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

[Coram: Pramod Kumar (Vice President),
and Ravish Sood (Judicial Member)]

ITA No. 6290/ Mum/2019
Assessment year: 2010-11

Income Tax Officer
Ward 2(3)(1), Mumbai **……..…Appellant**

Vs.

Rajeev Suresh Ghai **……...……Respondent**
N S Virani & Co, 28 Bhanushali Building
35, Mint Road, Mumbai 400 001 [PAN: AMYPG6195L]

Appearances by:

Milind Chavan *for the appellant*
Hiro Rai, *along with* **Ritu Punjabi** *for the respondent*

Date of concluding the hearing : 09/11/2021
Date of pronouncing the order : 23/11/2021

O R D E R

Per Pramod Kumar, VP:

1. The assessee before us is an Indian national fiscally domiciled in, and tax resident of, the United Arab Emirates for over three decades. He is said to have invested his unexplained income in specific residential properties in India. The short question requiring our adjudication in the present case is whether his unexplained investments, even if that be so, can be taxed in India upon investment in India, even when he is not carrying out any income generating activities in India. The only trigger to the taxation is his investments in India.

2. To set out the backdrop in which this question arises, a few things need to be taken note of. By way of this appeal, the Assessing Officer has challenged the correctness of the order dated 29th July 2019, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2010-11. Grievances raised by the appellant Assessing Officer are as follows:

> **1. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in not appreciating the existence of commercial relation between the assessee and M/s Ahuja Group?"**
>
> **2. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in not appreciating the evidentiary value of statement of Shri Jagdish Bhagwandas recorded u/s 132(4) of the IT Act, 1961?"**

3. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in considering the interest income amounting to Rs. 4,47,150/- to be taxable under article 22 of India-UAE DTAA not under article 11of the treaty?"

4. "Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in deleting the addition amounting to Rs. 2,50,40,000/- citing article 22 of India- UAE treaty without appreciating that Article 22 of the India- UAE treaty provides for taxability of income arising from immovable property; India-UAE DTAA (the tax-treaty) provides for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961. The treaty does not cover the taxation of income of the nature such as unexplained investment

3. The issue requiring our adjudication in this appeal lies in a rather narrow compass of material facts. The assessee before us is a non-resident Indian settled in the United Arab Emirates for the last three decades. The assessee is, therefore, eligible for the benefits of the India UAE Double Taxation Avoidance Agreement [(1994) 205 ITR (Sta) 409; Indo UAE tax treaty, in short]. As per information received from the investigation wing, the Assessing Officer noticed that, during the relevant financial period, the assessee has paid cash amounts aggregating to Rs 2,50,40,000 to one Ahuja Builders and has also received Rs 4,47,150 in cash, and interest in respect of the amounts so paid. The assessee was thus called upon to file the related income tax return, and the said return was subjected to scrutiny assessment proceedings. In the proceedings which followed, it was explained by the assessee that the assessee had invested a sum of Rs 850 lakhs in residential flats in Mumbai, but all the related payments have been made by official channels and the assessee produced evidence in support of those remittances. However, the Assessing Officer noted that as per data found by the investigation wing, during the search and seizure operation on Ahuja Group, the assessee had paid cash amounts, as 'on money', aggregating to Rs 2,50,40,000 to Ahuja Builders. This amount was treated as an "unexplained investment" under section 69. The Assessing Officer further noted that the sum of Rs 4,47,150 "which is probably interest on loan" and brought it to tax as such but under section 68. Aggrieved, the assessee carried the matter in appeal before the learned CIT(A). Learned CIT(A) deleted the impugned addition on the short ground that the assessee is a tax resident of UAE and as the income under section 68 or 69 can only be covered under the treaty head 'other income', such an income cannot be taxed in India. The Assessing Officer is aggrieved and is in appeal before us.

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

5. Let us, first of all, consider as to what is the basic nature of the transaction, which has resulted in the impugned tax liability. The assessee is said to have, even going by the claim of the revenue authorities, paid some unaccounted monies to the builder, and, by a fiction of law, these unaccounted or unexplained investments are being brought to tax. The trigger for taxability is thus investment in the immoveable property- unexplained investment at that. Bearing this in mind, let us now see the treaty provisions under which this income can be brought to tax in the hands of the assessee- in terms of the provisions of the Indo UAE tax treaty, as there is no dispute that the assessee is, being resident in and fiscally domiciled in the UAE, entitled to the benefits of the Indo UAE tax treaty. We are right now dealing with an assessment year in which tax residency certificate was not even mandatory, but quite fairly, that aspect has not even been

raised before us. Coming to the taxability under the Indo UAE tax treaty, such an income is not specifically taxed under any of the heads in the tax treaty in question. That brings us to the residuary head of income, dealing with 'other income', which is covered by article 22. Under Article 22 (1) of the Indo UAE tax treaty, "**Subject to the provisions of paragraph (2), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Agreement, shall be taxable only in that Contracting State**". It is not even anyone's case that income has arisen here; the case is that the income has been invested here. In any event, the assessee is all along tax resident in UAE, and he does not undertake any economic activities in India. The unexplained investments, which are inherently in the nature of the application of income rather than earning of income, cannot thus be taxed in India under Article 22(1). Article 22(2) only restricts the scope of article 22(1) by providing that "**The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base**". Obviously, this has no application in the present situation either, but what it does highlight anyway is the economic activity nexus with the income, which can be taxed under Article 22(1). Of course, where revenue authorities can bring on record any material to demonstrate, or indicate, that the unexplained investments in question have been made out of incomes generated in India, the situation will be materially different, but that is not the case at present.

