HIGH COURT OF JUDICATURE AT BOMBAY
सत्यमेव जयते

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 3296 OF 2018

Indostar Capital .. Petitioner

Versus

Asst. Commissioner of Income Tax,
(International Taxation) 2(2)(1) & Ors. .. Respondents

....

- Mr. Jehangir Mistri, Sr. Counsel a/w Mr. Sameer Dalal for the Petitioner
- Mr. Charanjeet Chanderpal a/w Ms. Shista Hadi for Respondent Nos. 1 and 2
- Ms. Aasifa Khan for Respondent No. 4

....

CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : APRIL 26, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. This petition is filed by one Indostar Capita, a Mauritius based company to challenge an order dated 20.6.2018 passed by respondent No. 1 - Assistant Commissioner of Income Tax under Section 197 of the Income Tax Act, 1961 ("the Act" for short). By the said order, he rejected the application filed by the petitioner.

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2. We may record facts as briefly as possible.

2.1 The petitioner was incorporated as a private limited company in October 2010 under the laws of Republic of Mauritius. The petitioner holds a Category 1 Global Business Licence issued by the Financial Services Commission of Mauritius to act as an investment holding company. The petitioner has also been issued the certificate as a "company resident in Mauritius for income tax purposes" which is popularly referred to as a Tax Residency Certificate ("TRC" for short) by Mauritius Revenue Authority.

2.2 The case of the petitioner is that it was formed with an intent to promote an Indian Non-banking Financial Company named Indostar Capital Finance Limited ("ICFL" for short). In order to acquire shares of ICFL, the petitioner raised capital from various groups of international institutional investors located across the world. In a span of over four years between 31.3.2011 to 17.8.2015, the petitioner acquired 7.13 Crores (rounded off) shares of ICFL which corresponds to 97.30% of its share capital. These transactions were duly reported to the Reserve Bank of India.

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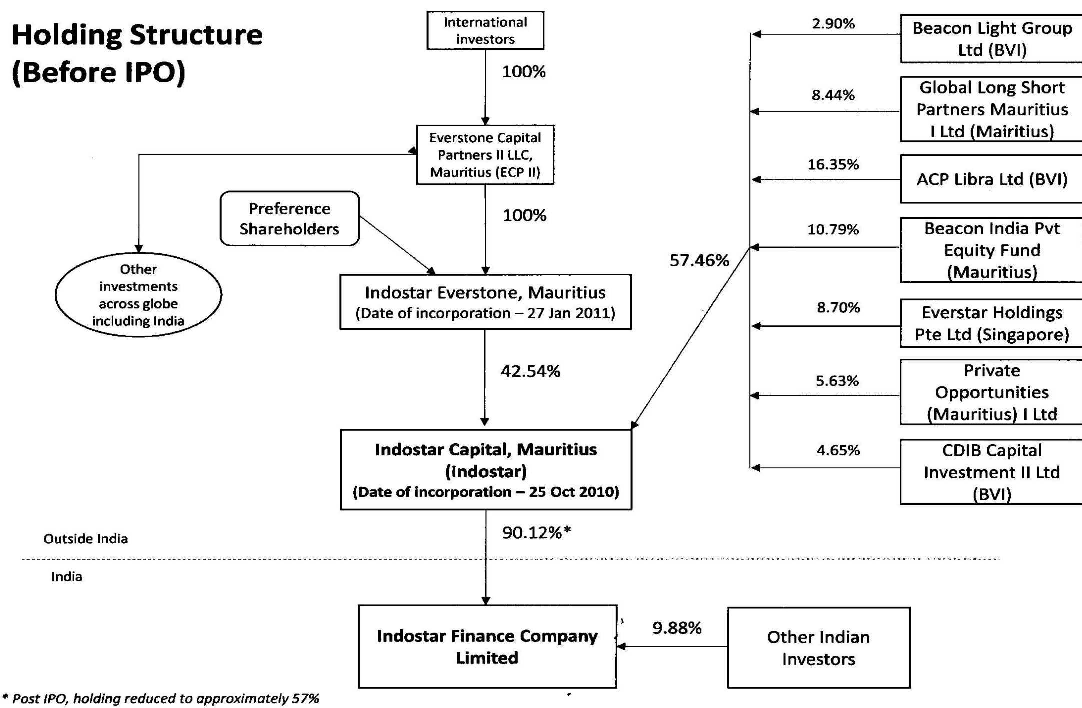
2.3 To appreciate the corporate structure which was constituted in order to enable the petitioner to make investment by acquiring shares in IFCL, we may reproduce the precise chain of holding of shares of different companies involved in this structure.



