.) wherein it was held that where the scope of scrutiny is limited to the issues raised, the revisional authority is not entitled u/s 263 of the Income Tax Act, 1961 to examine the issue not specified in the limited scrutiny assessment.

14. The ld. DR argued that this is not the case of limited scrutiny and hence the order of the ld. CIT was in accordance with the guidelines. It was argued that even in complete scrutiny cases, certain points of examination and verification have been prompted in the CASS but that does not curtail the power of the AO or ld. CIT to undertake complete scrutiny of the case.

15. Having gone through the Assessment Order, we find that the arguments of the ld. DR are acceptable.

16. On going through the entire issue, we deem it prudent to determine whether the income earned by the assessee who is a tax resident of Mauritius, out of the gains on currency derivates and the interest income on bonds is taxable in India or not.

17. The taxability of the receipts would validate the proceedings u/s 263 with regard to error as well as the prejudice caused to the revenue.

18. The arguments of the revenue are as under:

"As per the tax return and financial statement filed, it pays a minimal tax with majority of income from foreign jurisdiction is exempt from taxation. The Mauritian Tax law provides an extremely liberal taxation regime for fund which holds a global business license and are formed under Collective Investment Scheme. This regime provides for an income tax exemption of 80% on income derived by a Collective Investment Scheme, Closed-end fund, CIS manager, CIS administrator, Investment adviser or assets manager licensed or approved by the FSC. The exemption applies to the following income:

- *Foreign dividend, subject to amount not allowed as deduction in source country.*
- *Foreign-source interest income.*
- *Profit attributable to a PE of a resident company in a foreign country.*
- *Foreign-source income derived by a CIS, Closed End Funds, CIS manager, CIS administrator, investment adviser or asset manager licensed or approved by the FSC.*
- *Income derived by companies engaged in ship and aircraft leasing.*
- *Interest derived by a person from money lent through a peer-to-peer lending platform operated under a license issued by the FSC.*

As said before, liability to tax for treaty purposes refers to full or comprehensive liability and not liability that is limited under the domestic law of the relevant contracting state. Therefore, the criteria of "liable to tax" is not fulfilled in this case. In view of the above, the assessee is not a tax resident for the purposes of application of India- Mauritius DTAA.

In the instant case, the assessee company is created under Collective Investment Scheme. Collective investment vehicles (CIVs) generally, do not meet the definition of "liable to tax" in order to qualify as a resident of a contracting state for the purposes of tax treaties. As a general rule, domestic tax laws of several countries treat the income and gains of CIV as arising directly to the Investors and not to CIV itself. In short, the CIV is treated like a transparent entity. As a result, CIV does not get entitled to the benefits of tax treaties. Therefore, OECD Commentary to Article 1 (2017) in para 31 recommends that the contracting states should publicize their position on this issue bilaterally either by express provision in the tax treaties by stating that CIV is entitled to tax treaty benefits or

through exchange of notes. In the absence of such action, the CIV would not be entitled to benefits of tax treaties. Accordingly, as under India-Mauritius DTAA, no such position has been taken, then assessee company being a CIV will not get the benefits of India-Mauritius DTAA."

19. Hence, it was held that the assessee company is not entitled to avail benefits under India- Mauritius DTAA being not a resident for tax purposes because of non-fulfillment of condition of "liable to tax" criteria.

20. Rebutting the arguments of the revenue, the ld. AR argued that the Assessee is a fiscally transparent entity as it is incorporated as company under the laws of Mauritius. Further, Mauritius Income Tax Act, 1995 under section 43 states: "This Part shall apply to companies, unit trust schemes, trusts collective investment schemes, societies and Foundations". Section 45A of the Mauritian Act specifically provides for taxation of collective investment schemes. The Assessee files its income tax return in Mauritius. The same was also provided during the proceedings before ld. CIT. It was argued that the ld. CIT in his Order also states that the Assessee is liable to tax in Mauritius although it enjoys 80% exemption as per the domestic laws of Mauritius.

