

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO. 3156 OF 2018

HSBC Bank (Mauritius) Limited, Mumbai

.. Petitioner

Versus

Dy. Commissioner of Income Tax,
(International Taxation)-2(2)(2), Mumbai & Ors.

.. Respondents

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- Mr. Percy Pardiwalla, Senior Counsel a/w Mr. Niraj Sheth i/by Atul Jasani for the Petitioner
 - Mr. Suresh Kumar for the Respondents
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : JANUARY 11 & 14, 2019.

P.C.:

1. The petitioner is challenging a notice of reopening of assessment issued by respondent No. 1 - Assessing Officer on 28.3.2018. Brief facts are as under:-

2. Petitioner is a Banking Company registered under the laws of Mauritius. For the assessment year 2011-12, the petitioner had filed a return of income on 26.9.2011 declaring nil income. In the return, the petitioner had shown interest income of Rs. 238.01 crores (rounded off) and

claimed the same to be exempt from tax in India. This amount comprised of income on securities of Rs. 94.57 crores (rounded off) and interest income on External Commercial Borrowings ("ECB" for short) of Rs. 143.43 crores (rounded off). According to the petitioner, such income was not taxable in India by virtue of Double Taxation Avoidance Agreement ("DTAA" for short) between the two countries.

3. The Assessing Officer took the return of the petitioner in scrutiny. After detailed examination of the various claims of the petitioner, the Assessing Officer passed order under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 28.1.2016 in which he added a sum of Rs. 94.57 crores (rounded off) to the total income of the assessee by rejecting the petitioner's claim of such income on securities not being taxable in India. He however did not disturb the assessee's claim of interest income on ECB being not taxable.

4. To reopen such assessment, respondent No.1 - Assessing Officer issued the impugned notice, which, as can be seen was done beyond the period of four years from the

end of relevant assessment year. In order to do so, he had recorded following reasons :-

1. M/s. HSBC Bank (Mauritius) Ltd. is a limited liability company incorporated, registered and tax resident in Mauritius. The company is a Foreign Institutional Investor (FII) duly licensed by the Securities and Exchange Board of India (SEBI). The Return of Income (ROI) for A.Y. 2011-12 was e-filed on 26.9.2011 declaring total income at Rs. Nil. Thereafter, the case was selected for scrutiny under CASS and assessment u/S. 143(3) r.w.s. 144C(13) was completed at assessed income of Rs. 94,57,45,856/- disallowing the income from interest on securities, which had been claimed as exempt under Article 11(3)(c) of Indo-Mauritius Tax Treaty.
2. On perusal of assessee's Computation of Income, it is observed that the interest income on External Commercial Borrowings (ECB) amounting to Rs. 1,43,43,83,544/- has been claimed as exempt under Article 11 of India - Mauritius DTAA.
3. It is observed that in assessee's own case for A.Y. 2009-10 & A.Y. 2010-11, assessment was completed u/S. 147. The interest income on ECB was disallowed as the assessee failed to satisfy the criteria of beneficial ownership. The said addition has been confirmed by the Ld. CIT(A) vide its order dated 22.12.2017. Further, the addition on identical issue has been confirmed by the Ld. CIT(A) for A.Y. 2012-13 as well.
4. It is, further, observed that the assessee has claimed exemption on interest income on ECB amounting to Rs. 1,43,43,83,544/-. The condition under Article 11(3) of the India - Mauritius DTAA that interest should be beneficially owned by the recipient is not

fulfilled by the assessee. This shows that the Bank has been established to take the benefits of the treaty which it would not have actually received had it been banking from UK (since the major stakeholder in the assessee bank is HSBC Bank Plc - UK) or Hongkong (since the Mother Bank is Hong Kong based). Further, to stop the misuse of the treaty which is called "Treaty Shopping" in International Terms the India - Mauritius DTAA specifically uses the word beneficially owned which includes interest earned by the Government or a local authority, any agency or entity and any bank carrying bona fide banking business. Thus, the Banks also have to prove the beneficial ownership of the funds. In this case, it has regularly been assessed thoroughly and clearly explaining that the funds have been managed from abroad which any bank can do without establishing itself in Mauritius and accordingly, the beneficial ownership remains unproved. **It is clear that the banking activities carried out by the assessee in Mauritius locally are for the name sake and to only avail the benefit of the Indo - Mauritius Tax Treaty.**

