

**M/S Citicorp Trustee Company Limited as Trustees for Invesco Perpetual Global and Others Dit (international Taxation) Mumbai**

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**Court :** Authority for Advance Rulings

**Decided On :** Jul-29-2005

**Judge :** Hon<sup>ble</sup> Mr. Justice Syed Shah Mohammed Quadri (Chairman) Mr. A.S. Narang (Member)

**Appeal No. :** A.A.R. NO. 647, 648, 649 and 650 OF 2004

**Advocate for Pet/Ap. :** Present for the Departments Mr. T.N. Chopra (Special Counsel). Present for the Applicants Mr. Porus Kaka, Advocate and others.

**Judgement :**

Justice Syed Shah Mohammed Quadri

The following common question is set forth in these four applications, under section 245Q(1) of the Income Tax Act, 1961 (for short the Act):-

Whether in respect of the transaction, being the reorganization described in Annexure 2 of this application, the applicant is chargeable to tax in India under the provisions of the Income tax Act, 1961 or the agreement for avoidance of double taxation between India and the United Kingdom.

2. In as much as the said common question arises out of identical facts, we shall refer to the facts narrated in the first mentioned application (AAR/647/2004). The applicant is a limited company incorporated in Great Britain and is a tax resident of

the United Kingdom(U.K). The applicant was initially a trustee for a group of funds including Invesco Perpetual Global Smaller Companies Fund (Invesco Funds). Those funds were managed by Invesco Funds Managers Ltd., a company incorporated in Great Britain and a tax resident of U.K. The said funds were constituted as Unit Trusts under various trust deeds for the purpose of providing an investment vehicle to investors to earn profits. The applicant was registered with the Securities and Exchange Board of India (SEBI) as a Foreign Institutional Investors (FIIs) under the SEBI (Foreign Institutional Investors) Regulations, 1995 and made investments in Indian securities in accordance with the said regulations. The applicant states that it does not have a branch office or a place of business in India nor does it have any employee of its own or any investment advisor or agent in India. The transactions of purchase or sale of securities in India are carried on through brokers. The Indian securities of the applicant are held by the local custodian - Citi Bank, Mumbai -, which renders services to several other entities in ordinary course of its business.

3. With a view to avail of various advantages in terms of flexibility, transparency, cost and services in accordance with the regulations prescribed by Financial Services Authority(FSA) in U.K., it was decided to convert Unit Trusts into sub-funds of open-ended investment companies (OEICs). The Invesco Funds including Invesco Perpetual Global Smaller Companies Fund were reorganized under a scheme in September, 2003. The reorganisation involved appropriating the assets of each unit trust into two separate and distinct funds (1) liquidation fund and (2) unit holders fund. The liquidation fund was created to meet outstanding liabilities, if any, of the unit trusts and the unit holders fund, which comprises of the balance of the assets of unit trust, was to be appropriated for the purpose of corresponding sub-funds of OEICs. Each unit holder was given shares on the basis of one share for one unit and consequently, every unit was deemed to be cancelled and the trust deeds ceased to have effect. It is asserted that there was no sale, exchange, or extinguishments of underlying assets (including the Indian securities) as a result of change from the Unit trusts to the OEICs. There was also no payment of consideration by the OEICs to the Unit trusts. The applicant continued to be the owner of shares in Indian companies as before but it would, after reorganization, act as the depository of the OEICs instead of as the trustee of the Invesco funds.

There was no change in the beneficial ownership of the Unit Trusts nor was there any change in the effective beneficial ownership of the assets of the Unit Trusts. All the investors in the Unit Trusts became shareholders in the OEICs in the same proportions in which they originally held units. The aforementioned reorganization, it is stated, has the approval of Financial Services Authority (FSA) and enjoys exemption under the Tax Law of UK. After reorganisation, the applicant intimated SEBI of the change in the nomenclature for purposes of continuity of the operations. SEBI approved the change in the name of the Invesco Funds and continuation of portfolio investment in Indian securities by the OEICs.

