

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar VP and Saktujit Dey JM]**

ITA No. 7119/Mum/2014  
Assessment years 2007-08

**ING Bewaar Maatschappij I BV**  
**- As trustees of ING Emerging Markets Equity Fund**  
**(now known as NNIP Bewaar Maatschappij I BV)** .....Appellant  
*Nesco IT Building III, 8<sup>th</sup> floor, Nesco IT Park*  
*Nesco Complex Gate No. 2, Western Express Highway*  
*Goregaon (East), Mumbai 400 063 [ PAN: AAATI4316D]*

*Vs*

**Deputy Commissioner of Income Tax**  
**International Taxation Circle 2(2)(1), Mumbai** .....Respondent

**Appearances by**

**Dhanesh Bafna,** along with **Arpit Agarwal** for the appellant  
**Avaneesh Tiwari** for the respondent

Date of concluding the hearing : September 12, 2019  
Date of pronouncement : November 27, 2019

**O R D E R**

**Per Pramod Kumar VP:**

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 13<sup>th</sup> August 2014, in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2007-08.
2. Concise ground of appeal, as filed by the assessee appellant on 8<sup>th</sup> May 2019, adequately sums up the controversy requiring our adjudication in this case, and sets out the grievance of the assessee as follows:

**On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax Appeals 7-10 (“CIT (A)”) erred in upholding the action of the Deputy Director of Income Tax (International Taxation)-3(1)(“the Ld. A.O.”) in denying the benefit of Article 13 of the India-Netherlands Double Taxation Avoidance Agreement (“DTAA”) and consequently, taxing the capital gains amounting to Rs.23,38,08,365/- as per the Income Tax Act, 1961 (“the Act”)**

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is, as the Assessing Officer puts it, “a Fund established in the Netherlands and registered with the Securities Exchange Board of India (SEBI) as a sub account of ING Assets Management BV, a SEBI registered Foreign Institutional Investor (FII)”. It was a case of reopened assessment. During the course of the ensuring assessment proceedings, it was noticed that, in India, the assessee had short term capital gains of Rs 23,38,08,365 and long term capital gain of Rs 12,60,91,050, on sale of shares. While there was no dispute about non taxability of long term capital gains, in view of exemption under section 10(38), of the Act, the short term capital gains were claimed to be treaty protected from taxation in India, under article 13 of the India Netherlands Double Taxation Avoidance Agreement [(1989) 177 ITR (Statute) 72; 'Indo-Dutch tax treaty', in short]. The case of the assessee, in substance, was that the assessee is a tax transparent entity in the Netherlands, but since all its beneficiaries are fully taxable in respect of their shares of income in the Netherlands, the assessee is entitled to the treaty protection. It was also pointed out that the assessee, as a trustee, is legal owner of the assets held by ING Emerging Market Funds (INGEMEF, in short) which is a legal entity known, in the Dutch law, as FGR. i.e. *fonds voor gemene rekening*, which literally means funds for joint account, that admittedly the assessee acts for INGEMEF which is fiscally domiciled in the Netherlands, and, that INGEMEF is a tax transparent entity in the Netherlands in the sense that while it is not taxable in its own right, all the incomes earned by the entity are fully taxable in the hands of its constituents. It was emphasized that the assessee was a trust AOP, taxable in the capacity of representative assessee, and as the beneficiaries were taxable entities in the Netherlands, the assessee was eligible for the same treaty protection as well. Broadly, on the strength of these arguments, the assessee claimed the treaty protection from taxation in India. The Assessing Officer rejected this claim of treaty protection by observing as follows:

..... a detailed submission was filed by the assessee on 5.12.2013 wherein it was stated that:

**i) The assessee i.e ING BewaarMaatschappij I BV as a Trustee of ING Emerging Markets Equity Fund (ING EMEF)**

**ii) ING EMEF is Fund for joint account set up in Netherlands by way of contractual arrangement. It has been conceded that the Fund itself is not a tax entity in Netherlands but all the participants of the Fund are tax residents of Netherlands and therefore share in the Fund is determined as under:**

Sr. No	Name	Share in the Fund (%)
1.	TNG Institutional Emerging Markets Equity Fund	53.86%
2.	Nationale-Nederlanden Levensverzekering Maatschappij N. V.	19.66%
3.	ING BeleggingsfoudsenParaplu N.V.	26.48%

	<b>Total</b>	<b>100.00%</b>
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iii) IT was further claimed that the Fund resembles a Trust under the Income-tax Act, 1961. Therefore, provision of sections 160 to 164 of the Act would be applicable and therefore, the assessee i.e the Trustee therefore should be regarded as representative assessee of participant and therefore, the Fund should be taxed in the same manner and Mice extent as the beneficiary participant.

