No DTAA benefit to Mauritian Co. on Cap gains if it had merely lent its name for making investments

Summary – The Delhi ITAT in a recent case of AB Mauritius, (the Assessee) held that where Applicant a Mauritian Company, a part of C Group (comprising of two US companies) acquired shares of AB India, however, had no role in decision making process for acquiring shares of AB India from US sellers, Capital gains on transfer of shares held in AB India to its subsidiary company, AB Singapore would be taxable in India, Applicant would not be entitled to benefit of India-Mauritius DTAA

Facts

- The Applicant was a company incorporated in Mauritius having a Tax Residency Certificate granted by the Mauritius tax authorities.
- It was part of 'C' Equity Portfolio and 'C' Affiliates Fund LP ('C' Group) , which cumulatively held 79.62 per cent shares of the Applicant and the balance 20.38 per cent shares were held by other individual investors. It's business activities were carried on from Mauritius and managed by its Board of Directors.
- The Applicant vide Stock Purchase Agreement (SPA) acquired shares in 'AB' India through two US Sellers. The SPA was executed by 'S', as an authorized signatory, representing the promoter group and being fully authorized by the Board of Directors of the Applicant. These shares were taken over along with a liability which the sellers had payable to the 'C' Group as per the loan agreement.
- Pursuant to the aforesaid transaction, the Applicant became the owner of the shares of 'AB' India and agreed to repay the loan owed by the sellers to 'C' Group, which represents fair and just compensation for the shares acquired.
- The investment in 'AB' India had been shown in the audited financial statements of both the Applicant and 'AB' India since the time of investment.
- Thereafter, as part of the corporate strategy of the Group, a regional headquarter in Singapore was proposed, pursuant to which 'AB' Singapore was incorporated. The Applicant transferred shares held in 'AB' India to 'AB' Singapore, a subsidiary of the Applicant. The restructuring was solely motivated by business and commercial reasons.
- Thereafter, the Applicant sought Advance Ruling on whether it will be entitled to benefits of India-Mauritius tax treaty and whether the gains arising to it from the proposed sale of shares in 'AB' India to a Group Company ('Transferee') would not be liable to tax in India having regard to the provisions of Article 13 of the India-Mauritius tax treaty?

Held

- The SPA was an agreement between the Applicant and the 'C' Group on one side as buyers, the two US companies, 'AB' Inc. USA and 'US' Inc. USA, as sellers, and 'AB' India in which the shares were held. Even this agreement was signed by the MD of the 'C' Group, and not by any of the Directors of the Applicant, although it was shown as a party to this agreement as a buyer. This is clearly

illustrative of the fact that the Applicant had no role whatsoever in taking the decision with regard to acquisition of the shares in 'AB' India from the US sellers. The Applicant's assertion that the agreement was the result of an understanding between all the parties is unacceptable. There was no mention in this agreement as to how the Applicant was going to fund this acquisition, which makes it clear that it was not a party to the decision comprised in the SPA.

- The Applicant has stated that 'S' was authorized by the company. This letter of authorization has been produced for the first time in 2016 and is clearly meant to plug the gap in the very obvious lacuna, namely that it was 'S', MD of the Holding company, and not any Director of the Applicant who signed this very important decision and document, i.e. the SPA. There are no decisions or discussions in the Board to show that he was authorized. Further, such agreements would have full details of the consideration to be paid by each of the buyers, and in whose names shares are to be transferred, however, there was not a single clause informing or indicating its liability incurred for such an acquisition. This makes it clear that the Applicant's name was only superimposed in the Agreement as part of some arrangement, of which the Applicant was not aware at all.
- The agreement itself says that the shares were transferred in the name of the companies which paid the consideration, i.e. the 'C' Group. Having paid no consideration, as per the SPA, the Applicant could not be treated as the owner. It could only be benami or a name lender for the 'C' Group. Regarding the Applicant's submission that it was the registered and beneficial owner of the shares as per the shareholders register as early as in December 2003, when the SPA speaks of no consideration paid or payable by the Applicant, the question of its acquiring any shares in 'AB' India did not arise, except only on paper or by inter posing its name.
- In view of the above position, it cannot be ruled that the shares were genuinely acquired by the Applicant, that it became the beneficial owner of those shares, and that the capital gains derived on the transfer of those shares to 'AB' Singapore was income in its hands. On the above facts, since the 'C' Group, comprising of two US companies had acquired the shares in 'AB' India from two other US companies, the gain having arisen in India in the hands of the 'C' Group of the US, was taxable in India as per the India-US DTAA.
- Consequently, the Applicant, 'AB' Mauritius, would not be entitled to the benefits of the Agreement between the Government of Mauritius and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion, with respect to taxes on income from capital gains.