

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3070 OF 2016

The Commissioner of Income-Tax
(International Taxation)-3,
1st Floor, Schindia House, N.M.Marg,
Bellard Pier, Mumbai 400 038. ... **Petitioner**

V/s.
JSH (Mauritius) Ltd.,
C/o. S.R.Batliboi & Co., CA,
14th Floor, The Ruby,
29, Senapati Bapat Marg, Dadar (W),
Mumbai – 400 028. ... **Respondent**

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Ms.Minal Lad a/w. Ms.Namita Shirke i/b. Mr.Charanjeet,
Advocate for the Petitioner.

Mr.Porus Kaka, Senior Counsel a/w. Mr.Divesh Chawla i/b.
Mr.Atul K. Jasani, Advocate for the Respondent.

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**CORAM : S.V.GANGAPURWALA &
A.M.BADAR JJ.**

DATED : 28th July 2017.

ORAL JUDGMENT : (PER S.V.GANGAPURWALA J.)

1 The present Respondent applied for an advance ruling to the Authority for Advance Rulings (Income-Tax), New Delhi (hereinafter referred to as “AAR” for the sake of brevity) to

ascertain whether capital gains in respect of the transfer of shares of Tata Industries Limited (hereinafter referred to as “TIL” for the sake of brevity) to Tata Sons Limited (hereinafter referred to as “TSL” for the sake of brevity) are taxable in India in the hands of the Respondent/Applicant by virtue of the India-Mauritius Tax Treaty.

The Applicant sought ruling on following questions :

“Question 1 : Whether on the facts and circumstances of the case, the Applicant will be entitled to the benefits of the Agreement between the Government of Mauritius and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion (the 'India-Mauritius tax treaty') with respect to taxes on income and capital gains ?

Question 2 : If the answer to Question 1 is in the affirmative, whether on the facts and circumstances of the case, the gains arising to the Applicant from transfer of shares in Tata Industries Limited ('TIL') to Tata Sons Limited ('TSL') would not be liable to tax in India having regard to the provisions of Article 13 of the India-Mauritius tax treaty ?

Question 3 : Whether on the facts and circumstances of the case, if answer to Question 2 is in affirmative, the

Applicant, being a foreign company and in absence of a Permanent Establishment ('PE') in India, would not be subject to tax under the provisions of Section 115JB of the Act ?”

2 The Authority for Advance Rulings (Income-Tax), New Delhi answered the aforesaid three questions in favour of the Respondent. Aggrieved thereby, the Commissioner of Income-Tax (International Taxation)-3 has filed present Writ Petition.

3 Mr.Chandarpal, the learned counsel for the Petitioner in a lucid manner canvassed following submissions :

(a) The Respondent is a Shell and Fly-by-night Company. The Original investment proposal was made to FIBP depicting 'Jardine Matheson Bermuda' as proposed investor. However, a letter of request was made to FIBP stating that investment will now be routed through Mauritius and Jardine Matheson Ltd. was incorporated in Mauritius on 04/04/1996. The said JSH (Mauritius) Limited had never nominated anyone on the Board of TIL at any point of time. The active employees of Jardine Matheson Group were only on the Board of Tata Industries Limited. This clearly suggest that the actual beneficial investor was Jardine Matheson and not JSH (Mauritius) Ltd.

(b) The fact that the Respondent is a Shell Company is further fortified by the fact that the Respondent has never incurred expenses of wages, salaries of staff, electricity, water and telephone charges, rent, directors of emoluments. The only income and expenses shown in the financial statement are on account of interest received or paid to or from the group entities besides profits of sale of share in question. It demonstrates that JSH (Mauritius) Limited was not having business/commercial substance of its own.

(c) The JSH (Mauritius) Limited was created only for the purpose of taking advantage of Tax Treaty with Mauritius and not having any commercial or business substance. The AAR has observed that the Respondent is not a shell Company on the basis of balance-sheet of the Company but has not discussed basis of arriving at said view. No such discussion and evidence has been considered by the AAR while arriving at such conclusion.