4. Stretching its argument, it was claimed that because all the beneficiary participant are tax resident of Netherlands and none of them hold 10% or more share of any Indian company, therefore Article 13(5) of the India Netherlands Double Taxation Avoidance Agreement is applicable and capital gains will not be taxable in India and because their Representative Assessee can be assessee in the same manner and like extent, Trustee of the Fund i.e the assessee will also not be taxable in India.

5. In a nutshell, because the participants are tax resident companies of Netherlands eligible for benefit of Article 13(5) of the Treaty, the Fund "as custodian of the Trust" will also be not taxable for the capital gains.

6. The submissions made by the assessee was considered. There is no dispute, that the assessee is not a tax entity of Netherlands. The question is, can it be treated as Representative Assessee of the three participants and accorded the treatment in same manner and extent. The assessee has sought to equate the Fund as a Trust. It is far fetched presumption on the part of the assessee and cannot be accepted legally. It is the Fund (and assessee as its custodians) who had earned the capital gains from India as an Association of Persons (AOP) and it will be assessed as such. Now if it's not a tax resident entity of Netherlands, the benefit of Article 13 will not be extended to it.

4. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) also confirmed the stand of the Assessing Officer and observed as follows:

5. I have considered the A.O's order as well as the appellant AR's submissions. Having taken note to the same, I find that the appellant's claims that as the three participants of the fund are tax residents of Netherlands, hence the appellants entitled for the benefit of Article 13 of DTAA. This claim of the appellant is based on the assumption that the appellant should be treated as representative assessee of such three participants being tax residents of Netherlands.

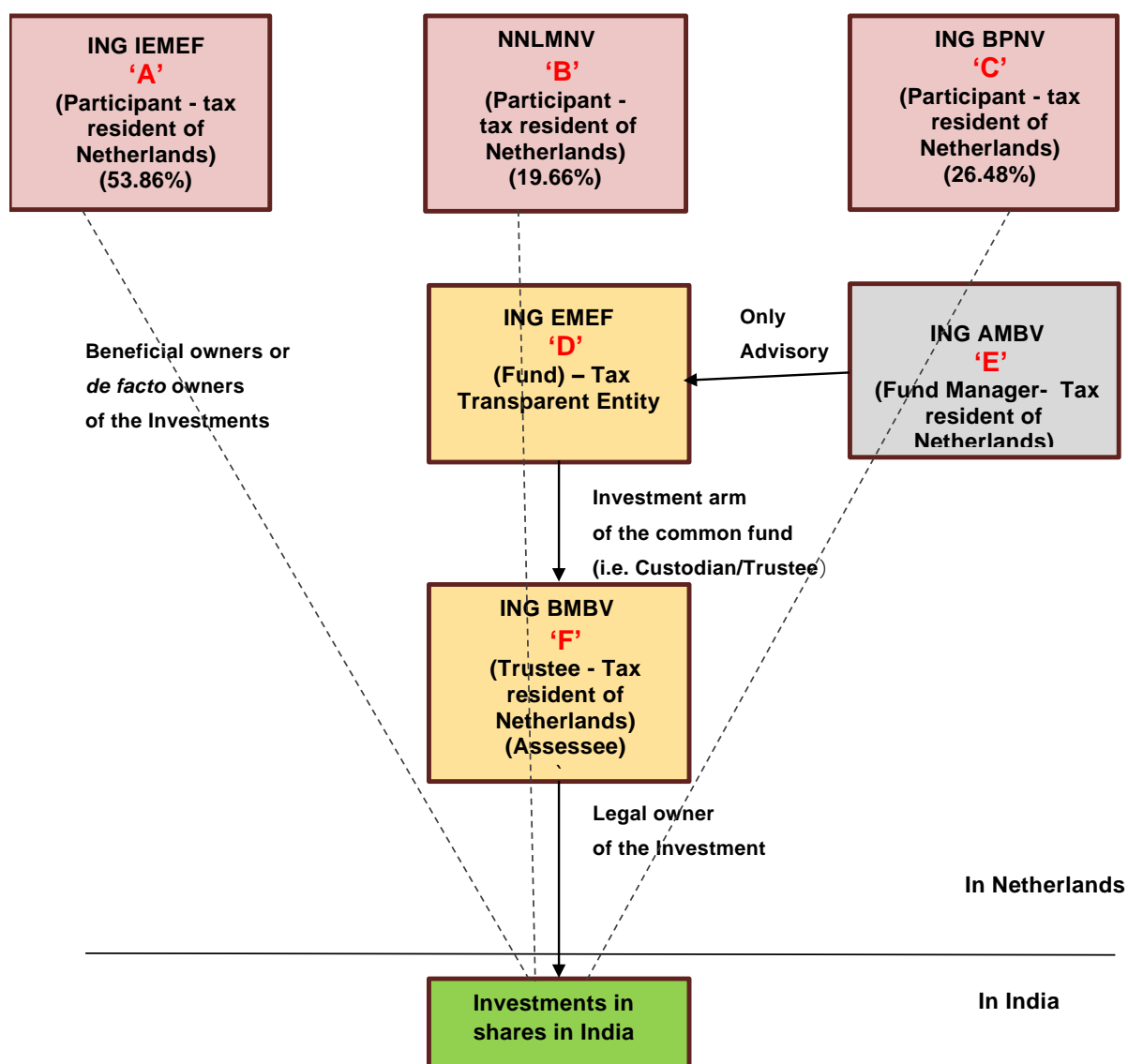
6. However, I do not find any substance in the appellant's such claim as the appellant cannot be assessed on the basis of status of participants of the fund. As the income of the appellant is assessable and not the income pertaining to the participants. Even I also find that the appellant is a non-taxable entity in Netherlands. Therefore, the A.O has rightly held that the benefit of Article 13 will not be extended to the appellant. Accordingly, the A.O has rightly held that the fund is an association of person. Hence the income arising in their hand is taxable in India. Therefore, the action of the A.O in holding the benefit of Article 13 is not available to the appellant is correct and justified. Even I find that the

