



Case Laws  
Discussion

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# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Writ petition before the HC assailing the impugned order of AAR .
- AAR order was passed in common ruling of Copal Partners, *In re*, 431 ITR 379
- Two writ petition -
- 770/2021-AbuDhabi Investment Authority. (ADIA) ( settlor & Sole beneficiary )
- 709/2021 - Equity Trust (Jersey ) ltd - ( ETL) -Trustee of the Trust -namely - Green Maiden A 2013 ( Trust)
- Law involved - Section 60,61 , 63 , 160, and Article 24 of India UAE DTAA and Indian Trust Act .

## **ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437**

- Fact of the case -
- ADIA is a public institution under UAE and covered under article 4(2) of the India UAE DTAA as resident of UAE .
- Does not have a BC/PE in India , also covered under Article 24 of the DTAA.
- Registered as FII and FPI with SEBI .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- ADIA Settled a Trust in Jersey .
- Settlement Deed entered on 22/07/2013 with the Trustee . The trust revocable trust and determinative trust as the settlor itself was the sole beneficiary .
- ADIA using Jersey for other overseas worldwide investment , Jersey is not obstructive or opaque jurisdiction , Exchange of Information with India .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Question before AAR
- Whether corpus contribution by ADIA to Trust is revocable transfer u/s 63.
- If the above is affirmative , whether the income from India out of such investment by the trust will be chargeable to ADIA u/s 61.
- If both of the above is affirmative , whether the income of ADIA is covered under article 24 of DTAA.
- If , all of the above is affirmative , the TDS rate.

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- AAR conclusion -
- Income accrued to Trust & taxable.
- No DTAA between India & Jersey, taxable.
- India UAE DTAA not applicable either on Trustee or Trust.
- India not ratified Hague Trust Convention and therefore trust law of foreign jurisdiction not applicable in India.

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- AAR conclusion -
- Settlor can not be sole beneficiary.
- Section 61 can't be applied otherwise it will be avoidance of tax and liable to rejected at the threshold itself u/s 245R.
- Trust not covered under Indian Trust Act & not covered in 160.
- Income has accrued to Trust and not trustee and it can't be taxed in the like manner and same extent.
- Rejected the ADIA argument that even if the trust is ignored , ADIA income not taxable under article 24 .Lifting of the veil not warranted . Accrual of the income to the trust and not ADIA , trust not covered under article 24.
- Section 115 AD is applicable to the trust as FII /FPI .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Assessee Arguments -
- Section 63(b), Transfer included settlement , Trust etc . Inclusive definition .
- As per deed of settlement - the transfer is revocable , not disputed and covered in revocable transfer for trust covered in 63(a).
- Transfer of corpus to trust under revocable transfer of for sole benefit of ADIA.
- Trustee is obliged to distribute the income of the trust so arised from the fund invested, to ADIA and there is no discretion of trustee - Non Discretionary Trust .
- Determinative trust as beneficiary is determined .



# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- As per settlement deed , ADIA has the right to terminate/dissolve the trust and in such event ADIA has to receive all proceeds of dissolution . ADIA can re assume the power on the entire income arising by such income to the trust .
- Retransfer of rights and reassumption of power in the settlement deed .
- Section 61 applicable .
- Alternatively , without prejudice , being determinative trust , it can be assessed under 160 as representative assessee and liability can be determined under 161 - Like manner and to the same extent as beneficiary . Takes the colour of ADIA income and article 24 applies .

## **ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437**

- Revenue has the option to apply section 166 . However , either due to 161 or 166 it can tax only interest on the trust properties . The liability of the trustee can not be higher than that of the beneficiary . No part of the corpus fund will be taxable .
- Section 60-63 , 160, 161 , 163 and 166 applies to Foreign Trust also , not confined with the trust registered in India .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Case law relied by Assessee -
- Columbia sportswear & Co -346 ITR 161(SC) - Maintainability of writ .
- Azadi Bachao - 263 ITR 706 for DTAA overriding the provision of act .
- Bhawna Nilkanth Nanavati - 255 ITR 529 to support that the settlor can be sole beneficiary . Trust is a matter of form rather substance . Trust is a pass through entity /conduit only and ownership lies with beneficiary only .

