Application of GAAR Provisions cannot be a ground for denial of Tax benefit under India-Singapore DTAA

The ITAT, New Delhi in ***Reverse Age Health Services Pte Ltd v. DCIT [ITA No.1867Del/2022 dated February 17, 2023]*** has directed the Revenue Department to delete the disallowance of Short Term Capital Gains ("**STCG**") and allow the benefit of the provisions of an India-Singapore Double Taxation Avoidance Agreements (**"DTAA"**) to the assessee on the grounds that Section 90 (2) of the Income Tax Act, 1961 ("**the IT Act**") allows the provisions of a DTAA to supersede the provisions of the IT Act, in case their application is more beneficial. Held that, though domestic GAAR provisions are applicable, the treaty benefit cannot be denied to the assessee.

Facts:

This appeal has been filed by Reverse Age Health Services Pte Ltd. ("**the Appellant**") challenging the order dated July 18, 2022 ("**the Impugned Order**") framed under Section 143 (3), read with Section 144 C of the IT Act.

The Appellant's Return of Income ("**ROI**") was selected for complete scrutiny because of a high ratio of refund of Tax Deducted at Source ("**TDS**"). The TDS was deducted by M/s. VIC Enterprises Private Limited on the sale consideration of the sale of shares of Dr. Fresh Healthcare Private Limited (**"Dr. Fresh Healthcare**") by the Appellant. The shares were acquired dated August 22, 2016 ("**the Impugned Shares**") and were sold on January 2, 2018, resulting in STCG of INR 1,92,63,473/-. The Appellant claimed that the STCG amount of INR 1,92,63,473/- is not taxable as per Article 13 of India - Singapore DTAA and the entire TDS of INR 1,09,39,285/- has been claimed as refund.

The Revenue Department ("**the Respondent**") denied the Appellant the benefit under Article 13 (4A) of the India - Singapore DTAA on the grounds that the Appellant had no economic

substance or commercial substance ("**the doctrine of substance over form**") and that it was a "shell" or a "conduit" company by invoking Article 3 (1) of the 2005 protocol to the India - Singapore DTAA.

The Appellant contended that, the Revenue Department completely ignored the tax residency certificate of the Appellant issued by the Singapore Tax Authority, the tax assessments carried out by the Singapore Tax Authority pertaining to the assessment between 2016 and 2018 Assessment Year ("**A.Y**") 2016-2017 and A.Y 2017-2018 and the financials for the Appellant of the 3 years ending March 31, 2016, March 31, 2017, March 31, 2018.

Issue:

1. Whether the Appellant is entitled to claim the benefit under Article 13 of India-Singapore DTAA?
2. Whether the Respondent can go behind the tax residency certificate issued by the other tax jurisdiction?

Held:

The ITAT, New Delhi in ***ITA No.1867Del/2022*** held as under:

- Relied on the judgment of the Hon'ble Supreme Court in the matter of ***Union of India And Anr. v. Azadi Bachao Andolan And Anr. [(2004) 10 SCC 1 dated October 7, 2003]***, wherein, it was noted that, Section 90 (2) of the IT Act which can be termed as treaty override provision, which allows the provisions of a DTAA to supersede the provisions of the IT Act, in case their application is more beneficial.
- Noted that, General Anti-Avoidance Rule ("**GAAR**") is applicable to the A.Y 2016-2017 and 2017-2018 which empowered the Respondent to declare the subject transaction to be an impressible arrangement.

- Analysed Section 101 of the IT Act and Rule 10 U (1) (d) of the Income Tax Rules, 1962("**the IT Rules**"), and noted that, the STCG amount of INR 1,92,63,473/-, the tax on which is below the threshold set out in Rule 10 U (1) (a) (supra).
- Further noted that, the Impugned Shares are acquired prior to the cut-off date set out in Rule 10 U (1)(d) (supra).
- Held that, domestic GAAR provisions are applicable but for the aforestated facts, the treaty benefit cannot be denied to the Appellant.
- Opined that, the doctrine of substance over form is prior to the codification of domestic GAAR and the legislators were conscious, while providing exemptions under Chapter X-A of the IT Act.
- Further opined that, even the treatment of the assessee company as "Shell" or "conduit" also does not hold any water in as much as the veracity of the expenditure incurred by the assessee in Singapore was a subject matter of tax scrutiny in Singapore and the same has been accepted to be genuine by the Singapore tax authorities as per tax assessment orders mentioned elsewhere.
- Stated that, the Appellant has furnished a valid tax residency certificate issued by the Inland Authority of Singapore, audited financial statements and ROI filed along with tax assessment orders by Singapore Tax Authority.
- Relied on the judgment of the Hon'ble Delhi High Court in the matter of ***Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. v. the Assistant Commissioner of Income Tax, [W.P.(C) 2562/2022 dated January 30, 2023]***, and directed the Respondent to delete the disallowance and allow the treaty benefit to the Appellant as per the relevant provisions of the law/treaty.

Relevant Provisions:

Section 90 (2) of the IT Act:

"Agreement with foreign countries or specified territories

Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

Rule 10 U (1) (d) of the IT Act:

"(1) Chapter X-A not to apply in certain cases

…..

(d) "any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before the [1st day of April, 2017] by such person."

(Author can be reached at info@a2ztaxcorp.com)