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SITG No. 248

TVF Fund Ltd.
v.
Deputy Commissioner of Income-tax, International Tax

Capital Gain On shares/ derivatives acquired prior to 1-4-2017 will be exempt under Article 13(3) and Article 13(4) of India-Mauritius DTAA and loss cannot be adjusted against such profit

08.03.2025

[2025] 171 taxmann.com 349 (Mumbai - Trib.)[23-01-2025]

Jain Shrimal & Co.

Facts of the Case

- The case involves TVF Fund Ltd**.**, a company **incorporated in Mauritius** and registered as a Foreign Portfolio Investor (FPI) with SEBI. The company invested in **Indian stock markets** through recognized exchanges like **NSE and BSE**.

- During the year under consideration, the assessee earned **long-term capital gain and short-term capital gain on sale of shares/derivatives** respectively **acquired prior to 1-4-2017**. The assessee thus claimed benefit of DTAA as per **section 90(2)** and claimed the long-term and short-term capital gains to be **exempt under article 13(3) and article 13(4)** of India-Mauritius DTAA as it stood prior to amendment.

- The Assessing Officer noted that during the year **assessee had brought forward long-term capital loss from assessment year 2020-21** and long-term capital loss suffered during the year under consideration and he computed capital gains in the hands of the assessee after setting off long-term and short-term capital losses against the long-term and short-term capital gains earned by the assessee before determining the amount that was held to be exempt in article 13(3)/(4) of India-Mauritius DTAA thereby taxing the gains which, otherwise is exempt as per the pre-amended Article 13(3)/(4)

Assessee's Contention

- The assessee argued that capital gains from the sale of shares acquired before **1-4-2017** should be **exempt from taxation in India** as per **Article 13(3) & 13(4) of the India-Mauritius DTAA**, which states that such gains are **taxable only in Mauritius i.e.** the country of residence of the assessee.
- Assessee contended that brought forward losses from shares acquired **after 1-4-2017 under section 74** of Income Tax Act should not be adjusted against exempt capital gains, as these losses relate to transactions taxable in India, whereas pre-2017 gains do not fall under Indian tax laws due to the DTAA exemption.
- Assessee relied on **Section 90(2) of the Income-tax Act, 1961**, which states that the provisions of the DTAA shall override Indian tax law if they are more beneficial to the taxpayer, making it unlawful to apply Indian tax provisions in a way that reduces the DTAA exemption.
- Assessee cited judicial precedents such as **Goldman Sachs Investment (Mauritius) Ltd. v. DCIT [2020] 120 taxmann.com 23 (Mumbai - Trib.)** and **JP Morgan India Investment Co. Mauritius Ltd. [2022] 143 taxmann.com 82 (Mumbai - Trib.)**, where the Tribunal ruled that **capital gains exempt under DTAA should not be reduced by taxable losses** from later transactions.

Revenue's Contention

- The Assessing Officer (AO) contended that since **the DTAA does not specify the method of computing capital gains**, the **Indian Income-tax Act should apply first** to determine taxable income.

- The AO argued that capital losses must be set off against capital gains before granting DTAA exemptions, as per the Income-tax Act, ensuring that the net taxable amount is calculated correctly under domestic tax law.

- The AO claimed that the assessee was selectively applying DTAA benefits to exempt gains while using Indian tax laws to carry forward losses, which was not permissible, as it created a **hybrid tax approach favoring the taxpayer**.

- The AO relied on past judgments, including **CIT v. Davy Ashmore India Ltd. [1991] 190 ITR 626 (CAL.)**, where Indian tax laws were upheld in cases where treaty provisions did not explicitly define computational rules.

Legal provisions

India-Mauritius DTAA

ARTICLE 13- CAPITAL GAINS

3A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.

4: Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident.

Section 90(2) of the Income Tax Act

Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

Legal provisions

Section 74 of the Income Tax Act, 1961

(1) Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss to the assessee, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

(a) in so far as such loss relates to a short-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset;

(b) in so far as such loss relates to a long-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset not being a short-term capital asset;

(c) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(2) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

Legal provisions

(b) in so far as such loss relates to a long-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset not being a short-term capital asset;

(c) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(2) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

Ruling

- The Tribunal ruled **in favor of the assessee**, stating that capital gains from shares **acquired before 1-4-2017** remain **tax-exempt in India** under **Article 13(3) & 13(4) of the India-Mauritius DTAA**.

- The Tribunal held that losses from shares acquired after 1-4-2017 are taxable in India but cannot be set off against exempt gains, as these two categories of income are treated separately under the tax law.

- The Tribunal reaffirmed that DTAA provisions override Indian tax laws, emphasizing that India had given up its right to tax such gains before 1-4-2017, and therefore, domestic tax provisions cannot be applied to override the treaty benefits.

- The Tribunal found the **Assessing Officer's computation to be incorrect**, as it **wrongly adjusted post-2017 losses against exempt gains**, and thus, the **assessee was entitled to carry forward the losses** instead of using them for set-off.

Ruling

- The ruling was based on **past judicial precedents**, including **Goldman Sachs Investment (Mauritius) Ltd. v. DCIT (2021)**, where a **similar position was upheld**, strengthening the principle that **exempt capital gains under DTAA must remain unaffected by Indian tax laws**.

Our Comments

- The assessee can claim DTAA benefits for capital gains on pre-April 1, 2017 acquisitions, and these gains cannot be reduced by set-off of post-2017 losses which is a general principle that loss cannot be set off against exempt income.

- Further, even if the CG is exempt as per DTAA and not as per Income tax act but by virtue of Section 90 assessee is allowed to incorporate benefit of DTAA in Income tax act.

- Further, in cases of amendment in DTAA any transaction before and after such amendment are considered as 2 separate transaction. Hence, CG prior to 2017, assessee can claim benefit under DTAA and for CG after 2017 assessee can opt for tax as per Income tax act.

Section/Article	Section 90(2) r.w.s 74 of IT Act and Article 13 of
DTAA/Country	India-Mauritius
Court	Mumbai Tribunal
Date of decision	23.01.2025

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

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