2.4 The petitioner desired to offload some 1.85 Crores (rounded of) of its shares of IFCL through IPO. The petitioner applied to the Assistant Commissioner of Income Tax under letter dated 14.5.2018 for grant of the certificate under Section 197 of the Act. In such application, the petitioner placed before the said authority the corporate structure and

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the source of funds for acquisition of the shares. The assessee pointed out that the assessee expected to receive Rs. 570/- to Rs. 572/- per share from sale of such shares through the IPO and that upon sale of 1.85 Crores of shares, the petitioner expected to receive a total sale consideration of Rs. 1058.68 crores. The petitioner made detailed averments why according to it, the capital gain arising out of sale of such shares is not taxable in the hands of the petitioner. The petitioner referred to the Double Taxation Avoidance Agreement ("DTAA" for short) between India and Mauritius to argue that as per the provisions contained in the said treaty, the income out of sale of shares cannot be taxed in the hands of the assessee in India. The assessee pointed out that in absence of the certificate issued by the Authority under Section 197 of the Act, the payer would be under obligation to deduct tax at source in terms of Section 195 of the Act while remitting the proceeds in to the assessee. The assessee's main contention, therefore, was that in absence of any tax liability in India, deduction of tax at source would not be permissible and therefore, the certificate as required may be granted. Along with this application, the petitioner

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produced several documents including a copy of TRC.

2.5 The Assistant Commissioner carried out detailed inquiry in relation to such application of the petitioner. He called upon the petitioner to provide several documents which the petitioner did. At the end of the inquiry, the said Authority passed the impugned order dated 13.6.2018. He rejected the application of the petitioner. His reasons for rejection can be summarized as under:-

i. Apart from making investment and advancing loan to Everstone Capital Limited, Mauritius, the petitioner has not made any business transaction or engaged itself in other commercial activities. Only revenue gained by the assessee is through interest income;

ii. The assessee does not maintain any establishment or had incurred any administrative expenses at Mauritius. It was not clear where the assessee would hold the director's functions. The assessee had no employees at Mauritius;

iii. The assessee is a majority shareholder of ICF Limited. The shareholding pattern of the petitioner, in turn, shows that the shares are held in different proportions by some eight companies in equity funds. These companies have been constituted but they do not have office or employees. The assessee had failed to produced TRC of these companies. The assessee failed to furnish details of the ultimate beneficiaries of the assets being transferred;

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iv. As a culmination of these factors, he was of the opinion that present was a case where the company had given the colour of genuineness of the transactions but it appears that the transactions were fake. The sum and substance of the Assistant Commissioner rejecting the application of the petitioner for certificate under Section 197 of the Act was that the entire transaction was not genuine. In his opinion, the entire tax structure was crated to avoid legitimate tax liability.

2.6 On 13.6.2018, the Assessing Officer passed the consequential order authorizing the payer of the sale proceeds of the shares to make the payment after deducting tax @ 10% on the entire amount of receipt. On 20.6.2018, he passed further order asking the payee to deduct income tax @ 10% of the actual gain. He thereafter passed another order on 20.6.2018 directing the payer to deduct tax @ 7.73% on the entire amount and release the rest in favour of the payee. It is not necessary to go into the details of such consequential orders. Suffice it to record, if the order passed by the officer under Section 197 of the Act stands, his final consequential order dated 20.6.2018 would be unexceptionable.

3. In the background of the said facts, learned counsel Mr. Mistri for the petitioner raised following

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contentions:-

i. The petitioner being a Mauritius based company, in terms of DTAA between India and Mauritius, it had no tax liability on capital gain arising out of sale of shares in question. Once this is established, there cannot be any direction for deduction of tax at source while remitting the sale proceeds of such shares. The Authority, therefore, committed an error in refusing the certificate under Section 197 of the Act;

ii. The petitioner is a company incorporated under the laws of Mauritius. It enjoys TRC issued by the Mauritian Authority. The Indian Revenue Authorities cannot dispute this TRC. As long as this certificate is in existence, the Income Tax Authorities cannot go beyond the certificate and deny the tax residency status of the petitioner at Mauritius. This would be contrary to the settled principles of law as well as circulars issued by Central Board of Direct Taxes ("CBDT" for short). Learned counsel submitted that CBDT circulars are binding on the Revenue Authorities even if the same may not be strictly in consonance with the statutory provisions contained in the Act;