21. From the perspective of a textual interpretation, "liable to tax" is supposed to mean liable to comprehensive taxation and not actually being subject to tax, as linguistically, the phrase "liable to tax" has a much wider scope than "subject to tax.

22. Further Section 2(29A) of the Income Tax Act, 1961 inserted vide Finance Act, 2021 clarified that the Act currently

does not define the term liable to tax though this term is used in section 6, in clause (23FE) of section 10 and various agreements entered into under section 90 or section 90A of the Act. Hence, it is proposed to insert clause (29A) to section 2 of the Act providing its definition. The term liable to tax in relation to a person means that there is a liability of tax on that person under the law of any country and will include a case where subsequent to imposition of such tax liability, an exemption has been provided. This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years. The ld. AR further relied on the judgments in the case of Union of India Vs. Azadi Bachao Andolan & Anr. 263 ITR 706, Serco BPO Pvt. Ltd. Vs. AAR 379 ITR 256 and In Re General Electric Pension Trust 280 ITR 425.

23. On going through the entire facts, we find that the observation of the ld. CIT that the assessee company is not entitled to treaty benefits being a non-resident for tax purpose because of non-fulfillment of condition of liable to tax criteria is wrong on facts. Just because, tax exemption is provided by the resident country doesn't give an automatic right to the revenue authorities to tax the income in the contracting state.

24. The revenue further argued that the assessee is not a legitimate resident and the assessee is a classic case to treaty shopping to avoid payment of taxes. The arguments of the revenue are as under:

"The preamble of the DTAA (in this case India-Mauritius DTAA) put forth the object and intent of the DTAA. As general rules of

interpretation of the provisions of the DTAAs, the text must be read along with its object and purpose. The object and purpose of the DTAAs including the India-Mauritius DTAA is not only to avoid double taxation but also the prevention of fiscal evasion. The preamble of India-Mauritius DTAA is reproduced as under:

"Whereas the annexed Convention between the Government of the Republic of India and the Government of Mauritius for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and for the encouragement of mutual trade and investment has come into force on the notification by both the Contracting States to each other on completion of the procedures required by their respective laws, as required by Article 28 of the said Convention;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961) and section 24A of the Companies (Profits) Surtax Act, 1964 (7 of 1964), the Central Government hereby directs that all the provisions of the said Convention, shall be given effect to in the Union of India."

Under a Tax Treaty framework, treaty benefits are extended only to the tax residents of the contracting states. However, treaty abuse may occur when a taxpayer resident of a third country, takes advantage of the favourable tax positions of a treaty that would not normally be available to him. This practice is popularly known as treaty shopping.

Prior to BEPS initiative, there were no specific provisions under OECD model or UN model to address treaty shopping in a comprehensive manner. As an initiative, "beneficial ownership" requirement was introduced in 1977 OECD model to address situations where dividend, interest or royalty payments are made to an intermediary, such as an agent or nominee interposed between

the beneficiary and the payer. However, beneficial ownership test has limitation to intermediate companies as companies are legal owners of the income and they are under no obligation to pass on the income as in the case for agents or nominees. Subsequently, a section on improper use of the convention was added to the Commentary on Article 1."

25. Taking cue from the order of the ld. CIT, the ld. DR argued that in Post BEPS, a new Article 29, concerning the entitlement to tax treaty benefits, was added to the OECD Model as well as the UN model update of 2017. The model article includes several alternative provisions that contracting states may choose from when drafting their tax treaties to ensure that tax treaty benefits are not granted in situations of evasion or avoidance. These provisions reflect the intention of the contracting states as included in the preamble to OECD and UN Model which is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. The intention included in the preamble and the provisions stipulated under Article 29 stem from the work carried out under OECD BEPS initiative and corresponds to the minimum standard as detailed in the Final Report on Article 6 of "Preventing the granting of Treaty benefits in inappropriate circumstances. Relying on the post BEPS scenario, the revenue argued that India has deposited the Instrument of Ratification to OECD, Paris along with its Final Position in terms of Covered Tax Agreements (CTAs), Reservations, Options and Notifications under the MLI, as a result of which MLI will enter into force for India on 01st October, 2019 and its provisions will have effect on India's DTAAs from FY 2020-21 onwards. Two modifications

