Tribunal deletes addition made under section 93, in respect of gains arising to the taxpayer's Mauritius subsidiary

The Income-tax Appellate Tribunal ('Tribunal'), Mumbai deleted the addition made in the hands of Tata Industries Ltd.[1] in respect of the gains arising to its wholly owned subsidiary in Mauritius from the sale of shares in an Indian company.

This addition was made under section 93 of the Income-tax Act, 1961 ('the Act') an anti-abuse provision that applies, *inter alia*, when income becomes payable to a non-resident in consequence of the transfer of assets to such a non-resident. If a resident acquires rights which enable him to enjoy such income, the law provides that such income can be taxed in his hands.

The Transaction

Apex Investment (Mauritius) Holdings Pvt. Ltd. ('Apex Mauritius') was a Mauritius based company which held shares in Idea Cellular Limited, an Indian company engaged in providing wireless communication services. In 2005, the taxpayer - Tata Industries Ltd. acquired the entire share capital Apex Mauritius from its US shareholders (New Cingular Wireless / AT&T).

Apex Mauritius thereafter sold its shares in Idea Cellular Ltd. to an Indian company that was part of the Birla group. Apex Mauritius claimed the benefit of Article 13 of the India-Mauritius Tax Treaty in respect of such gains.

The tax authorities, however sought to bring the gains to tax in India in the hands of Tata Industries Ltd. (i.e. the shareholder of Apex Mauritius) under section 93. They took the view that:

a) Income had accrued to Apex Mauritius, a non-resident, and that the taxpayer in its capacity as the holding company of Apex Mauritius had the power to enjoy such income;

b) All that section 93 required was that income should become payable to a non-resident as a result of the transfer of assets. The question of who had transferred the asset was not relevant.

[1] Appeal No. ITA/6750/Mum/2014 (Income-tax Appellate Tribunal, Mumbai, 10 November 2017)

c) The case did not fall under sub-section (3) of section 93, which excludes the applicability of this section where it is established that the transfers were *bona fide*, and not intended to avoid tax.

Findings of the Tribunal

The Tribunal set aside the addition made under section 93. In arriving at this conclusion, the Tribunal noted that:

a) The object of section 93 was to prevent residents of India from evading tax by transferring their assets to non-residents, while continuing to enjoy the income by adopting questionable means.

b) Section 93 contains a deeming fiction, and must therefore be construed strictly.

c) In this case, there was no transfer of assets by a resident to a non-resident. This is a basic requirement for the provisions section 93 to be invoked, and in the absence thereof, the addition under section 93 could not be sustained.

Comments

The conclusion of the Tribunal in this case is an important one and will help define the scope of an important anti-abuse provision in the Act.

Undoubtedly, the opening words of section 93 are quite broad since they refer to *a "transfer of assets by virtue or in consequence whereof.. any income becomes payable to a non-resident*". The tax authorities took the view in this case that section 93 could also apply to cases where there was admittedly no transfer *from a resident,* since such a requirement was not expressly contemplated in the law.

Although the judgment of the Tribunal does not elaborate on this point in significant detail, it nonetheless recognizes the logical principle that the transfer contemplated in section 93 must necessarily be *from a resident*, if the receipt of income by a non-resident is to be a *consequence of (or be by virtue of)* such transfer.

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