IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

आयकर अपील सं./IT(IT)A No.174/MUM/2025
(निर्धारण वर्ष / Assessment Year :2022-23)

Anushka Sanjay Shah 55/58, 5th Floor, Jolly Maker Chambers II, Nariman Point, Maharashtra-400021	**v/s.** **बनाम**	ITO, Int Tax Ward 4(2)(1), Kautilya Bhavan, Bandra Kurla Complex, Maharashtra-400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AJBPS3447B		
Appellant/अपीलार्थी	‥	**Respondent/प्रतिवादी**

निर्धारिती की ओर से /Assessee by:	Dr. K Shivaram & Shri Rahul Hakani
राजस्व की ओर से /Revenue by:	Shri Krishna Kumar

सुनवाई की तारीख / Date of Hearing	18.02.2025
घोषणा की तारीख/Date of Pronouncement	26.03.2025

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order of the Learned Income-tax Officer Int. Tax Ward 4(2)(1), Mumbai [hereinafter referred to as "AO"] dated 21.12.2024 passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for Assessment Year [A.Y.] 20-.

2. The assessee has raised the following grounds of appeal:

"1. The learned DRP erred in endorsing the order of the AO to assess the capital gains on mutual fund units arising from are taxable in India thereby affirming the addition of Rs. 1,35 66,368 made by the AO.
2. The Learned DRP and AO erred in holding that the short term capital gains on capital gain on debt fund of Rs.88,75,230/- and short term capital gain on equity fund of Rs.46,91,140/- under the head income from capital gain is taxable in India and benefits of Article 13(5) under the India -Singapore treaty are not applicable to the assessee.
3. The Ld.DRP and the AO erred in not following the order of Mumbai Tribunal in ITO v Satish Biharilal Raheja (2013) 37 taxmann.com 296/145 ITD 29 (Mum) (Trib.) and Dy.CIT (IT), Kochi v K.E. Faizal (2019)108 taxmann.com 545/178 ITD 383 (Cochin) (Trib) wherein the Hourable dekaing with the Articles referred to in the Indo-Swiss and India-UAE DTAAs pertaining to alienation of mutual fund units are identically worded to the India-Singapore DTAA.

4. The Ld.DRP and the AO erred in ignoring that section 90(2) provides option to assessee to select the provisions of DTAA or the Income Tax Act 1961 which ever are beneficia therefore the provisions of section 9(1) cannot be applicable to the facts of the appellant.

5. The Ld, DRP erred in not referring the binding judgements of the Appellate Tribunal and affirming the order of the AO which is contrary to law hence the order of the DRP may be quashed and set aside and exemption. claimed by the appellant may be allowed"

4. The assessee has raised as many as five grounds of appeal. However, the sole substantive issue involved in all these grounds is regarding the taxability of capital gains on mutual funds units amounting to Rs. 1,35,66,368/-.

5. Brief facts of the case are that the assessee is a non-resident Indian and filed return declaring income of Rs. 4,53,768/- on 27.06.2022. The case was selected for scrutiny. The assessee had shown income from short-term capital gain on debt funds of Rs. 88,75,230/- and short-term capital gain on equity funds of Rs. 46,91,140/- in respect of which deduction was claimed under the Double Taxation Avoidance Agreement (DTAA). The assessee had claimed that capital gains earned on the transfer of equity shares can not be charged as she

is a tax resident of Singapore and the provisions of Article 13 of DTAA are applicable. However, Ld. AO did not accept the contentions of the assessee and proposed to tax on the entire amount in the draft assessment. The assessee filed objections before the Ld. DRP. However, the action of the Ld. AO was endorsed by Ld. DRP which held that the capital gains arising from the units of mutual funds that derived substantial value from assets located in India are taxable in India. Accordingly, Ld. AO proceeded to tax the short-term capital gain of Rs. 1,35,66,368/- vide assessment order u/s 143(3) r.w.s. 144C(13) on 21.12.2024.

