

Mauritian entity holding a valid tax residency certificate is entitled to the benefit of India-Mauritius tax treaty

Recently, the Delhi bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of *Saraswati Holding Corpn. Inc*¹ ruled on the taxability of the income from the sale of shares in the hands of resident in Mauritius. The Tribunal held that the taxpayer holding tax residence certificate of Mauritius, was entitled to the exemption provided under Article 13(4) of the India-Mauritius tax treaty (the tax treaty). The Tribunal relied on the decision of the Supreme Court in the case of *Azadi Bachao Andolan*²

Facts of the case

- The taxpayer was a company incorporated in Mauritius holding the tax residence certificate of Mauritius. It was incorporated with the purpose of carrying on business in dealing and making investments in shares and securities etc. in India.
- The taxpayer made investments in the Indian capital market and derived income in the form of short term/long term capital gains. The taxpayer claimed exemption on the income from sale of investments after relying on the article 13(4) of the tax treaty and Circular Nos. 682³ and 789⁴ issued by the Central Board of Direct Taxes (CBDT).
- The Assessing Officer (AO) held that the effective management of the taxpayer was in India and accordingly, denied the exemption claimed by the taxpayer under Article 13(4) of the tax

¹DDIT v. M/s Saraswati Holding Corpn. Inc. (2009-TIOL-529-ITAT-DEL)

² UOI v. Azadi Bachao Andolan [2003] 236 ITR 706 (SC)

³ CBDT circular no. 682 dated 30 March 1994

⁴ CBDT circular no. 789 dated 13 April 2000

treaty.

- The Commissioner of Income-tax (Appeals) [CIT (A)] allowed the exemption under the tax treaty after observing the Delhi Tribunal's decision in the case of taxpayer itself for the assessment year 2000-01⁵

Contentions of the taxpayer

- The directors and shareholders of the taxpayer were not based in India. Accordingly, the taxpayer was not effectively managed from India.
- The decision of the Supreme Court in the case of Azadi Bachao Andolan was squarely applicable in the current case. The Supreme Court held that Circular No. 789 providing exemption to capital gains tax arises to the Resident of Mauritius was valid and efficacious.

Contentions of the tax department

- The taxpayer company was effectively controlled and managed from India. The word 'wholly' is defined under section 6(3) (ii) of the Income-tax Act, 1961 (the Act) and in a manner that during that year, the control and management of its affairs was situated wholly in India.
- As per the decision of the Delhi High Court in the case of Shiva Kant Jha⁶, Circular No. 789 was ultra vires and the provisions of section 90 and section 119 of the Act and was also bad and illegal.
- As per Circular No.1⁷ issued by the CBDT, if the taxpayer was a resident of both countries i.e. India and Mauritius, then the AO can proceed to treat such taxpayer as resident in India provided the effective management of the taxpayer is in India. Accordingly, the taxpayer was not entitled for the exemption given by the tax treaty.

Tribunal's Ruling

- The Tribunal held that the decision of the Supreme Court in the case of Azadi Bachao Andolan holding the Circular No. 789 as valid and efficacious and was applicable in the current case also.
- The taxpayer was entitled for the exemption provided under the tax treaty. Accordingly, the income by way of sale of shares was not taxable in India.

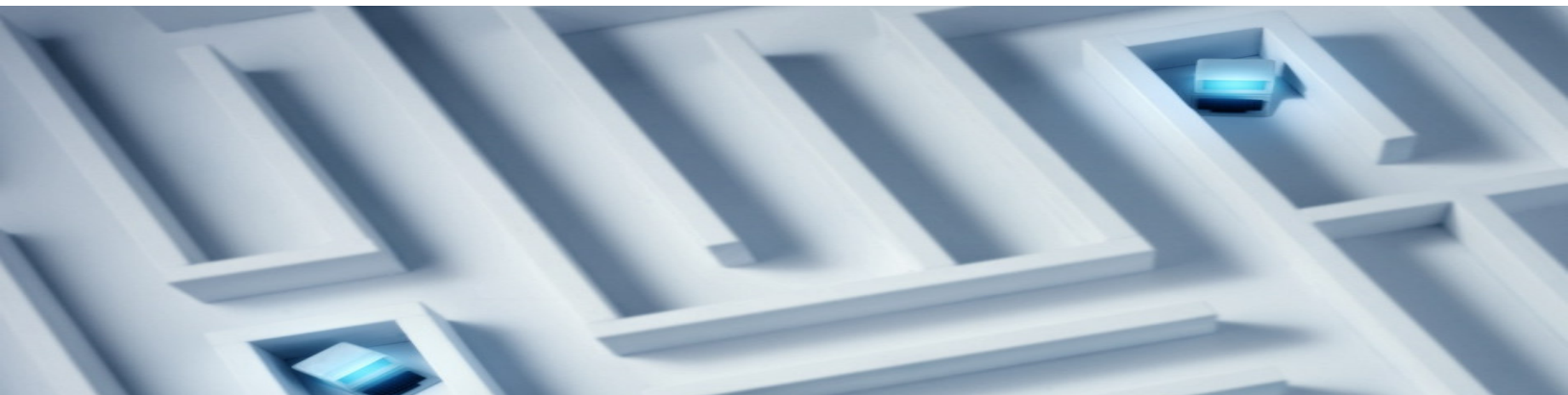
Our Comments

This ruling has reiterated that the resident of Mauritius holding a valid Tax Residence Certificate issued by the Mauritius Revenue Authority (MRA) is entitled to the exemption provided under the tax treaty on the income from sale of shares in Indian companies. The Tribunal has also upheld the principle laid down by the Supreme Court in the case of Azadi Bachao Andolan. This decision will further give relief to the FII's holding valid residency certificate of Mauritius.

⁵ M/s Saraswasti Holding Corpn. Inc. v. DDIT [2007] (16 SOT 735)

⁶ Shiva Kant Jha v. UOI [2002] 122 Taxman 952 (Delhi)

⁷ CBDT circular no. 1 dated 10 February 2003



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