4. In the comments submitted by the Director of Income-tax (International Taxation), Mumbai, the facts stated by the applicant are not disputed. However the applicant was put to proving the same. The material portion of the comments contained in para 9 reads as follows:-

The assertions made by CTCL above are questions of fact, and as such, may be determined by Id.AAR. The issue of transfer of Indian securities will arise if the applicant fails to establish that:-

- (i) as trustee of the unit trusts it was the owner of the Indian securities.
- (ii) as Depository of the OEICs, it still is the owner of the Indian securities.
- (iii) the scheme of arrangement is tax exempt in the UK.
- (iv) It is permitted under the UK regulations to act as a Depository and Trustee.

In a case of such failure, it is submitted that the Authority may be pleased to hold that the provisions of sec.2(47) will be attracted and capital gains will arise as a transfer will have taken place.

5. Mr. Porus Kaka, learned counsel appearing for the applicant, would submit that the reorganization of the applicant in U.K. is not a transaction chargeable to tax under the Indian Income-tax Act, nor would it result in transfer, within the meaning of section 2(47) of the Act, of Indian securities held by the applicant as all the conditions enumerated in para 9 of the comments of the Commissioner are

satisfied. Mr. T.N. Chopra, learned Special Counsel, appearing for the Commissioner drew our attention to the said para 9 of the comments and argued that if anyone of the four conditions was not satisfied the reorganization of the applicant would amount to transfer of Indian securities held by it as defined in section 2(47) of the Act.

6. Chargeability of tax under the Act in respect of a transaction by the applicant a non-resident - will have to be examined in light of the section 9(1)(i) of the Act, which is wide enough to cover both residents as well as non-residents. In so far as it is relevant for our purpose, it reads as follows:-

Section 9(1) (i)

9. (1) The following incomes shall be deemed to accrue or arise in India:-

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, [ \* ] or through the transfer of a capital asset situate in India.

x xx xxxx xxxx xx

A non-resident will be taxable in respect of all income deemed to accrue or arise to him in India, inter alia, through transfer of a capital asset situate in India. The capital assets of applicant in India are shares in Indian companies. The reorganisation under examination is in respect of the assets in UK. As a result of reorganisation the position of the applicant as a trustee of the Invesco funds has been changed to that of a depository of OEICs. It is obvious that by itself, it would not attract the provisions of section 9(1) (i) of the Act. If, however, the reorganisation results in transfer of shares held by the applicant in Indian companies, it would attract section 9(1)(i) of the Act.

To invoke section 9(1)(i) of the Act, it must be shown that there is a transfer of capital asset in India within the meaning of section 2(47) of the Act, which defines the term transfer, thus :

## Section 2(47)

2. In this Act, unless the context otherwise requires, -

(47) [transfer, in relation to a capital asset, includes-

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishments of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; ] [or]

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immoveable property.

Explanation For the purposes of sub-clauses (v) and (vi), immoveable property shall have the same meaning as in clause (d) of section 269UA.]

At the outset it may be mentioned that clauses (iii) to (vi) thereof are not relevant here. If the reorganisation falls under either clause (i) or clause (ii) of sub-section 47, it would amount to transfer. Admittedly in this case there is neither sale or exchange or extinguishments of any right in the shares held by the applicant in Indian companies. However, the Commissioner in para (9) of his comments took the plea that if anyone of the four clauses referred to therein is not satisfied, it would amount to transfer within the meaning of section 2(47). We shall now examine this aspect.

Conditions (i) and (ii) may be taken up together as they are two sides of the same coin. They are reproduced here:-

(i) as trustee of the unit trusts it was the owner of the Indian securities.

(ii) as Depository of the OEICs, it still is the owner of the Indian securities.

The substance of these two conditions relates to ownership of the Indian securities; whether the applicant which was the owner of the Indian securities as a trustee of the unit holders continues to be the owner of those securities as a depository of the OEICs. From the facts narrated above, it is evident that the reorganization of the securities in U.K. resulted in the applicant changing its status from that of a trustee of the unit holders to that of a depository of the OEICs. There is no change in the Indian securities as a consequence of reorganization of the applicant. The change spoken of is in the nomenclature of the applicant. In this connection, it will be useful to read the letter of SEBI dated May 13, 2004 communicating its no objection to the proposed change in the name of the Fund, which reads as follows:-