iii. The Assessing Officer carried out a detail inquiry which is not envisaged at the stage of deciding an application for issuance of certificate under Section 197 of the Act. The assessment can always be carried out with full investigation. However, at the stage of deciding whether the certificate under Section 197 of the Act should be issued, the Assessing Officer cannot conduct a full fledged investigation;

iv. Learned counsel submitted that the prima facie finding of the transactions being not genuine is not supported by any material on record. The petitioner company was constituted for the purpose of making investment in India. The petitioner received funds from various international financial institutions.

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Through, ICFL, the petitioner invested its such funds in Indian market. When the time was ripe, the petitioner decided to encash some of its gain. All the transactions were reported to the respective statutory authorities. There is no evidence to establish the allegation of sham or bogus transaction;

v. Learned counsel submitted that the assessment in the present case is yet to be made. The petitioner would file the return of income and participate in the proceedings. In order to protect the interest of the Revenue, the petitioner may offer certain security till the assessment order is passed. However, to withhold a substantial portion of the petitioner's proceeds out of sale of shares at this stage till the assessment is completed, which would consume considerable time, would be wholly unjust;

vi. Learned counsel referred to certain documents and relied upon certain decisions reference to which would be made at an appropriate stage.

4. On the other hand, learned counsel Mr. Chanderpal for the Department vehemently opposed the petition raising following contentions which we are recording in a summary format from the written arguments which he presented before us today.

i. Once it is prima facie shown that the transaction is not genuine, the petitioner must participate in the assessment proceedings and only if the petitioner succeeds in such assessment, the amount deducted by way of tax at source can be refunded. At the stage of passing the order under Section 197 of the Act, there was sufficient material to enable the

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Assessing Officer to reject the application;

ii. The petitioner is not a genuine Mauritius based company and as recorded by the Assessing Officer in the impugned order, various factors emerging from the record would establish that the entire transaction is non-genuine;

iii. The Assessing Officer has applied the tests laid down by the Supreme Court in case of **Vodafone International Holdings B.V. Vs. Union of India**[1] to come to such conclusion which is fully supported by the evidence on record;

iv. The petitioner also has an alternate remedy against the impugned order which can be challenged before the Commissioner under Section 264 of the Act. In the alternative, the petitioner can also file return of income and claim refund if it succeeds in establishing that it has no tax liability. In the context of availability of the alternate efficacious remedy, reliance was placed on the decision of the Supreme Court in case of **CIT Vs. Chhabil Dass Agarwal**[2]**;**

v. We must record that the learned counsel for the respondents had orally argued that after the decision of the Supreme Court in the case of Vodafone International Holdings (supra), Explanation 5 below sub-section (1) to Section 9 of the Act was inserted with retrospective effect from inception by virtue of which, the petitioner would be liable to pay tax on the receipts in question. However, we may record that this was neither raised in the written arguments presented before us and more importantly not a ground pressed in service by the Assessing Officer in the impugned order. Learned counsel for the respondents has also referred to certain decisions reference to which would me made at appropriate stage.

1 [2012] 341 ITR 1
2 [2013] 357 ITR 357

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5. At the outset, we make it clear that our entire consideration in the present judgment would be revolving around the correctness of the order passed by the Assessing Officer under Section 197 of the Act. Necessarily, we will have to touch on the question of taxablity of the receipts. All observations made in this judgment, therefore, would be prima facie in nature and would prejudice neither the petitioner nor the Department in the assessment which is yet to be done.

6. Sub-section (1) of Section 195 of the Act essentially provides that any person responsible for paying to a non-resident any sum chargeable under the provisions of the Act, would at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or any other mode, whichever is earlier, deduct income tax thereon at the rates in force.

7. Section 197 of the Act pertains to certificate for deduction at lower rate. Sub-section (1) of Section 197 of the Act provides that subject to the rules made under sub-

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section (2A), where in the case of any income of any person, tax is required to be deducted at the time of credit, or as the case may be, at the time of payment at the rates in force under the provisions including Section 195 and the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income tax at any lower rates or no deduction of income tax, he shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate. Sub-section (2) of Section 197 provides that where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled, deduct income tax at the rates specified in such certificate or deduct no tax, as the case may be.