submissions made by the appellant for canvassing the appellant as a representative assessee in accordance to Section 160(iv) is also not established as the appellant's claim so made is merely based on presumption of fact that the appellant being custodian of the fund is a representative assessee as a trustee of the INGEMEF. Hence; the appellant's this claim that it is assessable as a representative assessee of ING EMEF for and on behalf of the participants of ING EMEF is without having any substance or support of law. Even I find that no support of any documentary evidence or execution of any instrument were adduced to this effect by the appellant. Even the judicial pronouncements, which have been relied upon by the appellant are distinguishable on facts of the appellant's case. Hence, the same are nowhere applicable to the facts of the appellant's case. On the basis of aforesaid discussion of the facts available on record, I consider it proper and appropriate to hold that the A.O was completely justified in his action in not allowing the benefit of Article 13 of India-Netherlands tax treaty to the appellant. Accordingly, the action of the A.O stands confirmed.

5. The assessee is not satisfied and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

7. It is important to first understand the structure of the assessee entity. The assessee before us is a trustee of ING Emerging Markets Equity Based Funds (INGEMEF) which is registered with the Securities and Exchange Board of India as a sub account of ING Assets Management BV, a registered Foreign Institutional Investor (FII). There is no dispute that INGEMEF is a tax transparent entity, in the sense that while INGEMEF is not taxable in its own right, the constituents of INGEMEF are taxable in respect of their respective shares of earning. The form of its organization is FGR. i.e. *Fonds voor Gemene Rekening*, which literally means funds for joint account, and this form of organization, under the Dutch law, is in the nature of a contractual arrangement between the investors, fund manager and its custodian. The investors in this case are three entities- namely, ING Institutioneel Emerging Equity Market Fund (INGIEEMF, in short) with a participation share of 53.86%; Nationale-Nederlanden Levensverzekering Maatschappij NV (NNLNV, in short) with a participation share of 19.66% and ING Beleggingfondsen Paraplu N.V. (INGBPNV, in short) with the participation share of 26.48%. These three investors thus account for 100% of INGEMEF ownership. The funds so held by INGEMEF are invested through the custodian, i.e. the assessee before us (namely ING Bewaar Maatschappij I B.V., or INGMBIV, in short), who is legal owner of the investments on behalf of the investors, made on the advice of the fund manager ING Asset Management BV (INGAMBIV, in short). The *inter se* relationship between these entities could be, by way of a diagram, depicted as follows:



*[Dotted lines show the de facto ownership of Indian investments, and beneficiaries (A,B and C) to the fruits of these investments; all other entities (D,E and F) in this diagram are only entitled to the remuneration for services rendered by these entities]*

8. So far as the role of the assessee is concerned, it is that of a custodian of investments and it is not even the case of the revenue that the profits accruing to the assessee are in its own right. The impugned assessment order is framed in the name of the assessee in its capacity as trustee as the name of assessee, recorded in the assessment order, clearly notes “ING Bewaar Maatschappij I B.V.as trustee of ING Emerging Market Funds” in column # 1, and describes its business, in column # 10, as “sub-account of foreign institutional investor”. Clearly, the assessment has been framed in a representative capacity. What is, therefore, relevant is the status of ING Emerging Marketing Fund (INGEMF) and there is a finding by both the authorities below, i.e. the Assessing Officer as also the CIT(A), that since the INGEMEF is a

“non taxable entity in Netherlands”, the benefit of treaty protection cannot be extended to INGEMEF. That’s where the fallacious logic creeps in. The assessee is indeed a trustee for INGEMEF but INGEMEF *per se* is not the beneficiary because INGEMEF, rather than being a legal entity, is only contractual and tax transparent mechanism for collective investments by three beneficiaries shown as A, B and C in the above diagram. Obviously, if the assessee is to be taxed in its own right, there is no reason for denial of treaty protection as the assessee, in its own right, is a taxable entity in the Netherlands, which, even going by the Assessing Officer, appears to be by itself sufficient basis for treaty protection in India. It is in this backdrop that we need to examine the role and status of INGEMEF in some detail. As we have noted earlier as well, INGEMEF is an FGR. i.e. *Fonds voor Gemene Rekening*, which literally means funds for joint account, and this form of organization, under the Dutch law, is in the nature of a contractual arrangement between the investors, fund manager and its custodian. An FGR is, strictly speaking, not a legal entity as it is creation of an agreement and that is the reason it does not hold any assets on its own; the assets are held by a separate depository (i.e. assessee in this case). The clarifications issued by the International Tax Policy and Legislation Directorate, Ministry Of Finance, Government of Netherlands, notes that INGEMEF is tax transparent and the above legal position about FGRs, which are referred to as “Dutch Limited Funds for Mutual Account” in the said clarification (a copy of this clarification # IFZ/2012/678U is placed in the paper-book pages 72-75). If FGR is not a legal entity and if the FGR is simply a tax transparent entity in the sense that while it is not taxed in its own right but the profit shares pertaining to its various constituents are taxable in the respective hands, the real question that we need to address ourselves to is as to who is the actual beneficiary of the trustee, in whose representative capacity the assessee is to be taxed, and whether those beneficiaries are fiscally domiciled in the Netherlands in the sense that these beneficiaries are “liable to taxation by reasons of his domicile, residence, place of management or any other criterion of similar nature”. There are two reasons for this approach. The first reason, of course, is the fact that ING-EMEF is not a legal entity and is merely a contractual arrangement. To examine the taxability of its income, therefore, this contractual entity is required to be ignored, and one has to see the legal entities to whom income actually belongs, i.e. its participant investors. As a result of investments by INGEMEF, the incomes thus accrue directly to the three participant investors which account for 100% of the income of INGEMEF. There is no dispute, as evident from the certificates placed at pages 76, 77 and 78 of the paper-book, that all the three participants are tax residents of the Netherlands. Viewed thus, the income in question belongs to the tax residents of the Netherlands, and the treaty protection cannot, therefore, be declined. The second reason is that even if one goes on the basis that it is a tax transparent entity *simpliciter*, following the principles laid down by this Tribunal in the case of *Linklaters LLP Vs Income Tax Officer [(2010) 9 ITR (Trib) 217 (Mum)]*, what is actually important is the fact of income being actually in the tax net in the treaty partner jurisdiction, i.e. the Netherlands, rather than the manner in which the said income is in the tax net in the said treaty partner jurisdiction. The FGR for which the assessee is trustee is not a taxable entity in the Netherlands, on account of its being tax transparent as a closed FGR, and yet, as is the claim of the revenue, this FGR, represented through the trustee, is taxable in India. A specific confirmation, issued by the International Tax Policy and Legislation