were made. One, in the light of Article 6 of the MLI India had agreed to modify the Purpose of a CTA. This is done through insertion of a line in the Preamble of the treaty stating that the parties intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, as well as through treaty shopping. Therefore, post-BEPS, the issue becomes explicit that tax residents using treaty shopping to avoid payment of legitimate taxes is no more entitled to tax treaty benefits. Second, in view of Article 7 of MLI dealing with Prevention of treaty abuse, envisages the following approaches in bilateral treaties to curb treaty abuse. India has accepted to apply PPT as an interim measure and intends where possible to adopt LOB provision, in addition or replacement of PPT, through bilateral negotiations along with Simplified LoB. India and Mauritius both have signed the MLI and ratified their tax treaties to include Article 6 of MLI.

26. Therefore, it was argued that any arrangement to avoid payment of legitimate taxes such as treaty shopping or conduit companies is not entitled to India- Mauritius DTAA benefits being held to be improper use of treaties. On this background, the examinations of facts are conducted to ascertain as to whether the arrangement made by the assessee company is tantamount to tax avoidance.

27. It was argued that two individuals namely Ramesh Kumar Ahuja and Aditi Agrawal incorporated Sapien Capital Ltd, a UK company with 50% shareholding each. Both are tax residents of UK. Sapien Capital Ltd floated a wholly owned subsidiary namely Sapien Capital(Mauritius) Ltd in Mauritius which inturn created Sapien Funds Ltd, a Collective Investment Vehicle. This

CIV is registered as FPI in India and made investments in India. Admittedly, there are around 21 investors in the CIV who are tax residents of third countries. As per the details furnished during the proceedings, two investors were holding more than 10% of shares of the fund. Raj Shah, Sita Shah and Ronak Shah together hold 13.64 % of shares. All of them are tax residents of Kenya. Abhishek Agrawal, a tax resident of the UK held 13.13% of the shareholding. Sapien Capital (Mauritius) Ltd is also the fund manager of this CIV. The moot question is then why the CIV is not formed at the level of the UK or any other place other than Mauritius because whether the investments are made from the UK or Mauritius or any other location, commercial outcome in India would be similar. The only reason is to obtain a favourable tax position of taxation of capital gains under the India-Mauritius as available prior to modification of protocol in 2017. In order to understand the motive, one has to consider the arrangement as a whole instead of resorting to transactional analysis. In this regard, a reference may be made to the principle approved by Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India (2012)341 ITR1 (SC). The Apex Court had held that in order to ascertain the taxability of the cross-border transaction in India, the business activities as a whole is required to be ascertained.

28. It was argued that under the India-Mauritius DTAA, the taxing rights over the capital gains was with the country of residence. Alternatively, India being a source country had no rights to tax capital gains arising from transfer of shares of Indian companies. On the other hand, if the fund is invested from the UK, the capital gains that arise in India would suffer

source taxation in India under India-UK DTAA. The other disadvantages is that CIVs are treated as transparent entities in the UK and therefore, prima facie would not be entitled to tax treaty benefits being not a resident for tax purposes in the UK.

29. On the top of it, the incorporation in Mauritius would provide several tax benefits at the level of Mauritius. For instance, there is no capital gains tax in Mauritius. There is no withholding tax on dividend and interest in Mauritius. There is no exchange control in force and funds can be repatriated freely. The maximum income tax liability on a fund which is tax resident in Mauritius is 3%. A fund can claim underlying taxes and benefit from tax sparing provisions. It is now even possible to incorporate an exempt fund in Mauritius as a company up under the Mauritius Companies Act 2001. Such corporate funds will be exempt from tax but may not benefit from tax treaty advantages in certain situations.

