Gain arising from sale of shares by Spanish Co. not taxable in India by virtue of Article 14(6) of India-Spain DTAA

Summary – The Mumbai ITAT in a recent case of Merrill Lynch Capital Market., (the Assessee) held that In case of assessee, a Spain based company, engaged in real estate development activities in India, capital gain arising from sale of shares of various companies was not taxable in India by virtue of article 14(6) of India-Spain DTAA

Facts

- The assessee company, a tax resident of Spain, was licensed to purchase and sell securities in India as a Foreign Institutional Investor (FII). The assessee was also registered with the Securities and Exchange Board of India (SEBI). For the impugned assessment year the assessee filed its return declaring certained taxable income.
- During the assessment proceedings, the Assessing Officer found that the assessee had treated the income/loss arising out of foreign exchange transactions as capital gain and had claimed exemption under article 14(6) of India -Span DTAA.
- The Assessing Officer held that the capital gain on sale of shares of companies engaged in real estate development activities was taxable in India under Article -14(4) of India-Spain tax treaty. At the same time, though, the Assessing Officer agreed that in the impugned assessment year the assessee suffered short term capital loss in respect of sale of shares, however, he refused to allow carry forward of loss since the assessee had not claimed it in the return of income.
- The Commissioner (Appeals), however allowed assessee's claim of exemption under Article -14(6) of India-Spain DTAA.
- On revenue's appeal:

Held

- The issue is covered by the decision of the Tribunal in assessee's own case for assessment years 2007-08 to 2009-10. As could be seen, the issue in dispute between the parties is with regard to applicability of Article-14(4) of India-Spain tax treaty. The Commissioner (Appeals) while deciding the issue in preceding assessment years referring to Article-14(4) of India-Spain tax treaty *qua* Article-13(4) of U.N. Model Convention has held that capital gain arising out sale of shares is not taxable in India. The aforesaid decision of the Commissioner (Appeals) in assessment years 2007-08 to 2009-10 has been upheld by the Tribunal. No doubt, in the impugned assessment year, the Commissioner (Appeals) has followed his orders passed for the earlier assessment years. Moreover, as could be seen from the facts on record, the assessee had incurred huge loss in assessment year 2009-10 as well as in the impugned assessment year. Admittedly, if the capital gain is held to be taxable in India, then the loss suffered by the assessee and carry forward of such loss is allowable to the assessee. However, no such benefit has been given to the assessee by the Assessing Officer on the reasoning that assessee has not claimed it in the return of income. Thus, the assessee has been put to double jeopardy which is unjust and improper. In view of the aforesaid, there is no reason to interfere with the decision of the Commissioner (Appeals) on the issue.

- In the result, revenues appeal is dismissed.