Directorate, Ministry Of Finance, Government of Netherlands, to the effect that the ING EMEF, being a closed FGR and a tax transparent entity, is not a taxable entity in the Netherlands, is also placed before us. In the situation of this kind of an asymmetrical taxation, as is the legal position set out by the coordinate bench's decision in the case of Linklaters (*supra*), as long as the said income is liable to tax in the treaty partner jurisdiction, whether in the hands of the assessee or in the hands of its constituents when it's a tax transparent entity in the treaty partner jurisdiction, the said income cannot be declined treaty protection in India. The conceptual support for this approach, as noted in the said coordinate bench decision, is summarized as follows:

**Interpretation of statutes—Tax treaties—Contextual meaning vs. literal meaning—Principles of literal interpretation do not apply to the interpretation of tax treaties—To find the meaning of words employed in the tax treaties, the ordinary meanings given to those words in that context and in the light of its objects and purposes are to be looked at—Literal meanings of these terms are not really conclusive factors in the context of interpreting a tax treaty which ought to be interpreted in good faith and ut res magis valeat quam pereat, i.e., to make it workable rather than redundant—A treaty is to be interpreted in good faith on the basis of general expectations of the parties and in accordance with the ordinary meaning given to the treaty in the context and in the light of its objects and purpose—One cannot interpret a tax treaty, or for that purpose even a tax legislation, with dictionary in one hand and tax treaty in another—Hindalco Industries Ltd. vs. Asstt. CIT (2005) 94 TTJ (Mumbai) 944 : (2005) 94 ITD 242 (Mumbai) followed; Bulmer Ltd. vs. S.A. Bollinger (1972) 2 All ER 1226, IRC vs. Exxon Corporation (1982) STC 356, Union Texas Petroleum Corporation vs. Critchley (1988) STC 69 and Union of India & Anr. vs. Azadi Bachao Andolan & Anr. (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) relied on**

(Para 64)

**Conclusion:**

**To find the meaning of the words employed in tax treaties, the ordinary meanings given to those words in the context and in the light of its objects and purposes are to be looked at and not the literal meanings thereof.**

**Double taxation relief—Agreement between India and UK—Entitlement of UK based partnership firm to benefits of treaty—As per art. 1(1), the India-UK tax treaty is applicable to persons who are residents of one or both of the Contracting States—Article 4(1) provides that the term 'resident of a Contracting State' "means any person who, under the law of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature"—Thus, in order to be entitled to treaty benefits, income of a person in one of the Contracting States should be subjected to resident type taxation, on account of some locality related attachment in that Contracting State—It is the fact of taxability of entire income of the person in the residence State, rather than the mode of taxability there, which should govern whether or not the source country should extend treaty benefits with the Contracting State in which that person has fiscal domicile—Thus, even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, treaty benefits cannot be declined as long as entire income of the**

partnership firm is taxed in the residence country—Further, it is sufficient that under the assignment or distributive rules of the treaty, the residence State has a right to tax the income of the partnership firm, irrespective of the fact whether or not such a right is actually exercised by the residence State—Therefore, assessee, a UK based partnership firm, is eligible to the benefits of India-UK tax treaty as long as the entire profits of the firm are taxed in UK, whether in the hands of the firm or in the hands of the partners directly

**Held:**

In terms of art. 1(1), the India-UK tax treaty "shall apply to persons who are residents of one or both of the Contracting States". As to what are the connotations of expression "resident of a Contracting State", art. 4(1) of the treaty provides that, for the purposes of the said tax treaty, term 'resident of a Contracting State' "means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". It is thus necessary that the resident can only be 'person' and that person should be 'liable to taxation by reasons of his domicile, place of management or any other criterion of similar nature'. It is also important to bear in mind the fact that in terms of provisions of art. 3(2), "a partnership which is treated as a taxable unit under the IT Act, 1961, of India shall be treated as a person" for the purposes of this treaty. To the extent that a partnership is required to be treated as a person, thus, the position is free from any doubt or ambiguity. The controversy, however, revolves around second limb of definition under art. 4(1) which requires 'person' to be 'liable to taxation by reasons of his domicile, residence, place of management or any other criterion of similar nature'.

