IT/ILT : Article 13(4) of DTAA between India and Singapore is not an exemption provision but it speaks of taxability of particular income in a particular State by virtue of residence of assessee and provisions of article 24 of India Singapore Tax Treaty does not have much relevance insofar as it relates to applicability of article 13(4) to income derived from capital gain

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[2018] 96 taxmann.com 75 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'L'

Deputy Commissioner of Income-tax, IT Circle- 2 (1) (2), Mumbai

v.

D. B. International (Asia) Ltd.*

SAKTIJIT DEY, JUDICIAL MEMBER
AND N.K. PRADHAN, ACCOUNTANT MEMBER
IT APPEAL NO. 992 (MUM.) OF 2015
[ASSESSMENT YEAR 2011-12]
JUNE 20, 2018

Section 9 of the Income-tax Act, 1961, read with articles 13 and 24 of DTAA between India and Singapore - Income - Deemed to accrue or arise in India (Capital gain) - Assessment year 2011-12 - Whether article 13(4) in clear and unambiguous terms expresses itself as not an exemption provision but it speaks of taxability of particular income in a particular State by virtue of residence of assessee and provisions of article 24 do not have much relevance insofar as it relates to applicability of article 13(4) to income derived from capital gain - Held, yes - Assessee, a tax resident of Singapore, was carrying on its business operation, including trading in Indian securities, from Singapore - In course of such activity of trading in Indian securities, assessee had derived short-term capital gain which had been claimed as not taxable in India under article 13(4) - However, Assessing Officer, referring to article 24, held that exemption would apply only to extent of amount repatriated/remitted to Singapore - Whether capital gain derived by assessee from sale of Indian securities would fall under article 13(4) and, thus, would be taxable only in that State, i.e., Singapore and not in India - Held, yes [Paras 12-14] [In favour of assessee]

FACTS

- The assessee, a tax resident of Singapore, was carrying on its business operation, including trading in Indian securities, from Singapore in course of such activity of trading in Indian Securities, and had derived short-term capital gain which had been claimed as not taxable in India under article 13(4).
- The Assessing Officer observed that since the income from capital gain was not repatriated to Singapore in terms of article 24, it had to be taxed in India under the Indian Income tax Act and exemption under article 13(4) could not be allowed.
- The DRP, after considering the submissions of the assessee *vis-à-vis* the provisions contained under India-Singapore Tax Treaty and other facts and material on record,

held that the entire income received by the assessee from all sources was taxable in Singapore irrespective of the fact whether it was received in Singapore or not.

- On appeal :

HELD

- The aforesaid conclusion of the Assessing Officer is under a misconception of the provisions of India Singapore Tax Treaty. Article 13 deals with the taxability of capital gain arising from immovable and movable assets situated in one of the contracting State. While article 13(1) deals with sale of immovable property, article 13(2) deals with sale of movable property forming part of the business property of a PE. Article 13(3) deals with alienation of ships and aircrafts operated in International traffic or movable property pertaining to the operation of such ships or aircrafts. Whereas, article 13(4) deals with gains derived from any other asset which are not mentioned in article 13(1), 13(2) and 13(3). Thus, on a careful reading of article 13 as a whole, it becomes clear that the capital gain derived by the assessee from sale of Indian Securities will fall under article 13(4) and the gain derived by the resident of a contracting State from sale of any property shall be taxable only in that State. In other words, it will be taxed in the Country where the assessee is a resident. In the present case there is no dispute that the assessee is a resident of Singapore. Therefore, as per article 13(4) the gain derived by the assessee from sale of Indian Securities can only be taxed in Singapore. The Assessing Officer has attempted to deny the exemption claimed by the assessee under article 13(4) by invoking article 24 Applicability of article 24 will not arise in the present fact situation. On a careful reading of article 24 it becomes clear that if income derived from a contracting State is either exempt from tax or taxed at a reduced rate in that contracting State, whereas, the amount remitted or received out of such income in other contracting State is taxable in the other contracting State to the extent of such remittance or receipt, then the exemption or reduction of tax to be allowed under the Tax Treaty in respect of income derived in the contracting state shall be limited to the amount remitted or received in the other contracting State. Therefore, the first condition which article 24 imposes is, the income derived from a contracting State should either be exempt from tax or taxed at a reduced rate in that contracting State. Article 13(4) does not say that the capital gain derived in a contracting State is exempt from taxation in that contracting State. Capital gain derived by a resident of a contracting State shall be taxable only in that State. Thus, article 13(4) in clear and unambiguous terms expresses itself as not an exemption provision but it speaks of taxability of particular income in a particular State by virtue of residence of the assessee and the provisions of article 24 does not have much relevance insofar as it relates to applicability of article 13(4) to income derived from capital gain. The expression 'exempt' with reference to the capital gain derived by the assessee, has been loosely used. On the contrary, the overriding nature of article 13(4) makes the capital gain taxable only in the country of residence of the assessee. [Para 14]
- There is no infirmity in the directions of DRP. [Para 14]