5. Therefore, it was failure on the part of the assessee that it did not make true and full disclosure regarding its beneficial ownership status.
6. To summarize, it can be inferred that the claim of exemption to the tune of Rs. 1,43,43,83,544/- on 'interest on ECB' is chargeable to tax under the Income Tax and has escaped assessment. I have a reason to believe that the income of the assessee during the A.Y. 2011-12 has escaped assessment within the meaning of clause (c) of Explanation 2 of Section 147 of the Income Tax Act. Since the income escaping assessment in my opinion exceeds the sum of Rs. 1 lakh, it is a fit case for issue of notice u/S. 148 r.w.s. 149 of the IT Act for A.Y. 2011-12. Since the notice is being issued after expiry of four years from

the end of the relevant assessment year, necessary sanction u/S. 151(1) has been obtained from the Commissioner of Income Tax."

5. Upon being supplied the said reasons, the petitioner raised objections to the notice of reopening of assessment under letter dated 24.5.2018. The Assessing Officer, however, rejected said objections on 14.9.2018, hence, this Petition.

6. Learned counsel for the petitioner submitted that the notice of reopening of assessment was issued beyond the period of four years from the end of relevant assessment year. There was no failure on the part of the assessee to disclose truly and fully all material facts. There was no such allegations made by the Assessing Officer in the reasons recorded. Learned counsel took us through the documents on record to contend that the very ground on which the Assessing Officer now wishes to carry out reassessment, was a subject matter of detail scrutiny during the original assessment proceedings. Any attempt on his part, therefore, to reopen the assessment would be based on change of

opinion.

7. Learned counsel Mr. Suresh Kumar, on the other hand, opposed the petition contending that in the order of assessment, there is no discussion on the assessee's claim of ECB interest not being taxable in India. He relied on the reasons recored by the Assessing Officer and contended that the petitioner bank had no significant banking activities in Mauritius and that the bank had chosen the tax structure of Mauritius only to take benefit of a more advantageous Double Taxation Avoidance Agreement.

8. The perusal of the reasons recorded by the Assessing Officer would show that the only ground on which the notice of reopening of assessment is issued was the assessee's claim of exemption of interest income which in turn was based on DTAA between India and Mauritius. According to the Assessing Officer, the assessee had attempted to misuse the DTAA since according to him, the assessee did not carry out banking business in the said country.

9. In this context, we may note that the entire claim had come up for consideration before the Assessing Officer during the original scrutiny assessment, as would be clear from the documents on record. During the such assessment, the Assessing Officer had noted the assessee's claim of exemption of interest on ECB made in the return filed. In written query dated 21.10.2013, the Assessing Officer had asked the assessee to explain several issues and called for documents. Relevant queries of this communication read thus:-

2. Copy of tax Residence Certificate.

4. Please submit a hard copy of return of income filed in electronic form for AY 2011-12 along with computation of income, Form 3CEB, Form 3CD, Form 29B, Tax Audit report, Auditor's report, complete audited Balance Sheet, P & L A/c. including all schedules and all of its annexure.

13. Detail of exempt income claimed by you in your return of income and reasons thereof and state under which provision of Act / DTAA you claimed exempt.

In response to this communication, the assessee under its letter dated 16.12.2013 had conveyed to the Assessing Officer as follows:-

2. ***Copy of tax Residence Certificate:***

The copies of Tax Residency Certificate (TRC) issued by Mauritius Revenue Authorities dated 8 February 2010, 4 February 2011 and 17 January 2012 are enclosed as **Annexure 2**.

4. ***Please submit a hard copy of return of income filed in electronic form for AY 2011-12 along with computation of income, Form 3CEB, Form 3CD, Form 29B, Tax Audit report, Auditor's report, complete audited Balance Sheet, P & L A/c. including all schedules and all of its annexure:***

The Company on 26 September 2011 vide acknowledgment number 291837991260911 filed its return of income for the assessment year 2011-12.

