Cap gains from sale of G-Securities if not taxable in UAE shall not be taxable in India as well under Indo-UAE DTAA

Summary – The High Court of Bombay in a recent case of ICICI Bank Ltd., (the Assessee) held that where capital gain accrued to residents of UAE from sale of Government Securities in India carried out through respondent bank, was not taxable in UAE, income so generated could not be subjected to tax in India and, therefore, respondent bank was not liable to deduct tax at source while remitting amount in question to non-residents.

ORDER

1. This appeal challenges the order passed by the Commissioner and by the Tribunal.

2. The concurrent findings in the peculiar facts are that the respondent-assessee was not liable to deduct the tax at source on the income which its constituent or an Account holder derives from sale of securities.

3. Mr. Pinto appearing on behalf of the revenue would submit that the appeal raises substantial question of law and as formulated in the memo of appeal. He submits that the Double Taxation Avoidance Agreement is not a facilitating arrangement and merely because the capital gains are not subjected to tax in the State or in the country to which the constituent or account holder belongs namely UAE in this case, does not mean that the source of the income would not be liable to be taxed under Indian Law. Therefore, account holder or constituent having earned the income from the sale of securities in India, that income has not been remitted from India to UAE that the bank was liable to deduct the tax at source.

4. The Assessing Officer according to Shri Pinto probed the transaction in details and arrived at the above conclusion which is summarized by Mr. Pinto. The Commissioner of Income Tax as also the Tribunal erred in reversing this conclusion and by relying on the clauses of Double Taxation Avoidance Agreement between India and UAE. That the constituent or the account holder of the respondent bank was not obliged to pay any tax on the gain which have been derived in India in the country where he resides or belongs to, according to Shri Pinto, is the erroneous foundation on which the Assessing Officer's order has been set aside.

5. Ms. Vissanji appearing on behalf of the assessee would submit that none of the questions and which have been formulated by the revenue can be termed as substantial question of law. Firstly, she relies upon the Double Taxation Avoidance Agreement and clarifies that the ICICI bank namely the assessee has contracted with the UAE resident to a limited extent of allowing him to open an account in India

with the assessee, depositing the monies in the account of the account holder and which is the income derived from sale of securities by the account holder in India. Secondly, the capital gains that the account holder derives are not liable to tax in UAE, therefore, the same income generated in India cannot be subjected to tax. Moreso, when the account holder is not subject to the Indian Tax Law. She relies upon the order passed on 24th January, 2013 in a batch of appeals pertaining to the same assessee by the Division Bench of this Court and equally Ms. Vissanjee relies on the notification which has been issued by the Government under Section 90 of the Income Tax Act, 1961 on 18th November, 1993 and further Notification dated 28th November, 2007. She also relies upon the judgment of the Hon'ble Supreme Court in the case of *Union of India and Another* v. *Azadi Bachao Andolan and another reported* in 263 ITR 706.She submits that the view taken by the Tribunal and the Commissioner of Income Tax (Appeals) is in conformity and in consonance with the factual materials and the principles of law which have been laid down in the Hon'ble Supreme Court decision. Such a view cannot be said to be perverse or vitiated by an error of law apparent on the face of the record, enabling this Court to exercise its further appellate jurisdiction.

6. With the assistance of Mr. Pinto and Ms. Vissanjee, we have perused the memo of appeal and the orders passed by the Commissioner of Income Tax and the Tribunal. The facts as noted by the authorities are not in dispute. The respondents made remittance to foreign nationals based on the Chartered Accountants Certificates and undertakings in accordance with the Reserve Bank of India Circular dated 7th December, 2004. The respondents forwarded 11 C.A. Certificates together with their letter dated 14th June, 2005, 12 C.A. Certificates together with a letter dated 19th May, 2005 and 6 similar certificates with another letter dated 15th June, 2005. The Assessing Officer found that most of the beneficiary of the remittances were residents of UAE. The Chartered Accountant certified that the capital gain had arisen to the concerned persons on account of sale proceeds of government securities and the said gain so arisen is exempt under Article 13 of Double Taxation Avoidance Agreement between India and UAE. Hence, no tax was liable to be deducted at source.

7. This factual position has not been accepted by the Assessing Officer and he refused to permit the respondents to rely on the treaty or the clauses thereof. He analyzed the treaty and arrived at the conclusions which are recorded in his order.

8. The aggrieved assessee approached the Commissioner of Income Tax (Appeals) and the Tribunal and both of which firstly relied upon the decision of the Hon'ble Supreme Court in *Azadi Bachao Andolan* (*Supra*) there was also in the field a decision or order of the Tribunal in the case of *Assistant Director of Income Tax* v. *Green Emirates Shipping and Travels*. Incidentally, Mr. Pinto was unable to point out as to whether the view taken in Green Emirates has been questioned by the revenue any further. Apart therefrom, what we find is that on these admitted facts, the Tribunal came to a conclusion that there is no tax liability on the income by way of gains from sale proceeds of government securities in India in UAE. If the gains accrued to the residents of UAE and that was not subject to or liable to any tax in UAE, then, we do not find that the Tribunal or the Commissioner of Income Tax (Appeals) committed any

perversity in taking note of the treaty obligations or its clauses. It is in these circumstances, that the concurrent finding is recorded that once there is no liability to tax the capital gains arising to the individual constituents/investors on the transaction in government Treasury bills undertaken through the bank, the bank was not obliged to deduct the tax at source. The income is not liable to tax and, therefore, tax deduction at source on such income was not permissible and in the given facts and circumstances.

9. We are of the view that any larger question or issue need not be dealt with in the light of the above admitted facts. The concurrent view cannot be said to be perverse and we are in agreement with Ms. Vissanjee that both the Commissioner and Tribunal was right in considering the transactions, their nature, all persons with whom and by whom they were undertaken and the tax liability arising therefrom to arrive at the above concurrent conclusion. In the above circumstances, the appeals do not raise any substantial question of law. They are accordingly dismissed. No costs.