8. Section 201 of the Act pertains to consequences of failure to deduct or pay. As per sub-section (1) of Section 201, a person who is required to deduct any sum in accordance with the act but does not deduct the same or does not pay, or after so deducting fails to pay, the whole or any part of the tax, he would be deemed to be an assessee in default in respect of such tax.

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9. Combined reading of all the above noted provisions would show that in absence of a certificate of deduction of tax at source at a lower rate or no deduction, a payer whose liability to deduct tax at source under Section 195 of the Act is likely to arise incurs a risk of being declared a defaulter. However, as long as the certificate under Section 197 of the Act is in operation, in relation to the payments made by the payer such unpleasant consequences would not arise. Certificate issued under Section 197 of the Act, thus, provides an immunity to the payer from being declared a deemed defaulter. However, as is well settled, the proceedings under Section 197 of the Act would not decide the taxability of the certain receipts in the hands of the payee. In other words, even if a certificate under the said Section is issued, the Revenue can always in normal assessment bring the income to tax if otherwise permissible in law. Conversely, even if there is no certificate either asked for or granted, the assessee can always contest the taxability of the income in the assessment.

10. The question of deducting tax at source would arise only if the income in the hands of the payee is taxable. This

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well settled principle would need no reference to any authority. Nevertheless, we may note that the Supreme Court in the case of **GE India Technology Cen P Ltd Vs. CIT**[3]. held and observed that mere remittances to non-resident does not give rise to the duty to deduct tax at source under Section 195 of the Act. It was emphasized that important expression in Section 195(1) of the Act which deals with deduction of tax at source consists of the words, "chargeable under the provisions of the Act.". In case of Vodafone International (supra) also, the Supreme Court in this context had held and observed as under:-

> "89. Section 195 casts an obligation on the payer to deduct tax at source ("TAS" for short) from payments made to non-residents which payments are chargeable to tax. Such payment(s) must have an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax then no obligation to deduct the tax would arise."

11. With this background, we may address the question of taxability of income in question. We may recall, the assessee, a Mauritius based company had made sizable investment in an Indian Non-banking Financial Company of which the assessee was a majority stakeholder. At the

3 [2010] 327 ITR 456

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appropriate time, when the share prices were high, the assessee decided to book its profits in part. A portion of the shareholding was offloaded. This gave rise to a net gain to the tune of Rs. 800/- and odd Crores. Section 9 of the Act pertains to income deemed to accrue or arise in India. Sub-section (1) of Section 9 lists various receipts, incomes which cannot be deemed to accrue or arise in India. Reference to all the clauses under sub-section (1) is not necessary. We may record that Explanation 5 was added below sub-section (1) by Finance Act 2012 but with retrospective effect from 1.4.1962. This explanation reads as under:-

> "*Explanation 5.*—For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India."

12. Learned counsel for the Revenue was correct in pointing out that this explanation was added as a fallout of the judgment of the Supreme Court in case of Vodafone International (supra). We would take note of the discussion in the judgment of the Supreme Court later on. However, as would be clear from the discussion to follow, this explanation

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would not further the case of the Revenue. As noted earlier, the Assessing Officer in the impugned order has not even based his case on this explanation.

13. Chapter IX of the Act pertains to double taxation relief. Section 90 contained in the said chapter pertains to agreement with foreign countries or specified territories. Sub-section (1) of Section 90 provides that Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India interalia for avoidance of double taxation of income under the said Act and under the corresponding law in force of such country or territory and by Notification in Official Gazette make such provision, as may be necessary for implementing the agreement. Sub-section (2) of Section 90 provides that where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India under sub-section (1) for relief of tax or 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

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that assessee.

14. In terms of powers contained in sub-section (1) of Section 90 of the Act, the Government of India has entered into DTAA with Mauritius. Article 13 of the DTAA pertains to capital gains. Paragraph 1 of Article 13 provides that gains from the alienation of immovable property as defined in paragraph 2 of Article 6, may be taxed in the contracting State in which such property is situated. Paragraph 3A of the same Article provides that gains from alienation of shares acquired on or after 1.4.2017 in a company which is a resident of a contracting state may be taxed in that state. This was inserted in Article 13 by Notification dated 10.8.2016 and would come into effect from 1.4.2017. Simultaneously, paragraph 4 was also substituted. Previously, paragraph 4 provided that gains derived by a resident of a contracting state from the alienation of any property other than that is mentioned in paragraphs 1, 2 and 3, shall be taxable only in that state. To align this paragraph 4 with the insertion of paragraph 3A, it was amended under the same Notification dated 10.8.2016. Paragraph 4 now provides that gains from the alienation of any property but

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other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in contracting state of which the alienator is the resident.