(Paras 35 & 36)

There could be several reasons for which a person may be liable to tax in a tax jurisdiction, such as source based taxation of an income, a presumptive tax in respect of an offshore business, or simply a tax because of a physical presence, such as by a liaison office, in a tax jurisdiction, or because of a locality related attachment which leads to residence based taxation. The taxation of a person in all these situations does not necessarily indicate a fiscal domicile in that jurisdiction. In its contextual sense, expression 'liable to tax by reasons of his domicile, residence, place of management or any other criterion of similar nature' refers to a situation in which a person is liable to tax in a tax jurisdiction by the virtue of a locality related attachment which leads to residence type taxation. The common thread in all the factors which have decisive role to play in determination of fiscal domicile is that these factors consist of some locality related attachment of the person which leads to residence type, i.e. full-fledged and not in respect of a limited source, taxation of that person. What follows thus is that in order that person in one of the Contracting States entitles himself to treaty benefits in the other Contracting State, income of that person should be subjected to residence type taxation, on account of some locality related attachment, in that Contracting State.—Dy. CIT vs. General Electric Co. Plc. (2001) 71 TTJ (Cal) 973 followed.

(Paras 52, 53 & 55)

Modalities or mechanism of taxation may vary from jurisdiction to jurisdiction, as domestic law is a sovereign function and a bilateral tax treaty, or even the need



**of uniformity in entity classification approach—no matter how desirable someone may consider it to be, does not dictate such modalities of taxation being legislated. The fact of taxation, however, can be decided in an objective and uniform manner. From a country perspective, what really matters is whether the income, in respect of which treaty protection is being sought, is taxed in the treaty partner country or not. That is the clearly the underlying principle based on which residence definition is modeled. It would, therefore, seem logical that it is the event of taxability in the residence State, rather than the mode of taxability there, which should be a decisive factor for determining whether the person should be treated as eligible for treaty benefits of the Contracting State in which he claims to be resident. Viewed in the light of the detailed analysis above, it is the fact of taxability of entire income of the person in the residence State, rather than the mode of taxability there, which should govern whether or not the source country should extend treaty entitlement with the Contracting State in which that person has fiscal domicile. In effect thus, even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, as long as entire income of the partnership firm is taxed in the residence country, treaty benefits cannot be declined.**

**(Paras 56, 60 & 71)**

**There is one more way of looking at this issue and one more line of reasoning which leads to the same conclusion. A view is indeed possible that, given the context in which the expression ‘liable to taxation by reasons of his domicile, residence, place of management or any other criterion of similar nature’ is employed i.e. in the context of ascertaining fiscal domicile—as evident from the title of article as ‘Fiscal domicile’, it is sufficient that under the assignment or distributive rules of the treaty, the residence State has a right to tax income of the partnership firm—irrespective of the fact whether or not such a right is actually exercised by the residence State. The decisive factor of every type of domicile is a locality related attachment, such as a voting right for a person which again is based on where that person ordinarily resides. To ascertain fiscal domicile in the context of taxation, this locality related attachment has to have a further attribute i.e. it should be such as to lead to a full-fledged taxation as a person resident in that tax jurisdiction is subjected to. The difficulty, however, arises when a tax jurisdiction does not exercise that right to tax—whether directly in respect of that category of persons, or even in general terms. It will be somewhat absurd to suggest that, in such situations, that category of persons will not have fiscal domicile anywhere. That is clearly an incongruous result. Therefore, the test of fiscal domicile must be applied in such a manner so as to lead to a reasonable result. As long as de facto entire income of the enterprise or the person is subjected to tax in that tax jurisdiction, whether directly or indirectly, the taxability test must be held to have been satisfied. Of course, the other possible approach to such a situation is that as long as the tax jurisdiction has the right to tax the entire income of the person resident there, whether or not such a right is exercised, the test of fiscal domicile should be satisfied. Viewed thus, all that matters is whether that tax jurisdiction has a right to tax or not; the actual levy of tax by the tax jurisdiction cannot govern whether a person has fiscal domicile in that jurisdiction or not. This line of reasoning is diametrically opposed to the stand taken by the OECD in the matter, but, having carefully considered the stand of the OECD on this issue, the Tribunal is not persuaded by the OECD stand on the matter, nor the Indian judicial precedents support that position. As a matter of fact, even the Government of India’s approach to the tax**

**treaties does not entirely approve that school of thought either.—Asstt. Director of IT vs. Green Emirate Shipping & Travels (2006) 99 TTJ (Mumbai) 988 : (2006) 100 ITD 203 (Mumbai) relied on.**