6. Aggrieved with the order of Ld. AO, the assessee has preferred an appeal before the Tribunal. Before us, Ld. AR has submitted a breakup of short-term equity and debt mutual funds and claimed that the investment was made directly by the assessee and not by the portfolio manager. Bank statements show investments made to mutual funds and sale consideration credited directly by mutual funds to the assessee's bank account. With regard to the application of DTAA. Ld. AR has filed the following written submissions:

> *"(i) The short term capital gains arising from sale/redemption of mutual fund units would fall within the ambit of Para 5 of Article 13 of DTAA between India and Singapore. Para 5 of Article 13 of India Singapore DTAA reads as under:*
>
> > *"5. Gains from the alienation of any property other than that referred to in paragraphs 1,2,3,4A and 4B of this Article shall be taxable only in the Contracting State of which the alienator is a resident."*
>
> *Hence, Sale/redemption of mutual fund units would be covered by Para 5 of Article 13 of India Singapore DTAA and thus not taxable in India."*

7. In this regard, Ld. AR has placed reliance on the decision of the co-ordinate bench in the case of *ITO v/s Satish Beharilal Raheja (2013) 137*

taxmann.com 296. It has been pointed out that in the above case, the issue related to Indo-Swiss DTAA and Article 13(6) of India-Swiss DTAA which is identical to Article 13(5) of India-Singapore DTAA. Accordingly, the findings of the co-ordinate bench in this case are squarely applicable to the present case. Relevant portion of the order is reproduced below:

> *"7. We have perused the records and considered the rival contentions carefully. The dispute is regarding taxability of capital gain arising on account of sale of mutual fund units in India by the assessee, who is a non resident based in Switzerland. The assessee has claimed the benefit of Indo-Swiss tax treaty and argued that the capital gain is not taxable in India under the provisions of Article 13(6) of the Indo-Swiss tax treaty. The said Article has been reproduced in para 3 of this order, which deals with taxability of capital gain arising on transfer of different types of assets Article 13(4) and 13(5) deal with gain arising from alienation of shares. As per Article 13(5) gain arising from alienation of share in a company which resident of India can be taxed in India. The AO had treated the units of mutual fund as shares of Indian company and has held that gain is taxable under Article 5 (b). The case of the assessee is that units of mutual funds are different from shares of Indian companies and have been given different treatment in the Income Tax Act. Reliance has been placed on the judgment of Hon'ble Supreme Court in case of Apollo Tyres Ltd. (supra) in which it has been held that units of UTI are not shares of companies. We have carefully perused the said judgment. In that case the revenue authorities had noted that u/s 32 (3) of UTI Act, trust had been deemed to be a company and any distribution received by unit holder from the trust had been deemed to be income by way of dividend. The revenue, therefore, argued that unit of UTI will have to be considered as shares and accordingly the provisions of Explanation to section 73 shall apply and the business of shares has to be considered as speculation business. Hon'ble Supreme Court observed that even though the section 32(3) had created the fiction to make the UTI a deemed company and distribution of income received by the unit holder a deemed dividend, the deeming provision had to be applied for the purpose for which it had been specifically created. It was confined only to deeming UTI a company and deeming the income from units as dividend. There were no specific provisions for deeming the units as shares. Hon'ble Supreme Court, therefore, upheld the view that units of UTI are not shares of companies. Though the said judgment had been rendered in the context of Explanation to section 73, therefore is also applicable to the present situation which involves the interpretation as to whether units can be considered as shares. In our view in the absence of any specific provision under the Act to deem the unit as shares, it could not be considered as shares of companies and, therefore, the provisions of Article 13 (5) (b) can not be applied in case of units. We agree with the findings of CIT(A) that provisions of Article 13(6) are applicable in case of units as per which the capital gain cannot be taxed in India. The order of CIT(A) is accordingly upheld."*

8. Further reliance has been placed on two decisions of the co-ordinate benches as under:

1. *DCIT v/s K.E. Faizal (2019) 178 ITD 383 (Coch) (Trib.)*
2. *Sanket Kanoi v/s DCIT (2024) 168 taxman.com 418 (Delhi) (Trib)*

9. In both these cases, on similar facts the assessees were held to be covered by Article 13(5) India-UAE DTAA, which is identical to Article 13(5) of the Indo-Singapore DTAA. Hence Ld. AR has argued that the issue stands covered by the decisions of the different coordinate benches.

