MEERA BHATIA Vs ITO

Date of decision :Oct 29, 2009

2010-TII-06-ITAT-MUM-INTL

IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH "L" MUMBAI

ITA No. 1876/Mum/2006
Assessment Year : 2000-01

MEERA BHATIA
207, KAMDHENU CHS LTD
BUILDING NO 4, LOKHANDWALA
COMPLEX, ANDHERI (WEST), MUMBAI-400053
PAN NO: AEYPB9253J

Vs

INCOME TAX OFFICER INCOME TAX
1(1), MUMBAI

Pramod Kumar, AM And P Madhavi Devi, JM

Dated: October 29, 2009

Appellant Rep By: Shri Nishant Thakkar
Respondent Rep By: Smt Gunjan Misra

Indo-UAE DTAA - Articles 4, 13 - Whether an individual resident of UAE is entitled to treaty benefits.

The assessee, a resident of United Arab Emirates claimed benefit of Article 13(3) of the Indo UAE tax treaty in terms of which capital gains on alienation of shares are 'taxable only in the Contracting State of which alienator is resident' , However,relying on the decision ofthe AAR in the case of Cyril Eugene Pereira's case, which holds that "an individual who is not liable to pay tax under the UAE law cannot claim any relief from the only tax which is payable in India under the agreement" and that "the provisions of Double Taxation Avoidance Agreements donot apply to any cases where the same income is not liable to be taxed twice by the existing laws of both the contracting states", the Assessing Officer declined the tax treaty benefits to the assessee. Aggrieved,the assessee appealed to the CIT(A) without any success.On further appeal held that;

+ the case is covered by the decision of the Tribunal in the case of ADIT vs Green Emirate Shipping and Travels (*2006-TII-09-ITAT-MUM-INTL*) wherein it was held that actual payment of tax in one of the contracting States is not a condition precedent to avail the benefits of DTAA in the other Contracting States because the tax treaty prevents not only 'current' taxation but also "potential' double taxation. Once the right to tax UAE residents in specified circumstances vests only with principal State of the UAE under a tax treaty, that right, whether that right exercised or not, continues to remain exclusive right of that state

+ double non-taxation is also a fact of life, and tax sparings, which find place in several Indian tax treaties, are also a reality in international taxation. To enter or not to enter in a tax treaty which may leave scope for double non taxation is a conscious

decision of the respective Contracting State, but once such a tax treaty, as may leave scope for double non taxation, is entered into, judicial forums have to interpret the provisions of tax treaty as they exist.

+ in legal matters like interpretation of international tax treaties and with a view to ensure consistency in judicial interpretation thereof under different tax regimes, it is desirable that the interpretation given by the foreign courts should also be given due respect and consideration unless, of course, there are any contrary decisions form the binding judicial forums or unless there are any other good reasons to ignore such judicial precedents of other tax regimes.The view taken by ITAT in Green Emirates case has also been by a Dutch Court of Appeal.

+ the protocol amending the treaty by notification No. 282 of 2007, changed the definition of resident in Article 4(1)(b) which now provides that resident of a Contracting State, in the case of the UAE, means "an individual who is present in the UAE for a period or periods aggregating totalling in aggregate at least 183 days in the calendar year concerned, and a company, which is incorporated in UAE and which is managed and controlled wholly in UAE". This amendment in the definition of resident of UAE thus accepts the broad proposition that the taxability in one of the Contracting States is not a sine qua non to avail treaty benefits in the other Contracting State.

+ old Article 13(3) in the original Indo-UAE tax treaty stands substituted by new Article 13(3), 13(4) and 13(5) which considerably narrow down taxability of capital gains on alienation of shares in the domicile country.This provision, however, comes into effect from 1st April 2008 and will not, therefore, have any application on the facts of the present case.

Assessee's appeal allowed.

ORDER

Per: Pramod Kumar:

1. By way of this appeal, the assessee appellant has called into question correctness of order dated 7th February 2006, passed by the learned CIT (A) for the assessment year 2000-091, holding that the assessee is liable to pay tax on short term capital gains on sale of shares.

2. The controversy requiring our adjudication is set out in a very narrow compass of narrow and undisputed facts. The assessee before us is a resident of United Arab Emirates and her fiscal domicile is in the UAE. On this basis, she has claimed benefit of the Double Taxation Avoidance Agreement entered into by Government of India with the *Government of United Arab Emirates (205 ITR Statutes 49* - hereinafter referred to as 'Indo UAE tax treaty'). In terms of Article 13(3) of this Indo UAE tax treaty, as it stood at the relevant point of time, capital gains on alienation of shares are 'taxable only in the Contracting State of which alienator is resident' , This claim, however, did not find favour with the authorities below. Relying upon the decision of Hon'ble Authority for Advance Ruling in the case of *Cyril Eugene Pereira's case (239 ITR 650)*, = *(**2002-TII-31-ARA-INTL**)* which holds that "an individual who is not liable to pay tax under the UAE law cannot claim any relief from the only tax which is payable in India under the agreement" and that "the provisions of Double Taxation Avoidance Agreements donot apply to any cases where the same income is not liable to be taxed twice by the existing laws of both the contracting states", the Assessing Officer has declined the tax treaty benefits to the assessee. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the Commissioner (Appeals) but without any success. Not satisfied by the order of the CIT(A), the assessee is in second appeal before us.

3. Learned Representatives fairly agree that the issue is covered by the Tribunal's decision dated 30th November 2005, in the case of *ADIT vs Green Emirate Shipping and Travels* ***(2006-TII-09-ITAT-MUM-INTL)*** wherein the Tribunal has held that actual payment of tax in one of the contracting States is not a condition precedent to avail the benefits of DTAA in the other Contracting States because the tax treaty prevents not only 'current' taxation but also "potential' double taxation. Once the right to tax UAE residents in specified circumstances vests only with principal State of the UAE under a tax treaty, that right, whether that right exercised or not, continues to remain exclusive right of that state. In this case, speaking through one of us (i.e. the Accountant Member), the Tribunal further observed as follows:

> *"....As noted above, the exemption agreed to under the 'assignment' or distributive' rule, is independent of 'whether the Contracting State imposes a tax in the situation to which exemption implies'. In the case of John N Gladden V Her Majesty the Queen 85 TC 5188, which was quoted with approval by the Hon'ble Supreme Court in Azadi Bachao Andolan's case (supra), Federal Court of Canada was observed that''' the non-resident can benefit from the exemption (under the treaty) regardless of whether or not he is taxable on that capital gain in his own country, If Canada or the US were to abolish the capital gains tax completely, while the other country did not, a resident of the country which has abolished the capital gains would still be exempt form capital gains in that country". It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other courts. All that is necessary for this purpose is that the person should be liable to tax in the contracting State by reason of domicile, residence, place of management, place of incorporation for any other criterion of similar nature which essentially refers to the fiscal domicile of such a person. In other words, if fiscal domicile of a person is that person is actually liable to pay tax in that country, he is to be treated as resident of that contracting State. The expression 'liable to tax" is not to read in isolation but in conjunction with the words immediately following it i.e. 'by reason of domicile, residence, place of management place of incorporation or any other criterion of similar nature'. That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that country. These texts of fiscal domicile which are given by way of examples following the expression 'liable to tax by reason of i.e. domicile, residence, place of management, place of incorporation etc. are no more than examples of locality related attachments which attract, residence type taxation, that 'person' is to be treated as resident and this status of being a 'resident' of the Contracting State is independent of the activity of tax on that person. Viewed in this perspective, we are of the considered opinion that being 'liable to tax in the Contracting State by the virtue of an existing legal provision but would also cover the cases where that other Contracting State has the right to tax such persons irrespective of whether or not such a right is exercised by the Contracting State."*

4. Learned Departmental Representative, however, dutifully relies upon the orders of the authorities below, and urges us to confirm the same. She highlights the reasoning adopted by the CIT(A), relies upon the rulings of the Hon'ble Authority for Advance Rulings followed by the CIT(A), and submits that there is no justification for any interference in the order of the CIT(A).

5. However, we see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench in the case of Green Emirates Shipping & Travels (supra). It may result in double non taxation but then we cannot be oblivious to the fact that double non-taxation is also a fact of life, and tax sparings, which find place in several Indian tax treaties, are also a reality in international taxation. To enter or not to enter in a tax treaty which may leave scope for double non taxation is a conscious decision of the respective Contracting State, but once such a tax treaty, as may leave scope for double non taxation, is entered into, judicial forums have to interpret the provisions of tax treaty as they exist. We are in considered agreement with the views expressed by the co ordinate bench. Respectfully following the same grievance of the assessee must be upheld. It would perhaps also be appropriate to add a few lines on the developments post the said decision in the case of Green Emirates Shipping and Travels (supra)

6. The view taken by the Tribunal in the case of Green Emirates Shipping & Travels (supra) of the Tribunal has also been confirmed, a few months later, by a Dutch High Court vide judgment dated 15 February 2006. We consider it appropriate to reproduce the observations made by late Prof Klaus Vogel in the Bulletin for International Taxation (Volume 60 No 6 -2006 at pages 218-219) published by the International Bureau of Fiscal Documentation, Amsterdam. Prof Dr. Klaus Vogel, after referring to the Tribunal decision in the case of Green Emirate Shipping and Travel (supra), had observed as follows:-

> An unusual case decided by the Dutch Gerechtsh of Amstredam Court of Appeals on 15 February 2006 confirms this decision. The owners of the Dutch company, X BV emigrated from the Netherlands to Greece in 1995 and advised the Dutch tax authorities that they now exercised management and contract fro their new location, as a consequence of which the company became a Greek resident. This

> was not in dispute in May 2000, the taxpayers informed the Dutch authorities that, sine their relocation, they had endeavoured to register the company with the Greek Tax authorities, but failed to succeed because of the Greek tax authorities, but failed to succeed because of the Greek bureaucracy the company had not yet been assessed to the Greek corporate income tax.
>
> These facts were not contested by the Dutch authorities. But in 2004 they assessed the taxpayers for the Dutch corporate income tax retrospective for the year 1995. The tax inspector argued that, for Applying Art 4(1) of the Netherlands-Greece tax liability is not sufficient rather a factual subjective indebtedness" ("een feitelike subjective onderworpnheld") is required. The Court, however, refuted this argument it pointed out that the tax treaty did not postulate factual taxation: instead a legal obligation to pay tax on worldwide income was called for, which under Greek law was established.