## **ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437**

- CWT Vs Estate of Late Vikramsinhji of Gondal - 363 ITR 679 , to support that trust registered overseas are covered in Tax laws. Section 60 , 61 , 63 , 160 ,161, 166 are alien to foreign Trust.
- ITR-2 ,5,6,7 envisages the foreign trust as it ask the detail to be furnished by the assessee .
- CWT Vs Trustee of HEH Nizam Family -108 ITR 555 (SC) - Assessment of the Trustee is de facto assessment of the beneficiary in respect of their interest in the trust properties through Trustee .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Revenue Submission -
- Trust is taxable, There is no DTAA between India and Jersey , therefore no relief u/s 90. India-UAE DTAA not applicable.
- Indian Trust act not applicable due to section 1 of Trust Act , consequently section 61,63 or 161 or 164 not applicable .
- However conceded that no provision in the tax law bar the applicability of foreign trust on section 60-63 and other provisions.
- Conceded that DTTA will override the Tax laws .
- Conceded that there is no statutory bar to make the investment through SPV like Trust .
- Conceded that ADIA through its direct investment itself was eligible to benefit of article 24 , so choosing the SPV /Trust rout is not tax avoidance measure .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Court reasoning -
- Section 61 not dependent upon section 63 and a transfer can be revocable transfer of its own merits , section 63 merely extends section 61 .
- Section 63(b) is an inclusive definition and covers settlement or trust etc . If the conditions of section 63(a) are satisfied , any transfer whether through the Trust or not , will be covered .
- Section 63 is not confined with Indian Trust or Trust governed by Indian Trust Act .

# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- Trust not defined under Income Tax or General clause act. General Meaning- Trust defined under section 3 of Indian Trust Act. Foreign Trust although not settled or registered in India , is covered for tax purpose .
- Ratification of Hague convention is not applicable and does not dilute the covering section 60-63 to foreign trust .
- Vikramsinghjit of Gondal- SC held that Foreign Trust are covered in Indian Tax laws .
- Jersey Trust provisions are akin to Indian law .

## **ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437**

- Neither the income tax act nor the Indian trust act debar the settlor being the beneficiary of the Trust .
- Relied upon Bhavna Nilkant Ninavati case to uphold this principles.
- ADIA income would have exempt under article 24 itself , therefore taking a trust route was not for the purpose of tax avoidance but for commercial expediency .



# ABU DHABI INVESTMENT AUTH. Vs AAR 439 ITR 437

- On the alternative argument of section 160.
- Trustee can be representative assessee , no bar on Foreign Trust .The act presupposes the foreign Trust as a trust for tax purpose
- Details prescribes in the various ITR forms supports this view.
- Vikramsinghjit case (SC ) has applied the foreign Trust in section 164.
- Even when 63 not being applicable , trustee is a representative assessee and income can be taxed on trustee under 161 in the like manner and the extent as to the beneficiary only .
- The benefit of Article 24 is available either through the trust route or directly as the income belongs to ADIA only and not trust .
- India -UAE DTAA will be applicable only .



Q & A

# E&Y Global services Vs ACIT - DHC

Fact of the case -

- E&Y Global Services ( Petitioner ) is the LLC in UK of E&Y network and engaged in the providing technology and other support services to the member firm of E&Y.
- It has entered into contract with E &Y member firm for providing support services and deliverables for which it has entered into contract with third party for procurement of software .
- EYGBS India has entered into contract with petitioner for the - Right to benefit from the deliverablers /services .
- Specific services as per the MOU are as under -
- Common standard and policies , IT services , Knowledge , Global Industry Centre , Global Procurement services , Global Shared Services , other services .

# E&Y Global services Vs ACIT - DHC

Application before AAR -

1. Whether the amount received or receivable on account of services will be FTS.-  
**Not an FTS**
2. Whether the amount received as reimbursement of the cost of giving the Right to benefit and the deliverables /and or services will constitute income in the hands of UK entity .- **Not a reimbursement of expenses .**
3. Whether the payment received / receivable for the right to benefit and deliverables /services will amount to Royalty .- **Consideration for the right to benefit from the computer software is royalty whereas the consideration for right to benefit from the services is not FTS.**
4. What will be the TDS rate on each of the situation on the fact that the UK entity does not have the PE in India .

## E&Y Global services Vs ACIT - DHC

- Writ before HC - Arguments of Petitioner - On the issue of Royalty -
  1. The services are for the non -exclusive and non assignable use of deliverables or services .
  2. The consideration is for the services through the standard facility for which access is granted to member firm .
  3. No transfer of copyright in favour of the members and therefore should not be royalty - Engineerings analysys centre cases .

# E&Y Global services Vs ACIT - DHC

- Department arguments -
- The SC judgement is confined to the 4 category of arrangements and the petitioner case does not cover here therefore not applicable .
- The considerations are for the services of standard facility which it has created though procurement of the licensed software and therefore commercial exploitation of the standard facility .
- Computer program is a literary work and payment for the use or right to use such copyright will amount to royalty .
- It is covered under explanation (5) to the 9(10 (vi) and such explanation is clarificatory and will apply retrospectively and therefore covered .

# E&Y Global services Vs ACIT - DHC

HC observation -

1. The core transaction is to authorize the end user to have access and to use the licensed software and on this licensee has no exclusive right and therefore no copyright has been parted therefore not a royalty .
2. The consideration for the use of the software can not be Royalty . The contract of the UK entity and Indian entity has to be considered only and not the contract of UK entity with vendor.
3. Since AAR had relied on Citrix case ( 353 ITR 1) which the SC has declared a bad laws in engineering analysis , therefore this order also.
4. The theory of 4 type of agreement is not acceptable as the SC has laid the law of general application and based on the facts of the case , it is covered.



# THANKYOU