Ld. DR, on the other hand, has strongly relied on the orders of the lower authorities.

10. We have heard the rival submissions and perused the material available as well as the decisions of the co-ordinate benches relied upon by the Ld. AR . We find that the facts of the case of DCIT v/s K. E. Faizal (supra) are identical to the facts of the present case wherein it has been held as under:

> *"As per Article 13(5) of the Tax Treaty, income arising to a resident of UAE from transfer of property other than shares in an Indian company, are liable to tax only in UAE. On the other hand, Article 13(4) of the Tax Treaty provides that income arising to a resident of UAE from transfer of shares in an Indian company other than those specifically covered within the ambit of provisions of other paragraph of Article 13 may be taxed in India. Article 13(4) of the Tax Treaty covers within its purview capital gains arising from transfer of shares' and not any of the property. Therefore, Article 13(4) of the Tax Treaty cannot be applied in the instant case unless the units of the mutual funds transferred by the assessee qualify as shares for the purpose of Tax Treaty.*
> *The term 'share' is not defined under the Tax Treaty. As per Article 3(2) of the Tax Treaty, any term not defined under the Tax Treaty shall, unless the context otherwise requires, have the meaning which it has under the laws of the country whose tax is being applied. Therefore, the term 'share' would carry the meaning ascribed to it under the Act, and if no meaning is provided under the Act, then the meaning that the term carries under the other allied Indian laws would need to be applied. The Act does not define the term 'share'. However, section 2(84) of the Indian Companies Act, 2013 defines the term 'share' to mean 'a share in the share capital of a company and includes stock'. Further, the term 'company' has been defined to mean a 'company*

incorporated under the Companies Act, 2013 or under any previous company law'. Under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1995, mutual funds, in India can be established only in the form of 'trusts', and not 'companies'. Therefore, the units issued by Indian mutual funds will not qualify as 'shares' for the purpose of the Companies Act, 2013. Further, under the Securities Contract (Regulation) Act, 1956, a security is defined to include inter alia shares, scrips, stocks, bonds, debentures, debenture stock or other body corporate and units or any other such instrument issued to the investors under any mutual fund scheme. From the above definition of 'securities', it is clear that 'shares' and 'units of a mutual fund are two separate types of securities. Applying the above meaning to the provisions of the Tax Treaty, the gains arising from the transfer of units of mutual funds should not get covered within the ambit of Article 13(4) of the Tax Treaty, and should consequently be covered under Article 13(5) of the Tax Treaty. Therefore, the assessee, who is a resident of UAE for the purposes of the Tax Treaty, STCG arising from sale of units of equity oriented mutual funds and debt oriented mutual funds should not be liable to tax in India in accordance with the provisions of Article 13(5) of the Tax Treaty."

11. Considering the facts of the case, in the light of the provisions of India-Singapore DTAA and the decisions of the coordinate benches discussed above, we are of the view that the assessee is entitled to deduction in respect of short-term capital gains of Rs. 1,35,66368/- under the DTAA between India and Singapore is allowable. The assessee's appeal is therefore allowed.

Order pronounced in the open court on 26.03.2025.

Sd/-	**Sd/-**
BEENA PILLAI	**RENU JAUHRI**
(न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखाकार सदस्य/ACCOUNTANT MEMBER**

Place: मुंबई/Mumbai
दिनांक /Date 26.03.2025
अनिकेत सिंह राजपूत/ स्टेनो

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.

3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.