15. As per paragraph 4 as it stood at the relevant time, the capital gain arising out of the sale of shares, in case of a company like the present petitioner, could be taxed if at all in Mauritius. In other words, the gain arising the sale of shares acquired on or before 31.3.2017, in a company which is resident of India, could not be taxed in Indian territory.

16. It was in this context that the petitioner had moved the Assessing Officer for issuance of the certificate under Section 197 of the Act. This is a main plank of the petitioner on which the entire case was based. Prima facie, such case was also valid.

17. Division Bench of this Court in the case of **CIT (International Taxation) -3, Mumbai Vs. JSH (Mauritius) Ltd.**[4] had held that when the assessee had placed reliance on DTAA between two countries, reference to Section 9(1)(i) and Explanation 5 thereto would be of no

4 [2017] 84 taxmann.com 37 (Bombay)

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importance. It was observed as under:-

> "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 (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"

Likewise, the Division Bench of Punjab and Haryana High Court in case of **Serco BPO (P) Ltd Vs. Authority for Advance Rulings, New Delhi**[5] had held and observed as under:-

> "14. The DTAC is itself clear. We are however, saved the exercise of analyzing it in depth on its own terms in view of the circulars issued by the Central Board of Direct Taxes under Section 119 in respect of DTAC which are of crucial importance. Our task is made simpler still in view of the judgment of the Supreme Court in Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1. We will, therefore, refer to the circulars immediately."

18. In terms of the provisions of the Act and the relevant articles of DTAA, it would prima facie appear that the petitioner's income arising out of the sale of shares was not

5 [2015] 379 ITR 256 (Punjab & Haryana)

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taxable in India. Learned counsel for the petitioner had placed heavy reliance on the TRC issued by Mauritius Government and contended that as long as such certificate is in force, the Income Tax Authorities in India cannot dispute the same or go behind such circular. Our attention was drawn to the circular of CBDT dated 13.4.2000 which reads as under:-

"734. Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)

1. The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article 4 of the DTAC defines a resident of one State to mean "any person who, under the laws of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature." Foreign Institutional Investors and other investment funds, etc., which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritius Tax law and are, therefore, to be considered as residents of Mauritius in accordance with the DTAC.

2. Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income-tax Act, 1961. Under the DTAC, tax was deductible at source on the gross dividend paid out at the rate of 5% or 15% depending upon the extent of shareholding of the Mauritius resident. Under the Income-tax Act, 1961, tax was deductible at source at the rates specified under section 115A, etc. Doubts have been raised regarding the taxation of dividends in the hands of

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investors from Mauritius. **It is hereby clarified that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly**.

3. The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accordingly, FIIs, etc., which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of article 13.

Circular :*No. 789, dated 13-4-2000."*

19. This circular thus provided that foreign institutional investors and other investment funds which are operating from Mauritius are invariably incorporated in that country. These entities are liable to tax under the Mauritius tax laws and therefore, to be considered as residents of Mauritius, in accordance with DTAC. In the said circular, it is further clarified that certificate of residence is issued by the Mauritius Authorities. Such certificate will constitute sufficient funds for accepting status of the residence as well as beneficial ownership for applying the DTAC.

20. The fact that the CBDT circular issued in exercise of powers under Section 119(2) of the Act would bind the

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Revenue Authorities is undisputable. The Supreme Court in case of **Union of India Vs. Azadi Bachao Andolan**[6] had emphasized on this aspect. Reference was made to the earlier decision in case of **UCO Bank Vs. CIT**[7]**.**

21. The contention of the Revenue, however, is that the entire transaction is a colourable device and sham transaction. From the impugned order passed by the Assessing Officer and the written submissions presented before us, we gather that this is the principal line that the said officer has taken in the present case. Legal position that the Assessing Officer has taken, cannot be grudged. Despite the existence of DTAA, despite the availability of the TRC of the petitioner issued by the Mauritius Authorities and despite the CBDT circular that such certificate as long as in operation would be a valid consideration for applying the DTAA, we do not find that as laid down by the Supreme Court through series of judgments has shut out the case of the Revenue totally when it comes to a fraudulent or fictitious transaction.