**(Paras 72 & 75)**

**The amendment in the definition of resident of UAE vide Notification No. 282 of 2007, dt. 28th Nov., 2007, accepts the broad proposition that the taxability in one of the Contracting States is not a sine qua non to avail treaty benefits in the other Contracting State. The approach of the Departmental Representative to the effect that a person who is not liable to pay tax under the UK law cannot claim any relief from the tax payable in India under the agreement and that the provisions of tax treaties apply to any cases where the same income is not liable to be taxed twice by the existing laws of both the Contracting States is thus no longer backed by the tax administration itself. In view of the above discussions, the assessee was indeed eligible to the benefits of India-UK tax treaty, as long as entire profits of the partnership firm are taxed in UK—whether in the hands of the partnership firm though the taxable income is determined in relation to the personal characteristics of the partners, or in the hands of the partners directly.—J.J. Grudlingh vs. Commr. for South African Revenue Service 10 ITLR 446 distinguished.**

**(Paras 76 & 79)**

**Conclusion:**

**It is the fact of taxability of entire income of the person in the residence State, rather than the mode of taxability there, which should govern whether or not the source country should extend treaty benefits with the Contracting State in which that person has fiscal domicile; assessee, a UK based partnership firm, is eligible to the benefits of India-UK tax treaty as long as the entire profits of the firm are taxed in UK whether in the hands of the firm or in the hands of the partners directly.**

9. The principle emerging out of this analysis of legal position is that when an assessee is a representative assessee of a tax transparent entity, it is the status of beneficiaries or constituents of tax transparent entities which is relevant for the purpose of determining treaty protection. Viewed thus, this is beyond doubt that the income in question has actually accrued to the taxable entities on the Netherlands, which, according to the approach adopted by the Assessing Officer, is *sine qua non* for tax treaty protection. It would thus appear that the treaty protection has indeed been wrongly declined to the assessee. The reservation on treaty protection has arisen only on account of INGEMEF, a tax transparent entity which is in the nature of contractual arrangement, being in the picture, but then the assessee being a representative assessee of a tax transparent entity, as discussed above, requires the beneficiaries or constituents of the tax transparent entity being looked at. The assessee is indeed a trustee of INGEMEF but then INGEMEF is only a contractual arrangement for common investments by three investors and it cannot be treated as a beneficiary as it is not even a legal entity, it's a tax transparent conduit contractual arrangement for the purpose of collective investments. It is to be looked through so far as trust beneficiaries are concerned. The beneficiaries are thus clearly taxable entities in Netherlands. What essentially follows is like this. If the assessee is to be taxed in its

own right, which is not even the case of the revenue, there cannot be any dispute that the assessee is a taxable entity in the Netherlands, and, for this reason, the assessee is liable for treaty protection. If the assessee is to be taxed as a trustee in representative capacity, in our considered opinion, on the facts of this case clearly the beneficiaries are the three investors all of which are taxable entities in the Netherlands, and not the INGEMEF *per se*. Whichever way we look at it, thus, the assessee is entitled to treaty protection. Once that is found to be the position, article 13(5) clearly provides that the “gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident”. So far as sale on gains of shares are concerned, only article 13(4) can come into play and that too is not applicable on the facts of this case and it is not even the case of the revenue that the gains are on sale of unlisted shares which form part of substantial interest in the capital stock or are of the companies which hold principally immovable properties, other than the property in which the business is carried out. In any case, article 13(5) lays down the broad principle and article 13(1) to 13(4) set out the exceptions. It is not even the case of the Assessing Officer, and rightly so, that these exception clauses come into play on the facts of this case. This being the position, the capital gains, on sale of shares, in the hands of the assessee, and the investors it represents as trustee, are treaty protected from taxation in India. As we hold so, we may add that we are dealing with pre 1<sup>st</sup> April 2013 legal position and the requirements of Tax Residency Certificate (TRC) do not, therefore, come into play.

10. In view of the above discussions, and bearing in mind entirety of the case, we uphold the plea of the assessee and direct the Assessing Officer to grant the benefit of Indo Dutch tax treaty on the facts of this case. Ordered, accordingly.

11. In the result, the appeal is allowed. Pronounced in the open court today on the 27<sup>th</sup> day of November, 2019

*Sd/xx*  
**Saktijit Dey**  
(Judicial Member)

*Sd/xx*  
**Pramod Kumar**  
(Vice-President)

**Mumbai, dated the 27<sup>th</sup> day of November, 2019**

*Copies to:*

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

*By order*

*Assistant/Deputy Registrar*  
*Income Tax Appellate Tribunal*  
*Mumbai benches, Mumbai*