(d) According to the learned counsel, in case where Revenue finds that any holding structure and entity which has no commercial/business substance has been interposed only to avoid tax, then in such case, applying the case of 'Fiscal Nullity', it would be open to the Revenue to discard such interposing of that entity.

(e) The learned counsel further submits that this is a fit case of abuse of Tax Treaty and it amounts to Treaty Shopping. Such Treaty Shopping is undesirable since it frustrates the spirit of the Treaty.

(f) Only because the Respondent held shares of TIL for 13 years would not lead to presumption that Respondent is not Shell Company. Totality of the facts is required to be considered.

(g) The learned counsel submits that after the Judgment of the Apex Court in the case of *Vodafone International Holdings v. Union of India* reported in **2012 (341) IRT 1**, the legislature has amended Section 9(1) of the Income Tax Act, 1961. Since Explanation 5 and similar explanation have been added “for removal of doubts”, all such transactions, as in the present case, are covered in regular assessment retrospectively with effect from 1962. The AAR has committed a gross error in not considering this vital change in the legal position. The explanatory memorandum clearly provides that amendment of Section 9(1)(i) was to reiterate the legislative intent in respect of taxability of gains having economic nexus with India irrespective of the mode of realisation of such gains. The amendment sought to clarify the source rule of taxation in respect of income arising from indirect transfer of assets situated in India as explicitly mentioned in the memorandum. Explanation 5 would be applicable in relation to

deeming any income arising outside India from any transaction in respect of any share or interest in a foreign company which has the effect of the transferring directly or indirectly the underlying assets located in India as income accrued and arose in India. The learned counsel submits that period of holding of the share would be immaterial and irrelevant.

(h) The learned counsel also relied on Section 245(R)(2) (iii) and submits that the said provisions takes away power of the AAR to decide cases which involve the subject of tax evasion. It does not recognize admission or final stage. This vital aspect has been lost sight by the AAR.

(i) The learned counsel further submits that the Circulars relied by the Respondent are of no avail to the Respondent in view of the amendment to Section 9(1)(i) and Explanation 5 of the Act.

(j) The learned counsel further submits that ground of delay raised by the Respondent would not be much relevant. No strict period of limitation is prescribed in filing Writ Petition. Considering the administrative exigency, some time was lost. It is also not a case of inordinate delay.

4 Mr.Kaka, the learned Senior Advocate for the Respondent during the course of his erudite arguments, put forth following propositions :

(a) The statute does not provide any appeal against the order of the AAR. Finality is given to the Order passed by the AAR. This Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not sit as an Appellate Authority over the decision of AAR, but would only be concerned with due adherence to the decision making process and the AAR has strictly followed the decision making process. No error has been committed in the decision making process by the AAR.

(b) The Petition is filed after much delay i.e. after a period of eight months from the date of the Order. If such a Petition is entertained, it would frustrate the very object behind introduction of Scheme of AAR. No explanation has been given for belatedly filing Petition.

(c) The Respondent Company is incorporated in Mauritius on 4th April 1996. The Respondent is resident as per Section 6 of the Act and does not have any business presence or permanent establishment in India. The Respondent is engaged in business of investment and financing activities. The Respondent is holding a Category 1 Global Business Company License issued by the Financial Services Authority of Mauritius. The Mauritius Revenue Authority has issued TRC to the Respondent evidencing that it is a tax resident in Mauritius and it is renewed from time to time. The Respondent has filed its advance return in Mauritius offering its

income to tax and also paid taxes in Mauritius. It is a resident under Article 4(1) of India-Mauritius Double Taxation Avoidance Agreement (hereinafter referred to as “DTAA” for the sake of brevity) and is eligible to claim the benefits under the Treaty.

(d) The learned Senior Advocate further states that the Respondent had made investment in shares of TIL in June 1996 after obtaining Government approval including approval in May 1996 from Department of Industrial Policy & Promotion.

(e) The Investment in shares of TIL was made with an intention of long term investment. The shares were held for a period of 13 years and were transferred only in June 2009. Post-transfer of shares of TIL, the entire sale proceeds have been reinvested by the Respondent in another Tatagroup Company (Tata Power Limited) in July 2009.