The copies of the following documents are enclosed as under:

- a. The copy of the acknowledgment of the return filed along with paper return is enclosed as **Annexure 3**; and
- b. The statement of computation of total income is enclosed as **Annexure 4**.

The copy of the Form 3CB, 3CD, complete audited Balance Sheet, P & L A/c including all schedules, statement and all of its annexure will be provided shortly.

13. ***Detail of exempt income claimed by you in your return of income and reasons thereof and state under which provision of Act / DTAA you claimed exempt:***

The company is a tax resident of Mauritius as per Article 4 of Double Taxation Avoidance Agreement ('the Treaty') between India and Mauritius and holds a valid TRC issued by the Mauritius Revenue Authorities.

In terms of the Section 90(2) of the Act, the tax payer has the option of being taxed as per the Act or as per the relevant tax treaty (i.e. Mauritius in the present case), whichever is more beneficial.

In view of the said provisions, the Company has computed the following income exempt / non-taxable:

Under the provisions of the Act

Particulars	Claimed exempt
Long-term capital gains	under section 10(38) of the Act
Dividend income	under section 10(34) of the Act

Under the provisions of the Treat

Particulars	Claimed not taxable
Derivative Income	as per Article 7 of the Treaty*
Short-term capital gains	as per Article 13(4) of the Treaty
Interest income	as per Article 11 of the Treaty

* The Company does not have a Permanent Establishment in India within the meaning of Article 5 of the Treaty.

10. In a further letter dated 17.1.2014, the assessee had once again explained to the Assessing Officer as under:-

"8. Interest income claimed not taxable as per Article 11 of the India - Mauritius Tax Treaty, please justify the same.

The company is a licensed bank carrying on bonafide banking business in Mauritius. During the year, the Company earned interest income on investment in India in debentures and bonds and also earned interest on foreign currency loans granted to India companies.

As mentioned in point number 5 above, the Company being a tax

resident of Mauritius has opted to be taxed under the provisions of the India - Mauritius Tax Treaty, per section 90(2) of the Act.

The extract of Article 11 is reproduced below:

"1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, subject to the provisions of paragraphs (3) and (4) of this article, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State.

3. Interest arising in a Contracting State shall be **exempt from tax** in that State provided it is derived and beneficially owned by:

- (a) the Government or a local authority of the other Contracting State;
- (b) any agency or entity created or organized by the Government of the other Contracting State; or
- (c) **any bank carrying on a bona fide banking business which is a resident of the other Contracting State"**

The copy of the India - Mauritius Tax Treaty is enclosed as **Annexure D** for ready reference.

As the Company is a resident of Mauritius carrying on bonafide banking business, the aforementioned interest income arising in India will not be taxable in India in view of the exemption provided under Article 11(3) of the India - Mauritius Tax Treaty."

11. On 21.2.2014, the assessee once again wrote to the Assessing Officer, reiterated the earlier stand on the interest income and stated further as under:-

- 3. **Details of interest income on transactions other than debt securities - the name of the Indian corporates to whom ECB**

has been granted, name of the lead bank / sponsor bank, if any and explanation on how the interest income is not taxable.

As mentioned earlier, the Company is a licensed bank carrying on bonafide banking business in Mauritius.

During the year, apart from earning interest on investment in India in debentures and bonds, the Company has earned interest income on Buyers Credit and External Commercial Borrowings (ECB) granted in the normal course of its banking business. As requested during our hearing of 7 February 2014, we have enclosed the names of the Indian corporates to whom ECB loans are granted as **Annexure B** and a sample copy of the agreement entered into with Titan Industries Ltd and Ultratech Cement Limited and Termsheet letter thereon, for grant of ECB loan as **Annexure C and D**.

Further, the Company submits that it does not have any lead bank / sponsor bank for grant of ECB loans to Indian corporates.