6 [2003] 263 ITR 706 (SC)
7 [1999] 237 ITR 889 (SC)

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In Azadi Bachao Andolan (supra) also, while explaining the observations made in the earlier judgment of the case of **McDowell & Co Ltd Vs. CTO**[8], this small window was not closed. More recently, the Supreme Court in the case of Vodafone International (supra) made elaborate observations in this regard. Vodafone International (supra) was the case in which the question of taxing the capital gain in the hands of the foreign based company came up for consideration before the Supreme Court. Principally, the question itself was did the complex corporate structuring give rise to transfer of capital asset? Bombay High Court having ruled in favour of the Revenue, the assessee was in appeal before the Supreme Court. The three judge bench of the Supreme Court overruled the Bombay High Court's view and in an elaborate decision held that the transaction in question did not give any rise to tax liability. We are not concerned with the finer aspects of this central issue that the Supreme Court was called upon and had decided. We would, however, refer to the certain portions of this judgment in which the Supreme Court had provided caveats where the logic derived would not apply in case of certain situations such as fraudulent or

8 [1985] 154 ITR 148 (SC)

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fictitious transactions. The decision was rendered by S.H. Kapadia, J. speaking for himself and Swatante Kumar, J. A separate concurring opinion was expressed by K.S. Radhakrishnan, J. In the judgment authered by S.H. Kapadia, J, it was observed that the Westminster Principle states that given that the document or transaction is genuine, the Court cannot go behind it to some supposed underlying substance. In paragraph 69 of the judgment, it was observed that in the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is sham or tax avoidant. In the concluding portion in paragraph 90 of the judgment, it was observed that offshore transaction evidences participative investment and not a sham or tax avoidant preordained transaction. It was, therefore, held that the Indian Tax Authority had no territorial tax jurisdiction to tax the said offshore transaction.

In a separate opinion, K.S. Radhakrishnan, J. also discussed the concept of doctrine of lifting of corporate veil.

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It was observed that such doctrine can be applied in tax matters even in the absence of any statutory authorisation to that effect. Such principle can be applied even in cases of holding and subsidary companies where in spite of being separate legal personalities, if the facts reveal that they indulge in dubious methods for tax evasion. In paragraphs 98 and 99, referring to DTAA between India and Mauritius and the circulars issued by CBDT, it was observed as under:-

> "98. LOB and look through provisions cannot be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the Tax Department cannot pierce the veil and look at the substance of the transaction. **DTAA and Circular No. 789 dated 13.4.2000, in our view, would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance. Tax Department, in such a situation, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Tax Department to discard the device and take into consideration the real transaction between the parties , and the transaction may be subjected to tax. In other words, TRC does not prevent enquiry into a tax fraud, for example, where an OCB is used by an Indian resident for round-tripping or any other illegal activities, nothing prevents the**

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Revenue from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of the OCB in the entire transaction.

99. No court will recognise sham transaction or a colourable device or adoption of a dubious method to evade tax, but to say that the Indo-Mauritian Treaty will recognise FDI and FII only if it originates from Mauritius, not the investors from third countries, incorporating company in Mauritius, is pitching it too high, especially when statistics reveals that for the last decade the FDI in India was US$ 178 billion and, of this, 42% i.e. US$ 74.56 billion was through Mauritian route. Presently, it is known, FII in India is Rs.450,000 crores, out of which Rs. 70,000 crores is from Mauritius. Facts, therefore, clearly show that almost the entire FDI and FII made in India from Mauritius under DTAA does not originate from that country, but has been made by Mauritius Companies / SPV, which are owned by companies/individuals of third countries providing funds for making FDI by such companies/individuals not from Mauritius, but from third countries."

In concluding portion, the learned Judge observed that sale in the said case was not the fall out of an artificial tax avoidance scheme or an artificial device, pre-ordained, or pre-conceived with the sole object of tax avoidance, but was a genuine commercial decision to exit from the Indian Telecom Sector.

22. The important element of this judgment, therefore, is that the entire discussion of the Supreme Court proceeds on

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the basis that in case of genuine transactions flowing out of commercial relations, certain set of principles would apply in relation to taxability of a non-resident. At the same time, the common thread of the judgment in both opinions expressed by the leaned Judges is that in case of sham or bogus transaction, no such parameters would apply.