Securities and Exchange

Board of India

FII DIVISION

INVESTMENT MANAGEMENT DEPARTMENT

IMD/FII/9714/2004

May 13, 2004

Citicorp Trustee Company Limited

Citigroup Centre

Canada Square

Canary Wharf

London E 14 5LB

Dear Sirs,

Sub.: Change in the name of the sub-accounts from:

1. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Global Smaller Companies Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Global Smaller Companies Fund

2. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Pacific Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Pacific Fund

3. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Emerging Countries Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Emerging Countries Fund

4. Citicorp Trustee Company Limited as Trustee for INVESCO Institutional Asia and Australasia Fund to Citicorp Trustee Company Limited as Depository for INVESCO Institutional Asia and Australasia Fund

5. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Global Dynamic Theme Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Global Dynamic Theme Fund

6. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual International Equity Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual International Equity Fund

7. Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Asian Fund to Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Asian Fund Please refer to the letter dated May 07, 2004 received from your custodian Citibank regarding the above matter. We do not have any objection to the change in name of the sub-accounts from:-

OLD NAME

## NEW NAME

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Global Smaller Companies Fund (1997088)

Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Global Smaller Companies Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Pacific Fund (1997092)

Citicorp Trustee Company Limited as Depository For INVESCO Perpetual Pacific Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Emerging Countries Fund (2001342)

Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Emerging Countries Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Institutional Asia and Australasia Fund (2001387)

Citicorp Trustee Company Limited as Depository for INVESCO Institutional Asia and Australasia Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Global Dynamic Theme Fund (2001365)

Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Global Dynamic Theme Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual International Equity Fund (1997105)

Citicorp Trustee Company Limited as Depository for INVESCO Perpetual International Equity Fund

Citicorp Trustee Company Limited as Trustee for INVESCO Perpetual Asian Fund (1997090)

Citicorp Trustee Company Limited as Depository for INVESCO Perpetual Asian Fund

Further, please note that the securities held in the existing name will have to be re-registered under the new name.

Yours faithfully,

Sd/-

Archana Ahuja

Officer

cc: The Chief General Manager, Exchange Control Department, Reserve Bank of India, S B S Marg, Mumbai 400 023.

cc: The Manager, Custodial Services, Citibank, Mumbai

A perusal of the letter, extracted above, discloses that the identity of the applicant as well as the ownership of the applicant of the Indian securities, pre-reorganisation and post-reorganisation remains the same and that change is in the name of the sub-accounts, which was not objected to by SEBI. Further, the duties and responsibilities of the applicant as a trustee and as a depository as prescribed by the Financial Services Authority (FSA) of the UK are said to be identical.

Thus it is clear that conditions (i) and (ii) are satisfied.

According to the Commissioner the third condition, which the applicant must satisfy, is that the scheme of arrangement is tax exempt in UK. Mr. Kaka prefaced his submission with the plea that the question as to whether the reorganisation enjoys tax exemption in UK would not be germane to the issue of taxability of applicant in India as a result of reorganisation. Nonetheless he had taken us through various provisions of Income and Corporation Taxes Act 1988 (ICTA)

relating to taxation of income and taxation of capital gains which is governed by the Taxation of Chargeable Gains Act 1992(TCGA) to show that the reorganisation was not taxable in UK.

It will be apt to refer to section 703, 704 and 707 of the ICTA. Section 704 enumerates circumstances under which any tax advantage derived by a person within the meaning of section 703 could be denied or reversed unless the person shows that the transaction was carried out either for bonafide commercial reasons or in the ordinary course of making or managing investments and in either case the main object is not to obtain a tax advantage, otherwise provisions of section 703 deprive him of tax advantages derived by him. Section 707 is an enabling provision under which an application may be made to the Board requesting it to notify that the provisions of sub-section(3) of section 703 will not apply to the proposed transaction.

We may also refer to the relevant provisions of TCGA. Section 126 of the TCGA defines the reorganisation to mean, inter alia, conversion of shares of one class into another within the same company. Section 127 of TCGA provides that subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of original shares. Section 137(1) of the TCGA states that provisions of section 136 shall apply only if the proposed transaction is for bonafide commercial reasons and does not form part of the scheme or arrangement the main purpose of which is avoidance of liability to capital gains tax or corporation tax. The procedure for obtaining a clearance from the UK Inland Tax Revenue to the effect that the scheme of reconstruction is for bona fide commercial reasons and that section 137(1) will not apply to the said re-organization, is contained in section 138 of TCGA.

