

# Tax Hotline

December 26, 2022

## **BENEFICIAL OWNERSHIP TEST CANNOT BE READ INTO ARTICLE 13 (CAPITAL GAINS) OF THE INDIA-MAURITIUS TAX TREATY, WITHOUT SPECIFIC LANGUAGE TO SUCH EFFECT – THE STORY CONTINUES (PART 2)**

In May 2022, the Mumbai bench of the Income Tax Appellate Tribunal (“ITAT”) set aside an assessment order denying benefits with respect to the taxation of capital gains under Article 13 of the India Mauritius double taxation avoidance agreement (“DTAA”) (on account of the Mauritius seller not being the *beneficial owner* of the capital gains received). Detailed analysis of ITAT order is provided in our [previous hotline](#).

While the ITAT reiterated the well-established principles of treaty interpretations, holding that the ‘*beneficial ownership*’ test cannot be read into Article 13 of the DTAA as it would amount to re-writing of the DTAA provisions. However, in doing so, the ITAT (despite being the final fact-finding authority) remitted the matter back to the Assessing Officer (“AO”) to make a fresh finding on the issue (i.e., (a) whether the test of *beneficial ownership* applies to Article 13 of the DTAA; and if so, (b) whether the taxpayer satisfies the test and is therefore allowed to claim the benefits under Article 13). Thus, though the ITAT reiterated the principles of tax certainty, good public policy, and good faith interpretation of tax treaties, on the other hand, it refrained from providing a decisive ruling on the issue at hand (thereby prolonging the dispute).

The taxpayer subsequently filed a miscellaneous application before the ITAT, seeking rectification of the impugned ITAT order. The claim of the taxpayer was that there was enough material on record to hold that the assessee was the beneficial owner of the shares in the Indian companies, and that it is purely academic as to whether or not the test of *beneficial ownership* can be read into Article 13 of the DTAA. In doing so, the taxpayer pointed out that the ITAT is the final fact-finding authority, and thus, cannot remand matters back to the lower authorities on questions of law and on matters where all facts have been disclosed and are available on record. As such, the taxpayer’s application argued that there was a ‘*mistake apparent on record*’ in the order of the ITAT, which needed to be corrected (relying on the High Court rulings in the case of *Sony Pictures Network India Ltd vs ITAT* (Write Petition no. 3509 of 2018, Bom HC), and *Coca Cola India Pvt Ltd vs Assistant Registrar* [(2014) 52 taxmann.com 399 (bom)]).

The ITAT, in response recalled the matter for adjudication themselves, on the question of whether *beneficial ownership* can be read into Article 13 of the India Mauritius DTAA (on merits). In doing so, the ITAT explained that at the time of its initial order, the ITAT was not satisfied with the question of the *beneficial ownership* requirements being read into Article 13; however, since the affected parties were not heard on this aspect, it was considered as appropriate to remit the matter back to the AO on this aspect. Thus, while the ITAT had expressed their prima facie view in this respect, since none of the parties were heard on this aspect, it was remitted to the AO for proper adjudication on this foundational aspect.

The ITAT accepted that remanding the matter back to the AO for adjudication was a mistake, since the ITAT itself should have taken a call (based on merits) as to the requirements (or lack of requirements) in Article 13 with respect to *beneficial ownership* (by directing the parties to address the ITAT on this aspect). To this extent, the approach of the ITAT was contrary to the law laid down by the High Court in the above-mentioned cases. Thus, the ITAT found that there was indeed a ‘*mistake apparent on record*’ to the extent of remitting the matter back to the AO on a question of law, when all the material facts are on record. While recalling the matter for adjudication on merits (and giving a date to the parties to be heard based on merits of this aspect), the ITAT also noted that remitting the matter to the AO would imply substantial delays in the matter reaching finality.

### **NDA OPINION**

The order of the ITAT to recall and adjudicate on the issue is appreciated, given that we may now expect a conclusive ruling on the issue of whether the test of beneficial ownership can be read into Article 13 of the India-Mauritius DTAA (without express language to such effect). Given the prima facie findings of the ITAT in the May, 2022 order, it seems that the taxpayer may finally find relief in this aspect.

– Arijit Ghosh & Ipsita Agarwalla

You can direct your queries or comments to the authors

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