CASE REVIEW

Citicorp Investment Bank Singapore Ltd. v. *Dy. CIT* [2017] 81 taxmann.com 368 (Mum. - Trib.) (para 14) *followed*.

CASES REFERRED TO

Citicorp Investment Bank Singapore Ltd. v. *Dy. CIT* [2017] 81 taxmann.com 368 (Mum. - Trib.) (para 13).

M.V. Raj Guru *for the Appellant.* **P.J. Pardiwala** and **Niraj Sheth** *for the Respondent.*

ORDER

Saktijit Dey, Judicial Member - This is an appeal by the Revenue against the directions of the Dispute Resolution Panel-I (DRP), Mumbai, dated 22.12.2014, pertaining to the assessment year 2011-12.

2. Grounds no.3 and 4, being general in nature need no adjudication.

3. Ground no.1 is against the decision of the DRP in accepting assessee's claim that the income from early settlement of forward foreign exchange contract is to be assessed under the head *"Capital Gain"* and not under the head *"Income from Other Sources"*.

4. Brief facts are, the assessee is a tax resident of Singapore. For the assessment year under dispute, the assessee filed its return of income on 30th September 2011, declaring total income of Rs. 10,79,86,878. During the assessment proceedings, the Assessing Officer noticed that the assessee has incurred loss of Rs. 21,29,40,000 on cancellation of forward foreign exchange contract which has been treated as short term capital loss and assessee has sought carry forward of the same to future years. Being of the view that forward foreign contract is not a capital asset, the Assessing Officer called upon the assessee to explain why the loss claimed should not be assessed as income from other sources. In reply, it was submitted by the assessee that forward foreign exchange contract are entered into only for hedging against the foreign exchange rate variation in respect of investment made by the assessee in India. It was submitted, since, the investments are capital assets, forward foreign exchange contract are in capital field and loss arising on cancellation of such contract is on capital account. The Assessing Officer, however, was not convinced with the submissions of the assessee and ultimately held that the loss incurred of Rs. 21,29,40,000 on cancellation of forward foreign exchange contract has to be assessed under the head *"Income From Other Sources"*. Accordingly, referring to Article-11 and 23 of India-Singapore DTAA, he held that the loss incurred by the assessee neither can be set-off nor carried forward. Being aggrieved with the aforesaid decision of the Assessing Officer, assessee raised objection before the DRP.

5. The DRP, after considering the submissions of the assessee and taking note of the fact that the Tribunal in assessee's own case for assessment year 2005-06 and 2006-07, held that the loss arising from cancellation of forward foreign exchange contract is to be assessed under the head *"Capital Gain"*. Accordingly, the DRP directed the Assessing Officer to delete the addition.

6. The learned Sr. Counsel, Shri P.J. Pardiwala, appearing for the assessee submitted that the issue in dispute is decided in favour of the assessee by the Tribunal in assessee's own case for assessment year 2005-06, 2006-07 and 2008-09. Copy of the orders are also placed before the Bench.

7. The learned Departmental Representative, Shri M. V. Rajguru agreed that the issue in dispute has been decided in favour of the assessee in the preceding assessment years.