Interest income earned by the Company is **not** liable to tax as per Article 11 of the India - Mauritius Tax Treaty. The Company has provided detailed submission vide letter dated 17 January 2014, giving justification on why interest income is not taxable in India.

The Company reiterates, as submitted in the letter dated 17 January 2014, that the Company being a tax resident of Mauritius has opted to be taxed under the provisions of the India - Mauritius Tax Treaty, per section 90(2) of the Act (as explained in paragraph (I) above).

The extract of Article 11 is reproduced below:-

"1. Interest arising in a Contracting State and paid to a resident of

the other Contracting State may be taxed in that other State.

2. However, subject to the provisions of paragraph (3) and (4) of this article, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State.
3. Interest arising in a Contracting State shall be **exempt from tax** in that State provided it is derived and beneficially owned by:
 - (a) the Government or a local authority of the other Contracting State;
 - (b) any agency or entity created or organized by the Government of the other Contracting State; or
 - (c) **any bank carrying on a bona fide banking business which is a resident of the other Contracting State"**

As the Company is a resident of Mauritius carrying on bonafide banking business, the aforementioned interest income arising in India will not be taxable in India in view of the exemption provided under Article 11(3)(c) of the India - Mauritius Tax Treaty.

12. It was after such detailed examination that the Assessing Officer passed the order of assessment on 28.1.2016 in which he disallowed the assessee's claim of exempt interest of Rs. 94.57 Crores which related to interest on securities. He, however, did not tamper with the assessee's claim of exempt interest of Rs. 143.43 Crores which was interest on ECB. Thus, the entire issue was minutely examined by the Assessing Officer during the

original scrutiny assessment. To the extent, the Assessing Officer was not satisfied with the assessee's claim of exempt interest, the same was disallowed. However, in the context of assessee's claim of exempt interest of Rs. 143.43 crores, by virtue of DTAA between India and Mauritius, the Assessing Officer accepted the same by making following observations:-

Less : exempt u/S. 10(34) of the Act	<u>26,91,08,116</u>	NIL
Interest on ECB	1,43,43,83,544	
Less : exempt u/S. 90 of the Act r.w. Article 11 of the DTAA between India and Mauritius (as the company is carrying on bonafide banking business in Mauritius)	<u>1,43,43,83,544</u>	NIL
Interest Income on securities (as per discussed in para 6) taxable @ 20% (plus surcharge and education cess, as applicable)	94,57,45,856	<u>94,57,45,856</u>
Total Taxable Income		94,57,45,856

13. This very issue now the Assessing Officer wants to re-examine during the process of reassessment. For multiple reasons, same would be wholly impermissible. Firstly, as noted, the entire issue is a scrutinized issue. The Assessing Officer not only noticed the claim of the assessee during scrutiny assessment, prima facie not being satisfied, raised multiple queries during such assessment why the claim

should not be disallowed. The assessee replied to the such queries and claimed the benefit of DTAA between the two countries. The Assessing Officer accepted such claim making specific mention in the order of assessment holding that the assessee is entitled to the benefit of DTAA since the assessee was carrying on bonafide banking activities in Mauritius. The Assessing Officer now desires to re-examine the issue on the ground that the assessee does not carry on bonafide the banking activities in Mauritius. This would be based on mere change of opinion and would be impressible as held by the series of judgments of the various Courts. Reference in this regard may made to the decision of the Supreme Court in the case of **CIT Vs. Kelvinator of India Ltd.**¹ in which it was held that even after the amendment in Section 147 of the Act with effect from 1.4.1989, the principle of change of opinion would continue to apply.

14. Quite apart, the impugned notice has been issued beyond the period of four years from the end of relevant assessment year. There is nothing in the reasons recorded to suggest that there was any failure on the part of the

1 [2010] 320 ITR 561 [SC]

assessee to disclose truly and fully all material facts which led to the income chargeable to tax escaping assessment. In fact, the perusal of the reasons would show that the Assessing Officer was merely proceeding on the material already on record. Even on this ground, the impugned notice should be set aside.

15. In the result, the impugned notice dated 28.3.2018 is set aside. Petition allowed and disposed of accordingly.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]