23. Therefore, had the Assessing Officer in the present case sufficient prima facie material to demonstrate that the entire transaction from the inception was sham and colourable device and a bogus transaction to simply avoid tax, it was still open for him to express his opinion accordingly and refuse to grant certificate under Section 197 of the Act. In the present case, however, perusal of the impugned order would convince us that the material at his command fell short of this requirement. We have summarized principle factors which the Assessing Officer pressed in service. Mere fact that the assessee company has not transacted any other business by itself may not be conclusive. The reference to the assessee unable to produce TRC of the companies which hold shares in the assessee company is erroneous. The petitioner would point out that

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such certificates were produced before the Assessing Officer. The observation that mere transfer of money though banking channel would not be conclusive, may be quite correct but the same cannot be a ground against the assessee unless there is adverse material. It is true that the extent of administrative expenditure and the employment structure may be some of the factors which eventually would go to establish whether the transaction was sham and the very existence of the assessee was fraudulent, however by themselves may not be sufficient. All these aspects can and need to be gone into in the assessment proceedings.

24. We have noticed the provisions contained in Section 197 of the Act. One of the main benefits for an assessee who obtains a certificate under Section 197 of the Act for no deduction of tax at source or for deduction of tax at low rate would be to receive full payment from the payer without exposing the payer to the possibility of being declared as deemed defaulter. Yet another purpose of Section 197 of the Act would be to secure the interest of the Revenue. Particularly, in a case where the payee is non-resident, the recovery of possible tax if such tax liability is eventually

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crystallized in the assessment proceedings, would become more complex. Yet, another fallout of granting or not granting of certificate under Section 197 of the Act will be as to who would control the possible tax element till the assessment is completed. We fully share the anxiety of the Revenue that without adequate protection of recovery, the possible tax component should not be released in favour of the assessee. Under these circumstances, in view of the discussion above, we propose to quash the impugned order dated 20.6.2018 passed under Section 197 of the Act and after balancing the equities, direct the respondents to release the withheld payment subject to adjustment in the assessment.

25. In the result, the petition is disposed of with following directions:-

i. The impugned order dated 20.6.218 is quashed.

ii. The Assessing Officer shall issue necessary certificate of no requirement of deducting tax at source to the petitioner under Section 197 of the Act.

iii. The tax already deducted by the payer as per the directives of the Assessing officer and deposited in the Government revenue shall be released in favour of the

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petitioner along with interest if any payable as per law latest by 15.6.2019 subject to following conditions:-

a. The petitioner shall as stated by its learned counsel, maintain a minimum 50 Lakhs shares of ICFL. This figure we have arrived at on the basis of the statement made by the learned counsel for the petitioner that the current value of these shares is Rs. 402.55 per share. By such valuation, the total value of these 50 Lakhs shares would come to over Rs. 200 Crores. This would provide a security of over 200% of the disputed tax amount.

   At any stage, if the total value of these 50 Lakhs shares goes below 125% of TDS being released in favour of the petitioner by virtue of these directions, the petitioner shall immediately inform the Assessing Officer about the same and shall to the extent of shortfall of 200% of the amount of TDS provide security to the satisfaction of the Assessing Officer. In case of any difficulty, it would be open the either side to approach the Court.

b. Learned counsel for the petitioner further stated that the petitioner shall maintain such minimum number of shares till 31.3.2021 which is the last date for passing the order of assessment under normal circumstances, unless of course assessment order is passed earlier, in which case the entire issue will be governed by such assessment order subject to right of appeal. The petitioner shall abide by such statement.

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c. Additionally, it is provided by us that the petitioner shall maintain such shares upto 31.12.2021 which would enable the Assessing Officer to complete assessment even after invoking extended period of limitation. If the Department needs any further extension beyond 31.12.2021, it would be open for it to apply.

d. As stated by the learned counsel for the petitioner, the petitioner shall file a return of income before the Assessing Officer before the due date of filing of the return.

e. A responsible officer of the petitioner company shall file undertaking before this Court latest by 15.5.2019 that the petitioner shall abide by all statements made by their counsel which are recorded above.

26. The petition disposed of accordingly.

[SARANG V. KOTWAL, J.] **[AKIL KURESHI, J]**

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