8. We have considered rival submissions and perused materials on record. As could be seen, this is a recurring dispute between the assessee and the Department from the preceding assessment years. While deciding the issue in assessment years 2005-06 and 2006-07 in ITA no.4583/Mum./2009 and ITA no.2954/Mum./2010, dated 3rd October 2012, the Tribunal has held that the gain arising from forward exchange contract should be assessed as capital gain. Following the aforesaid decision, the Tribunal

again in assessee's own case for assessment year 2008-09 in ITA no.6984/Mum./2011, dated 17th July 2013, has held that the gain from forward foreign exchange contract has to be treated as capital gain. As a natural corollary the loss arising from such contract has to be treated as capital loss. The DRP having followed the decision of the Tribunal in assessee's own case, we do not see any reason to interfere with the directions of the DRP on the issue. The ground raised is dismissed.

9. In ground no.2, the Department has challenged the decision of the DRP in holding that the capital gain derived by the assessee is not taxable in India in terms of Article-13 of the India-Singapore Tax Treaty.

10. Brief facts are, during the assessment proceedings the Assessing Officer noticed that, though, the assessee has derived capital gain on sale of shares, debt instruments and derivatives, however, it has claimed the same as exempt under Article-13(4) of the India- Singapore Tax Treaty. He, therefore, called upon the assessee to justify its claim of exemption. In response, it was submitted by the assessee that it is liable to tax in Singapore on its worldwide income. Therefore, as per Article-13(4) of the Tax Treaty, the capital gain is taxable in Singapore. It was submitted, since the worldwide income is to be taxed in Singapore, the remittance of such income to Singapore is of no relevance for the purpose of claiming benefit under the India Singapore Tax Treaty. The Assessing Officer, however, did not find merit in the submissions of the assessee. Though, he accepted that provisions of Article-13(4) of the India-Singapore Tax Treaty allows exemption of capital gain in the source country i.e., India, however, the provisions of Article-24 provides for restriction of such exemption in respect of capital gain to the extent of income repatriated to the country of residence i.e., Singapore. Referring to section 10(1) of Singapore Income Tax Act, the Assessing Officer observed that as per the said provision income has to be taxed on receipt basis in Singapore even for the income received outside Singapore. The Assessing Officer observed that since the income from capital gain was not repatriated to Singapore in terms of Article-24 of the Tax Treaty, it has to be taxed in India under the Indian Income Tax Act and exemption under Article-13(4) of the Tax Treaty cannot be allowed. Accordingly, he brought to tax the short term capital gain of Rs. 455, 70,78,733. The assessee objected to the aforesaid addition before the DRP.

11. The DRP, after considering the submissions of the assessee vis- a-vis the provisions contained under India-Singapore Tax Treaty and other facts and material on record agreed that the entire income received by the assessee from all sources is taxable in Singapore irrespective of the fact whether it is received in Singapore or not. In this context, the DRP referred to the letter issued by the Inland Revenue Authority of Singapore (IRAS) confirming that capital gain derived by the assessee from sale of equities, debt securities and derivatives in India constitutes trade source income accruing in or derived from Singapore and is subject to tax in Singapore under section 10(1)(a) of the Singapore Income Tax Act by reference to the full amount and not with respect to the amount which is remitted or received in Singapore. Further, DRP observed that the assessee is a tax resident of Singapore and does not have permanent establishment (PE) in India. The assessee is carrying on its business operation including trading in securities from Singapore. Thus, it was held that as per Article-13(4) of the India Singapore Tax Treaty, Singapore has the exclusive right to tax the income and the restriction / conditions imposed under Article 24 of the Tax Treaty would not apply. Referring to the observations of the Assessing Officer that the restriction of exemption would only apply to the extent of repatriation of income to Singapore, the DRP observed that once it is held that the capital gain is to be taxed in the country of residence of the assessee, the applicability of Article-24 becomes redundant, since, the income is taxable in Singapore with reference to full amount and not with reference to the amount remitted or received in Singapore. With the aforesaid observations, the DRP directed the Assessing Officer to delete the addition.

12. The learned Departmental Representative relied upon the observations of the Assessing Officer.

13. The learned Sr. Counsel for the assessee strongly relying upon the observations of the DRP submitted that as per Article-13(4) of the India-Singapore Tax Treaty, capital gain arising from sale of certain asset is only taxable in the country of residence of the assessee. He submitted, once such income is not taxable in India under Article- 13(4) of the Tax Treaty, the necessity of remittance to Singapore for applying Article-24 of the Tax Treaty becomes irrelevant. He submitted, assessee as per the provisions of Singapore Income Tax law was assessed on its worldwide income including the capital gain derived from India. In this context, he drew our attention to letter dated 28th August 2014, issued by IRAS. He submitted, once the entire worldwide income of the assessee is assessed at Singapore, a part of it cannot be taxed in India as it will amount to double taxation of the same income. In support of his contention, the learned Sr. Counsel for the assessee also relied upon the decision of the Tribunal, Mumbai Bench, in *Citicorp Investment Bank Singapore Ltd*. v. *Dy. CIT* [2017] 81 taxmann.com 368.

14. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. There is no dispute to the fact that the assessee is a tax resident of Singapore. Even, the factual finding recorded by the learned DRP that assessee does not have a PE in India and it is carrying on its business operation, including trading in Indian Securities, from Singapore has not been controverted by the Department. Undisputedly, in course of such activity of trading in Indian Securities assessee has derived short term capital gain which has been claimed as not taxable in India under Article-13(4) of the India-Singapore Tax Treaty. However, the Assessing Officer referring to Article-24 of the Tax Treaty has held that the exemption would apply only to the extent of the amount repatriated / remitted to Singapore. In our view, the aforesaid conclusion of the Assessing Officer is under a misconception of the provisions of India Singapore Tax Treaty. Article-13 of India Singapore Tax Treaty deals with the taxability of capital gain arising from immovable and movable assets situated in one of the contracting State. While Article-13(1) deals with sale of immovable property, Article-13(2) deals with sale of movable property forming part of the business property of a PE. Articl-13(3) deals with alienation of ships and aircrafts operated in International traffic or movable property pertaining to the operation of such ships or aircrafts. Whereas, Article- 13(4) deals with gains derived from any other asset which are not mentioned in Article-13(1), 13(2) and 13(3). Thus, on a careful reading of Article-13 as a whole, it becomes clear that the capital gain derived by the assessee from sale of Indian Securities will fall under Article-13(4) of the India Singapore Tax Treaty. As per Article-13(4) of the Tax Treaty, the gain derived by the resident of a contracting State from sale of any property shall be taxable only in that State. In other words, it will be taxed in the Country where the assessee is a resident. In the present case there is no dispute that the assessee is a resident of Singapore. Therefore, as per Article-13(4) of the India Singapore Tax Treaty, the gain derived by the assessee from sale of Indian Securities can only be taxed in Singapore. The Assessing Officer has attempted to deny the exemption claimed by the assessee under Article-13(4) by invoking Article-24 of the India Singapore Tax Treaty. In our considered opinion, applicability of Article-24 of the Indian Tax Treaty will not arise in the present fact situation. On a careful reading of Articl-24 of India Singapore Tax Treaty, it becomes clear that if income derived from a contracting State is either exempt from tax or taxed at a reduced rate in that contracting State, whereas, the amount remitted or received out of such income in other contracting State is taxable in the other contracting State to the extent of such remittance or receipt, then the exemption or reduction of tax to be allowed under the Tax Treaty in respect of income derived in the contracting state shall be limited to the amount remitted or received in the other contracting State. Therefore, the first condition which Article-24 imposes is, the income derived from a contracting State should either be exempt from tax or taxed at a reduced rate in that contracting State. Article-13(4) of the India Singapore Tax Treaty does not say that the capital gain derived in a contracting State is exempt from taxation in that contracting State. What Article-13(4) says is, capital gain derived by a resident of a contracting State shall be taxable only in that State. Thus, Article-13(4) in clear and unambiguous terms expresses itself as not an exemption provision but it speaks of taxability of particular income in a particular State by virtue of residence of

the assessee. That being the case, the provisions of Article-24 of India Singapore Tax Treaty does not have much relevance insofar as it relates to applicability of Article-13(4) to income derived from capital gain. The expression 'exempt' with reference to the capital gain derived by the assessee, in our view, has been loosely used. On the contrary, the overriding nature of Article 13(4) of the Tax Treaty makes the capital gain taxable only in the country of residence of the assessee. The decision cited by the learned Sr. Counsel for the assessee also supports this view. In aforesaid view of the matter, we hold that there is no infirmity in the directions of the DRP on the disputed issue. Ground raised is dismissed.

15. In the result, Revenue's appeal is dismissed.

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*In favour of assessee.