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In Re: Emirates Fertilizer

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Court : Authority for Advance Rulings

Decided On : Oct-27-2004

Reported in : (2004)192CTRAAR590

Judge : S S Quadri

Appellant : In Re: Emirates Fertilizer

Judgement :
Appellants: In Re: Emirates Fertilizer Trading Company WLL Vs.

Income Tax Act, 1961 - Section 90(2); Constitution of India - Article 13Union of India v. Azadi Bachao Andolan, (2003) 263 ITR 706 (SC); P.V.A.L. Kulandagan Chettiar (Dead) through LRs. case, (2004) 267 ITR 654 (SC) Double taxation relief--Agreement between India and UAECapital gains on transfer of shares in Indian companies In view of the provisions of para 3 of article 13 of the DTAA between India and UAE, capital gains arising to a resident of UAE on alienation of shares in Indian companies can be taxed only in UAE and not in India and that their taxability under the Act in India does not depend upon whether they are as a fact taxable in UAE.In view of article 13(3) of DTAA between India and UAE, capital gains from alienation of shares in Indian companies held by a resident of UAE will not be taxable in India.

It is clear that under the treaty the capital gains arising from alienation of the shares in Indian companies to the applicant who is a resident of UAE are taxable only in UAE. Under the Act, it cannot be disputed that capital gains arising to a

non-resident in India are taxable in India. Having regard to section 90(2), the terms of the treaty have overriding effect over the provisions of the Act in the event of there being conflict between the treaty and the Act. It follows that in view of the provisions of para 3 of article 13 of the treaty, the capital gains arising to the applicant can be taxed only in UAE and not in India and that their taxability under the Act in India does not depend upon whether they are as a fact taxable in UAE.Accordingly, gains from alienation of shares in Indian companies held by the applicant, a resident of UAE, will not be taxable in India.Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) and P. V.A.L. Kulandagan Chethar (Dead) through LRs (2004) 267 ITR 654 (SC).

1. The applicant is a non-resident firm. In this application under Section 245O(1) of the IT Act, 1961 (for short the "Act"), the applicant seeks advance ruling on the following questions : (1) India has DTAA with UAE. As per Article 13(3) of the DTAA between India and UAE, signed in 1993, gains from alienation of shares in an Indian company held by resident of UAE will be taxable only in UAE. So as our client is a resident of UAE for which necessary tax residency certificate is enclosed. Hence, under this tax treaty the assessee would not be liable to capital gains tax in India.

(2) If there is no relief available then whether the assessee can avail the benefits of first proviso to Section 48 along with Section (3) Otherwise, after calculating long-term capital gains as per first proviso to Section 48, whether the assessee can avail the benefit of the lower tax rate of 10 per cent as per first proviso to Section 112.

To answer these questions, a brief reference to facts would be necessary. The applicant is a partnership firm and is a resident of UAE. In September, 1985, it acquired four million shares of Indo Gulf Corporation amounting to Rs. 40 millions. The said company was demerged into Indogulf Fertilizer in regard to the fertilizer business and with Hindalco Industries Ltd. in regard to the other business pursuant to the scheme of demerger and amalgamation approved by the Allahabad High Court on 18th Nov., 2002. The applicant got the shares as per the scheme of demerger and amalgamation in the companies referred to above.

The applicant now proposes to dispose of the said shares. From the perusal of Annex, III it, appears that the applicant wanted to sell the shares on 3rd Nov., 2003, at the consideration indicated therein which resulted in capital gains--long-term capital gains to the applicant, 2. In the comments offered by the Director of IT (International Taxation), Mumbai (referred to in this ruling as the "Commissioner"), the fact that the applicant is a non-resident partnership is not disputed nor is the fact that Government of the United Arab Emirates and the Government of the Republic of India entered into a Treaty for the Avoidance of Double Taxation and Prevention of Fiscal Evasion, effective from 22nd Sept., 1993, in issue. What is sought to be contended here is that the applicant is not taxable in UAE and if by virtue of para 3 of Article 13 of the treaty it is not taxed in India, it will lead to a situation of double non-taxation. It is, therefore, pleaded that the applicant be taxed in India under the Act.

3. The applicant is not present either in person or through any representative. Indeed the applicant was informed by the Secretariat of this Authority that he has a right to be heard before pronouncement of the ruling, if it so desires. The notice was issued to him on 21st Sept., 2004.

4. Heard. Mr. Sunil Agarwal, Addl. Director of IT, who appears for the CIT.5. From the perusal of the questions noted above, it is evident that question No. (1) is the main question and question Nos. (2) and (3) are consequential. It would be necessary to refer to Article 13 of the treaty which runs thus : 1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in para 2 of Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base may be taxed in that other State.

3. Gains from the alienation of any property other than that mentioned in paras 1 and 2 shall be taxable only in the Contracting State of which the alienator is a resident." Para 1 of Article 13 deals with gains derived from the alienation of immovable property; it is not relevant here. Para 2 of Article 13 is concerned with alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in other Contracting State; it is also not relevant for the present discussion. Para 3 deals with gains which arise from alienation of any property other than mentioned in paras 1 and 2. The gains which arise from alienation of such property are made taxable only in the Contracting State of which the alienator is a resident, 6. From the facts narrated above, it is clear that under the treaty the capital gains arising from alienation of the shares in Indian companies to the applicant who is a resident of UAE are taxable only in UAE.Under the Act, it cannot be disputed that capital gains arising to a non-resident in India are taxable in India. Having regard to Section 90(2) of the Act, the terms of the treaty have overriding effect over the provisions of the Act in the event of there being conflict between the treaty and the Act. [Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) and P.V.A.L Kulandagan Chettiar (Dead) through LRs (2004) 267 ITR 654 (SC)). It follows that in view of the provisions of para 3 of Article 13 of the treaty, the capital gains arising to the applicant can be taxed only in UAE and not in India and that their taxability under the Act in India does not depend upon whether they are as a fact taxable in UAE.7. Accordingly, on question No. 1 it is ruled that gains from alienation of shares in Indian companies held by the applicant, a resident of UAE, will not be taxable in India.

In view of ruling on question No. 1, question Nos. 2 and 3 do not survive.

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