In accordance with the aforementioned provisions the applicant obtained the clearance of the Inland Revenue which is in the following terms:-

Inland

Revenue

MacFarlanes

10 Norwich Street Revenue Policy

London Business Tax Clearance Team

EC4A 1BD Fifth Floor

22 Kingsway

LONDON

WC2B6NR

Group Leader: Ray McCann Tel 020 7438 7474

Date 16 April 2003 Fax 020 7438 4409

Our ref T1600/1691/03/NR/RMCC [www.inlandrevenue.gov.uk](http://www.inlandrevenue.gov.uk)

Your ref GAC/JAXJ/569646 Email [reconstructions@ghnet.gov.uk](mailto:reconstructions@ghnet.gov.uk)

recons

Dear Sirs

INVESCO FUND MANAGERS LIMITED

Thank you for your letter of 4 April 2003. I have considered the applications made under S707 ICTA 88, S138(1) TCGA 1992.

S707 ICTA 88 Transactions in Securities

I am authorized to say that the Board are satisfied that the provisions of S 703(3) ICTA 1988 should not be applied to the proposed transactions.

Share Exchanges and Reconstructions

I am authorized to say that the Board of Inland Revenue are satisfied that the provisions of subsection (1) of Section 137 Taxation of Chargeable Gains Act

1992 should not have effect in respect of these transactions, with the result that Section 136 Taxation of Chargeable Gains Act 1992 would not be prevented from applying.

Yours faithfully,

Sd/-

RAY McCANN

A plain reading of the letter of the Inland Revenue, extracted above, discloses that condition no. (iii) is satisfied.

In view of this finding we consider it unnecessary to go into the question as to what would have been the position, had the applicant not obtained clearance from the Inland Revenue (Board).

The only condition that remains to be examined is condition no. (iv) i.e. whether It is permitted under the UK regulations to act as a Depository and Trustee. To show that this condition is satisfied it would suffice to refer to the extract of Financial Services Authority Register. FSA Register is a public record of financial services firms and other bodies which fall under its regulatory jurisdiction as defined in the Financial Services and Markets Act 2000 of UK, which came into force on December 1, 2001. It shows that the applicant is registered as FSA and that it has necessary permission to act as a trustee and a depository, which reads as under:-

Financial Services Authority Register

122206 Citicorp Trustee Company Ltd.

Permissions

Activity Name: Acting as the depository or sole director of an open-ended investment company

Customer type

All

## Limitation

Limited to acting as depository of an ICVC.

Activity Name : Acting as trustee of an authorized unit trust scheme

## Customer type

All

Activity Name : Agreeing to carry on a regulated activity

## Limitation

Limited to carry on regulated activities.

Activity Name : Arranging safeguarding and administration of assets

## Investment instrument

Certificates representing certain security

Commodity Future

Commodity option and option on commodity future

Contract for Differences (excluding a spread bet and a rolling spot forex contract)

Debenture

Future (excluding a commodity future and a rolling spot forex contract)

Government and public security

Option (excluding a commodity option and an option on commodity future)

Rights to or interests in investments (Contractually Based Investments)

Rights to or interests in investments (Security)

Rolling spot forex contract

Share

Spread Bet

Unit

Warrant

Customer type

All

Limitation

Rights/interests cont ltd to cont based inv.

Rights/interests sec ltd to securities listed

Limited to trustee activities.

Limited to acting as depository of an ICVC.

Activity Name : Dealing in investments as agent

Investment Instrument

The parties have not adverted to any of the provisions of Double Taxation Avoidance Agreement between the Government of Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland dated 26.10.1993. It is needless to mention that when no tax liability arises under the Act, the treaty per se does not create any tax liability.

From the above discussions, it follows that there has been no transfer of shares in Indian companies held by the applicant as a consequence of the reorganisation of the applicant in U.K. In the result we rule on the common question in the aforementioned applications as under:

that in respect of transaction, being reorganisation described in Annexure-II of the application, the applicant is not chargeable to tax in India under the provisions of the Income-tax Act, 1961 or the agreement for avoidance of double taxation between India and the United Kingdom.

Pronounced in the open Court of the Authority on this 29th day of July, 2005.

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