30. Further, the fund manager in this case is Sapien Capital (Mauritius) Ltd which is a wholly owned subsidiary of an UK company namely Sapien Capital Ltd, UK. This company is controlled by two individuals namely Ramesh Kumar Ahuja and Aditi Agrawal who are also tax residents of the UK. Therefore, the fund is actually controlled by Ramesh Kumar Ahuja and Aditi Agrawal who are based in UK. Therefore, there is no commercial rationale of creating the fund at the level of Mauritius as the investment could actually be managed from the UK. This is a typical arrangement of several funds. The only motive is to avoid payment of legitimate taxes. As a result, the existence of assessee company in Mauritius lacks any commercial reasoning.

Continuing the arguments, the revenue submitted that Ramesh Kumar Ahuja and Aditi Agrawal incorporated Sapien Capital Ltd., a UK company with 50% shareholding each. Both are tax residents of UK. Sapien Capital Ltd floated a wholly owned subsidiary namely Sapien Capital (Mauritius) Ltd. in Mauritius which inturn created Sapien Funds Ltd., a Collective Investment Vehicle. This CIV is registered as FPI in India and made investments in India. Admittedly, there are around 21 investors in the CIV who are tax residents of third countries. The CIVs are created for a limited time frame. Once the investments are disposed of, the proceeds from the investments are completely disbursed to the investors on the basis of their contribution. In fact, the tacit arrangement is to pass on every income to its real owner after deducting expenses for fund management. Therefore, this is completely a back-to-back arrangement. A company may be coined as conduit if the dominion and control over the income is with somebody else. In the instant case, the economic owner of the income is the investors. Therefore, a conduit company would also fail the test of beneficial ownership. It was argued that the TRC is only a first step but it is not a final to accord benefits of the treaty provisions.

31. In nutshell, the revenue argued that this is a classic case of treaty shopping to avoid payment of taxes. Therefore, the company would not be entitled to tax treaty benefits under India-Mauritius DTAA as it is not a legitimate tax resident. Taking the arguments further, the revenue argued that the arrangement is a conduit and also that TRC is not conclusive and treaty allows control & management test in case of dual residency.

32. Rebutting the arguments of revenue, the ld. AR argued that the ld. CIT has erred in stating that India and Mauritius both have signed the MLI and ratified their tax treaties to include Article 6 of MLI whereas, in fact Mauritius has not notified its tax treaty with India as a "covered tax agreement" in its submission to OECD to implement MLI. Setting up a fund in Mauritius is a commercial decision based on many factors sans the incidental tax benefits the jurisdiction might provide. The jurisdiction also offers a complete range of financial products such as treasury/investment/asset management, investment funds (closed-end, open- ended, retailed etc), protected cell companies, captive insurance, family offices and trusts, which adds to the completeness of the eco system being made available to Fund Managers for an efficient structuring of their businesses. It was argued by the ld. AR that Mauritius is a major financial center for fund management for global funds and has availability of skilled managers and administrators which are cost efficient as compared to UK. Fund is active till now and has not shut after the amending protocol came into effect. So there is no case that the fund was set up only take advantage of the treaty as it stood prior to its amendment.

33. The ld. AR argued that the ld. CIT has erred factually in alleging that the arrangement is a back-to-back arrangement and the fund is not the beneficial owner of the income as it has no dominion and control over the same, when in fact, the fund does not pass on each and every income it.

34. The ld. AR relied on the CBDT Circular 789 of 13th April 2000 and also the fact that the constitutional validity of

impugned circular was upheld by the Hon'ble Supreme Court of India.

35. The ld. AR argued that in the latest version of OECD MTC it is expressly mentioned that the term "beneficial owner is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance." In the context of Article 10 & 11, the term "beneficial owner" is intended to address difficulties arising from the use of the words "paid to" in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends. The recipient of o dividend is the "beneficial owner" of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person. It was argued that this type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles.