(f) The learned Senior Advocate submits that the Respondent is resident under Article 4(1) of the DTAA, hence eligible to claim benefit of the Article 13(4) of the DTAA. As per provisions of Article 13(4) of the said DTAA, the long term capital gain arising on transfer of shares in TIL is not chargeable to tax in India.

(g) The learned Senior Advocate relies on the Circular dated 30th March 1994 and submits that the said Circular was

specifically issued giving clarification regarding the taxation of capital gain tax under Article 13 of the Treaty. The Circular clarifies that any resident of Mauritius deriving income of alienation of shares of Indian Companies will be liable to capital gains tax only in Mauritius and will not have any capital gains tax liability in India. Further, the Circular dated 13th April 2000 is relied and submits that this Circular provides that the Certificate of Residence issued by the Mauritius Tax Authority is sufficient evidence for accepting the status of residence. Further reliance is placed on press release dated 1st March 2013 stating that the Government has provided a clarification to the words introduced in the Act under Sub-Section 5 of Section 90. It clarifies that the TRC provided by the resident of contracting State will be accepted as evidence and Income-Tax Authority in India will not go behind the TRC and question his residential status. Further Circular dated 13th April 2000 would continue to be in force, so also clarified that the Circular issued by CBDT would be binding on the Tax Authorities and cannot be ignored. The learned Senior Advocate refers to the Judgment of the Apex Court in a case of ***Union of India and Anr. v. Azadi Bachao Andolan & Anr.*** reported in **2003 ITR Volume 263 page 706** and submits that in the said Judgment the Apex Court upheld the validity of the Circular dated 13th March 1994 and 13th April 2000 issued by the CBDT and held that once the Certificate of Residence is granted, that would be conclusive evidence for determining the status of residence under

the Treaty. Relying upon the said Judgment, the learned Senior Advocate submits that the Treaty Shopping is not illegal.

(h) The learned Senior Advocate submits that the objection with regard to maintainability of the application before the AAR qua Section 245(R)(2)(iii) of the Act is not tenable. The AAR on 14th September 2011 observed that “the investment made by the Holding company of Bermuda are required to be looked into. It reserved for consideration the question whether the transaction is designed for avoidance of tax in India, when it considers the application for Ruling under Section 245(R)(4) of the Act. The said Order is not challenged by the Petitioner and it has become final. Now they cannot turn around and raise the said issue. Moreover, the AAR has concluded that the Respondent is not a Shell or Fly By Night Company and has not indulged in tax avoidance.

5 We have considered the submissions canvassed by the learned counsel for the respective parties.

6 This Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India would not sit as an Appellate Authority over the finding of the AAR. This Court would exercise its writ jurisdiction if the appreciation of facts and finding arrived at by the AAR is perverse or if the provisions of law are not properly construed.

7 The factual matrix that the Respondent is incorporated in Mauritius, holds a Category 1 Global Business License issued by Financial Services Authority of Mauritius and is incorporated on 04/04/1996, is not disputed. It is also not disputed that the Certificate is issued by the Mauritius Revenue Authority to the Respondent evidencing that it is a tax resident in Mauritius during the relevant period. The Respondent had acquired shares of Tata Industries Limited (TIL) in June 1996 is a matter of record. The Respondent sold shares of TIL on 10th July 2009 is also a matter of record.

8 Section 90(2) of the Act specifically provides that where the Government of India had entered into Double Taxation Avoidance Conveyance (hereinafter referred to as “DTAC” for the sake of brevity) with the Government of any other country for granting relief of tax or any avoidance of double taxation, then in relation to the Assessee to whom said agreement applies, the provisions of Tax Treaty shall apply to the extent they are more beneficial to the Assessee. The Circular dated 30th October 1995 so also above referred Circulars of the year 2003 and 2013 clarifies the said aspect. The Apex Court in a case of ***Azadi Bachao Andolan & Anr.*** (referred to supra) has observed as under :

“There are many principles in fiscal economy which, though at first blush might appear to be evil, are

tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the respondents over the so-called “abuse” of “treaty shopping”, perhaps, it may have been intended at the time when the Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge which is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.”