7. In legal matters like interpretation of international tax treaties and with a view to ensure consistency in judicial interpretation thereof under different tax regimes, it is desirable that the interpretation given by the foreign courts should also be given due respect and consideration unless, of course, there are any contrary decisions form the binding judicial forums or unless there are any other good reasons to ignore such judicial precedents of other tax regimes. The tax treaties are more often than not based on the models developed by the multilateral forums and judicial bodies in the regimes where such models are being used get occasions to express their views on expressions employed in such models. It is only when the views so expressed by judicial bodes globally converge towards a common ground that an international tax language as was visualized by Hon'ble Andhra Pradesh High Court in the case of *CIT vs Vishakhapatnam Port Trust (144 ITR 146) = (**2003-TII-14-HC-AP-INTL**)*, can truly come into existence, because unless everyone, using a word, or a set of words, in a language, does not understand it in the same manner, that language will make little sense. There is one decision in favour of the assessee on this issue by the Dutch Court of Appeal and no other country judicial precedent from any other judicial forum has been brought to our notice. The view taken by this Tribunal has been followed in the aforesaid subsequent Dutch Court of Appeal judgment. These things taken together, when viewed in perspective discussed above, also persuade us not to take any other view of the matter than the view so taken by the Tribunal in the case of Green Emirate Shipping and Travels (supra).

8. While concluding the aforesaid decision, the Tribunal had made the following observations:

> Before parting with the matter, we may add that instead of allowing such matters, as is the dispute before us, be subjected to confusing signals resulting in uncertainty and prolonged litigation, it is certainly more desirable for the Government to take a clear cut stand on the issue or let the matter be resolved at the level of Governments of the Contracting States. That perhaps is a better solution for quickly resolving the disputes on such a fundamental aspect of a tax treaty as to who will be eligible for the benefits of that tax treaty. We hope Government will resolve this matter once for all and would not allow that uncertainty to last for long..

9. We have noted that a successful initiative has indeed been made to resolve this issue at level of the Contracting States. On 6th March 2007, a protocol, amending the Indo UAE tax treaty, has been entered into. This protocol has since been notified by the Government of India vide Notification No. 282 of 2007, dated 28th November 2007 *(213 CTR Statues 64).* One of the amendments made by this protocol is the change in definition of resident in Article 4(1)(b) which now provides that for the purpose of the Indo UAE tax treaty, resident of a Contracting State, in the case of the UAE, means "an individual who is present in the UAE for a period or periods aggregating totalling in aggregate at least 183 days in the calendar year concerned, and a company, which is incorporated in UAE and which is managed and controlled wholly in UAE". This amendment in the definition of resident of UAE thus accepts the broad proposition that the taxability in one of the Contracting States is not a sine qua non to avail treaty benefits in the other Contracting State. The fundamental assumption by the Assessing Officer that that "an individual who is not liable to pay tax under the UAE law cannot claim any relief from the only tax which is payable in India under the agreement" and that "the provisions of Double Taxation Avoidance Agreements donot apply to any cases where the same income is not liable to be taxed twice by the existing laws of both the contracting states" is thus no longer backed by the

tax administration itself. As we notice this position, we are alive to the fact that the protocol to the Indo UAE tax treaty has come into effect from 1st April 2008 but that is not really relevant in the present context. What is material is the fundamental approach to the availability of treaty benefits to the residents of Contracting States without making it conditional upon dual taxability of same income. This approach is clearly in conformity with the approach adopted by us in the case of Green Emirates Shipping & Travels (supra) and the amendments so brought about by the amendments in the Indo UAE tax treaty have thus introduced good deal of clarity about the legal position on such fundamental aspects of a tax treaty as to who will be eligible for tax treaty benefits.

10. While on the amendments brought about the protocol amending the Indo UAE tax treaty, it is also important to take note of the fact that old Article 13(3) in the original Indo UAE tax treaty stands substituted by new Article 13(3), 13(4) and 13(5) which considerably narrow down taxability of capital gains on alienation of shares in the domicile country. Except in a situation in which the shares are of a company holding, directly or indirectly, principally immoveable property in the other Contracting State, capital gains on alienation of shares are to be taxed in the Contracting State of which the company is resident. This provision, however, comes into effect from 1st April 2008 and will not, therefore, have any application on the facts of the present case. For all these reasons and in view of the above discussions, we uphold the grievance of the assessee and direct the Assessing Officer to extend benefits of Indo UAE tax treaty to the assessee appellant. The assessee appellant gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the Open Court today on the 29th October 2009.