36. We find that the circular No. 789 of CBDT reads as under:

"734. Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)

1. The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article 4 of the DTAC defines a resident of one State to mean "any person who, under the laws of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other crite-rion of a similar nature." Foreign Institutional Investors and other investment funds, etc., which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritius Tax law and are, therefore, to be considered as residents of Mauritius in accordance with the DTAC.

2. Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income-tax Act, 1961. Under the DTAC, tax was deductible at source on the gross dividend paid out at the rate of 5% or 15% depending upon the extent of sharehold-ing of the Mauritius resident. Under the Income-tax Act, 1961, tax was deductible at source at the rates specified under section 115A, etc. Doubts have been raised regarding the taxation of dividends in the hands of investors from Mauritius. 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 beneficial ownership for applying the DTAC accordingly.

3. The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accord-ingly, FIIs, etc., which are resident in Mauritius would

not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of article 13."

Circular : No. 789, dated 13-4-2000.

37. The aforesaid circular has been a subject matter of interpretation by Hon'ble High Court of Delhi wherein the circular was held to be ultra vires of the provisions to Section 90 and Section 119 of the Income Tax Act, 1961 and later on the Hon'ble Supreme Court upheld the validity of the Circular No. 789. Hence, the revenue cannot deny the benefit of India-Mauritius Tax Treaty to the assessee which is the assessee is legally entitled to on the strength of TRC issued by the Mauritian Tax Authorities. The Finance Ministry, through a clarification dated 2 March 2013, also clarified 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. For the sake of ready reference, the said Finance Ministry's Clarification is reproduced below:

FINANCE MINISTRY'S CLARIFICATION ON TAX RESIDENCY CERTIFICATE (TRC)
PRESS RELEASE, DATED 1-3-2013

"Concern has been expressed regarding the clause in the Finance Bill that amends Section 90 of the Income-tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of section 90 was introduced last year by Finance Act, 2012. That subsection requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.

DTAAs recognize different kinds of income. The DTAAs stipulate that a resident of a contracting state will be entitled to the benefits of the DTAA.

In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA. The same words are proposed to be introduced in the Income-tax Act as sub-section (5) of section 90. Hence, it will be clear that nothing new has been done this year which was not there already last year.

However, it has been pointed out that the language of the proposed sub-section (5) of section 90 could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India. The government wishes to make it clear that that is not the intention of the proposed subsection (5) of section 90. The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.

In the case of Mauritius, circular no. 789, dated 13-4-2000 continues to be in force, pending ongoing discussions between India and Mauritius."

38. Further, the Hon'ble High Court of Delhi in the case of Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. Vs. ACIT in CM Appeal 7332/2022 vide order dated 30.01.2023 reiterated that TRC is statutorily the only evidence required to be eligible for the benefit under the DTAA and the respondent's attempt to question and to behind the TRC is wholly contrary to

the Government of India's consistent policy and repeated assurances to Foreign Investors. Further, we are also not in agreement with the observation of the ld. CIT that the assessee has about 21 investors who are non-tax resident of Mauritius and hence the assessee is a conduit. What is relevant is whether the assessee company is a taxable entity in Mauritius or not?

39. Further, we also find the observation of the ld. CIT that the assessee has entered in only two transactions in the whole years in G-sec Bonds and few transactions in cash is only a partial truth. In addition to the investments in bonds and exchange traded cash equities, the assessee has large number of exchange traded derivatives transactions. The same can be proved by examination of the contracts notes which have been already provided to the ld. CIT. These contract notes reflect transactions of the assessee on MCX, BSE & NSE. In addition to the investments in India, the assessee has also invested in LME, CMX, SSE & DGCX. Hence, the contention of the ld. CIT that the income earned by the assessee from derivatives is not a business income also cannot be accepted.

40. Hence, keeping in view the entire facts, we have no hesitation to say 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.

41. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 08/06/2023.

Sd/-	Sd/-
(Saktijit Dey)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 08/06/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR