



SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 234

Saket Kanoi

vs

DCIT

UAE resident earning capital gain income from mutual fund in India will only be taxable in UAE and not in India

30.11.2024



Facts of the Case

- ❖ Assessee, a resident of UAE, who had earned capital gains in India from the sale of mutual funds of Rs. 1,54,01,166/-
- ❖ The assessee claimed exemption from capital gains tax in India under Article 13(5) of the India-UAE Double Taxation Avoidance Agreement (DTAA), which grants taxing rights on such income to the UAE.
- ❖ Assessing Officer stated that it was not a case of double taxation. Hence denied assessee, the benefit of India-UAE DTAA.

Assessee's Contention

- ❖ The Assessee contented that the Assessing Officer (AO) and the Dispute Resolution Panel (DRP) have grossly erred on the premise that an individual (assessee) is excluded from the definition of "**person**" under UAE Tax Decree of 1969 and that in absence of any existing Income tax law in the UAE on Individuals, the benefit of the India-UAE DTAA is not allowed.
- ❖ Actual payment of tax in the UAE is not required; it is sufficient that the UAE has the right to tax under the DTAA.

Assessee's Contention

- ❖ AO and DRP have grossly erred by concluding that since assessee is not "**liable to any taxes**" in the UAE and since there are no existing Income tax laws in the UAE applicable on Individuals, the benefit of the India-UAE DTAA is not allowed, since the income is not doubly taxed.
- ❖ AO and DRP have grossly erred by concluding that as per Sec 90(1) since the words used are "**taxes paid**", the benefit of India UAE DTAA cannot be given to the assessee.

Revenue's Contention

- ❖ AO and DRP contended that since appellant is not "liable to any taxes" in the UAE and since there are no existing Income tax laws in the UAE applicable on Individuals, the question of giving benefit of the India UAE DTAA to the appellant does not arise.
- ❖ Ld. Assessing Officer (AO) and DRP contended that assessee will not get benefits under the India-UAE DTAA for capital gains on sale of debt mutual funds on the premise that an individual (the appellant herein) is excluded from the definition of "person" under UAE Tax Decree of 1969.
- ❖ In the absence of any actual payment of Income tax and filing of any Tax return in the UAE, assessee does not get the benefit of any article under the India-UAE DTAA. Ld. AO has relied upon the decision of the AAR in the case of Abdul Razack Menon [2005] 146 Taxman 115/276 ITR 306 (AAR) which had considered the decision of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan [2003] 132 Taxman 373/263 ITR 706 (SC)

Revenue's Contention

- ❖ AO contented that since income is not taxed anywhere in the world, assessee will not be covered by article 2 of tax treaty and also it was not a case of double taxation.
- ❖ The tax treaty does not contemplate any such relief where a contracting state may levy in future. Tax treaties provide relief from actual taxes paid or liable to be paid in contracting states as per existing tax laws.
- ❖ Assessee has also taken a plea that his claim was accepted in earlier years, however, the plea is not acceptable as each assessment year is different under the Act.
- ❖ Capital gains from sale of mutual funds are covered within scope of income u/s 5 of the Act. Accordingly, capital gains from sale of mutual funds are to be added to the income of the assessee.

Legal provisions

Section 90(1) of the Act:

The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory)

Legal provisions

Article 2 of India-UAE DTAA:

1. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital including taxes on gains from alienation of movable or immovable property as well as on capital appreciation.

2. The existing taxes to which the Agreement shall apply are :
 - a) In United Arab Emirates:
 - i. Income tax
 - ii. corporation tax
 - iii. Wealth tax(hereinafter referred to as "U.A.E. tax") ;
 - b) In India :
 - i. the income-tax including any surcharge thereon ;
 - ii. the surtax ; and
 - iii. the wealth-tax(hereinafter referred to as "Indian tax").

Legal provisions

Article 13 of India-UAE DTAA:

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in paragraph (2) of Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base may be taxed in that other State.

Legal provisions

Article 13 of India-UAE DTAA:

3. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.
4. Gains from the alienation of shares other than those mentioned in paragraph 3 in a company which is a resident of a Contracting State may be taxed in that State.
5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 above shall be taxable only in the Contracting State of which the alienator is a resident

Ruling

- ❖ **The DTAA prevents both actual and potential double taxation**, and its provisions apply even if the other contracting state (UAE) chooses not to exercise its taxing rights.
- ❖ Judicial precedents clarified that the term "liable to tax" under a DTAA means the contracting state must have the right to tax the person, regardless of whether such taxation is enforced.
- ❖ The judgement is announced in favour of the assessee and hence the assessee is eligible to get benefit of the India-UAE DTAA.

Our Comments

- ❖ DTAA are not only entered to avoid double taxation of an income but one more function of DTAA is to bifurcate the taxing right of an income between the resident country and source country.
- ❖ Hence, DTAA is not only applicable when an income is taxed in two countries but is also applicable to check in which country an income could be taxed i.e. resident country, source country or both country.

Section/Article	Section 90(1) of the Income-tax Act, 1961 and article 2 & 13 of DTAA
DTAA/Country	India UAE DTAA
Court	ITAT of Delhi
Date of decision	23-10-2024

Note: Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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