9 The Apex Court in the said Judgment further observed that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the Double Tax Avoidance Agreement. When that happens, the provisions of such an agreement with respect to cases to which they apply would operate even if inconsistent with the provisions of Income Tax Act. The Apex Court further observed that the Circulars issued by the CBDT under Section 119 of the Act are binding on all officers and employees employed in the execution of

the Act, even if they deviate from the provisions of the Act. The Apex Court in the said Judgment observed that the whole purpose of DTAC is to ensure that the provisions thereunder are available even if they are inconsistent with the provisions of Indian Income Tax Act. The further observation is made by the Apex Court that the principle of piercing the veil of incorporation can hardly apply to a situation as the one before it. The Apex Court further made the following observations :

“If the court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it would not be permissible for the court to treat the intervening legal steps as non est based upon some hypothetical assessment of the “real motive” of the assessee. In our view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o'-the-wisp.”

“We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents.”

10 In the present matter, it would be relevant to note that the shares were purchased by the Respondent in the year 1996 and were held for long period of 13 years and were sold in the year 2009. This goes to suggest the bona fide of the applicant. The said shares were again invested in the another company of the same group in India and the same are being held by the Respondent. Considering this aspect, it has been observed by the AAR that the Respondent is not a Fly By Night or a Shell Company. It does not appear that while considering the factual matrix of the matter, the AAR has perversely recorded any finding. It has based its finding on the basis of evidence on record. The said findings is a findings of fact arrived at on the basis of appreciation of evidence. With regard to the objection raised by the Petitioner under Section 245(R) (2)(iii) of the Act, the same would not arise at this stage. The said provision reads as under :

“Procedure on receipt of application.

245R. (1).....

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application:

Provided that the Authority shall not allow the application where the question raised in the application,—

(i) is already pending before any income-tax

authority or Appellate Tribunal [except in the case of a resident applicant falling in sub- clause (iii) of clause (b) of section 245N] or any court;

(ii) involves determination of fair market value of any property;

(iii) relates to a transaction or issue which is designed *prima facie* for the avoidance of income-tax [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N.

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner."

11 The said provision would come into operation when the application by the party relates to a transaction or an issue which is designed *prima facie* for the avoidance of income tax. On 14th day of September 2011, the AAR passed an Order stating that the issue with regard to the investment made by holding company would be considered while considering the application for ruling under Section 245(R) (4) of the Act. The said Order was never assailed by the Petitioner. The Petitioner thereafter submitted to the jurisdiction of the AAR and contested the matter on merits.

The Ruling is given by the AAR. The AAR on considering the application and the documents and the facts on record had conclusively held that the transaction is not designed for avoidance of income-tax. Once such conclusive finding is given, it would not be open for the Petitioner to fall back on Section 245(R)(2)(iii).

12 The reliance placed on Section 9(1)(i) and Explanation 5 thereto by the learned counsel for the Petitioner would not be of any avail to the Petitioner. In the present case, the Respondent has placed reliance on the Double Taxation Avoidance Agreement between India and Mauritius. It is clear from the said Agreement that the capital gains from alienation of the shares situated in India could only be taxed in Mauritius and not in India. The Apex Court in a case of *Azadi Bachao Andolan & Anr.(supra)* has clearly observed that the terms and provisions of the Agreement i.e. DTAA shall operate even if they are inconsistent with the provisions of the Income Tax Act. The Petitioner could have relied on Section 9(1)(i) and Explanation 5 if the present case would have not been covered by the DTAA.

13 Though the question of limitation/delay/laches would not be inconsequential we refrain from going into said aspect as we have decided this Petition on merits itself.

14 On perusal of the Judgment of the AAR, it transpires that the AAR has considered all the relevant aspects of the matter and has arrived at the just conclusion. The Treaty has also been rightly considered.

15 In view of conspectus of the matter, the Writ Petition stands dismissed, however, with no order as to costs.

(A.M.BADAR J.)

(S.V.GANGAPURWALA J.)