6. As for the plea that the India- UAE treaty provides for taxability of income arising from immovable property, this plea is contextually irrelevant inasmuch as what we are dealing with right now is not an income from the immovable property, but an income said to have been invested in an immovable property. The plea is thus devoid of any legally sustainable merits. As for article 23(1), which refers to taxation of capital represented by immovable property, the said article refers to taxation of capital but does not provide, as learned Departmental Representative seem to suggest, for taxation by virtue of investment in the immovable property. Explaining the scope of similar provision, the OECD Model Convention Commentary, which is quoted with approval in UN Model Convention Commentary, states as follows:

> **1. This Article deals only with taxes on capital, to the exclusion of taxes on estates and inheritances and on gifts and of transfer duties. Taxes on capital to which the Article applies are those referred to in Article 2.**
>
> **2. Taxes on capital generally constitute complementary taxation of income from capital. Consequently, taxes on a given element of capital can be levied, in principle, only by the State which is entitled to tax the income from this element of capital.**

7. Clearly, therefore, article 23(1) has no application in the present context. What is impugned before us is not a taxation on capital represented by an immoveable property but taxation on account of a part of investment in an immovable property being unexplained. Since a tax on capital is a tax on assets rather than a tax on income, wealth tax, which is covered by article 2(b)(iii) could at best be covered by the same, but that aspect of the matter is not even relevant in the present context.

8. Coming to the plea, embedded in the ground of appeal, that the **"Indo UAE tax treaty provides for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961",** we see no merits in this plea either. Classification of an income and taxation of an income is inherent part of the treaty mechanism, and unless an income fits in the treaty description of that income, it cannot be subjected to tax as such.

9. The interplay between the treaty and domestic law, as being sought to be canvassed by the revenue authorities, is alien to the treaty taxation mechanism.

10. As a matter of the fact that the ground of appeal itself states that "**the treaty does not cover the taxation of income of the nature such as unexplained investment**" and that is the end of the road so far as taxation of an income, in any head other than the residuary head of 'other income', is concerned, and, since the said income is not even taxable under the residuary article 22, there cannot be any taxation of this income in the hands of the assessee under the Indo UAE tax treaty.

11. It is always useful to bear in mind the fact that, on the first principles, the trigger for taxation of an income in a source jurisdiction is either the economic activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation, The assessee before us is certainly an Indian national, but he is admittedly resident in the UAE so far as his residential status, under the Indo UAE tax treaty is concerned, is of the UAE tax resident. The residuary taxation rights, in terms of the treaty provisions, belong to the residence jurisdiction, but even if that was not to be so, the residence rights can at best go to the source jurisdiction, which in turn refers to a jurisdiction in which the income is earned, rather than a jurisdiction in which the income is invested. By no stretch of logic, therefore, such an income could be taxed in India, which is neither residence nor source jurisdiction; it is at best investment jurisdiction. However, the scheme of tax treaties limits the rights of taxation either to residence or to source jurisdiction.

12. What essentially follows is that if, under the domestic tax laws of the UAE, the amounts in question can be treated as of income nature, the tax implications of these amounts, under the scheme of the Indo UAE tax treaty, can at best follow in the UAE, but that is not relevant in the present context of holding these amounts to be, even if so permissible in our domestic tax laws, taxable in India. The revenue thus derives no support from the Indo UAE tax treaty, which, under the scheme of Section 90(2), must make way to the domestic law provisions except to the extent the applicable treaty provisions are 'more' favourable to the assessee.

13. As for the alleged interest income, there is no finding whatsoever to suggest that there was indeed any interest income inasmuch as even the Assessing Officer is tentative when he states that the related entry "probably" refers to interest receipt. The taxability of interest is, even by the standards of the revenue authorities, also thus far from established. There is no evidence whatsoever, or even a serious allegation, that there is an interest income.

14. Learned counsel, however, has much more armoury in defence of the conclusions arrived at by the learned CIT(A). It is his case that all investments in India are duly accounted for, and what is being said to unaccounted is a pure figment of imagination based on material which cannot meet any judicial scrutiny. Learned counsel invites our attention to certain nuances of the domestic tax law jurisprudence and submits, no matter how politely and in a subtle manner though, that even under the basic provisions of domestic law, the amounts in question could not

be brought to tax, and there is thus no occasion to even look at the treaty provisions. He submits that the assessee was not confronted with the material on the basis of which the impugned additions are made and that the assessee was not given an opportunity to cross-examine the person from whom the alleged incriminating material was seized. Learned counsel further submits that the presumption of correctness of the seized material, under section 132, operates vis-à-vis the searched person and not vis-à-vis the universe. It is his vehement argument that, in any event, the impugned addition could not have been made in the hands of the assessee. While learned counsel is content with the relief given to the assessee on the basis of the treaty provisions, if that is the conclusion we reach, but he nevertheless wishes to reserve his rights to raise all these issues as and when, in his considered view, it is necessary to do so.

15. Given our findings as above, however, it is not really necessary to deal with these aspects on merits. The assessee before us is a tax resident of the United Arab Emirates and is thus entitled to the benefits of the Indo UAE tax treaty. When the rights to tax the income in question, under the applicable tax treaty provisions, are allocated to the residence jurisdiction, it is wholly immaterial whether or not the source jurisdiction has the right to tax that income, and, in any event, India is not even a source jurisdiction for the income in question as no economic activities have been carried out in India- it is at best the jurisdiction in which earnings are invested. That cannot anyway have any bearing on the taxation of income. In our considered view, therefore, since, under the terms of the Indo UAE tax treaty, the right to tax the amounts in question, even if that be of income nature in the hands of the present assessee, does not belong to India, all these issues being raised by the learned counsel are wholly academic as of now, and do not call for our adjudication. Having said that, however, in due deference to the legitimate rights of the assessee, we make it clear that, if so necessary in future, the assessee will be at liberty to raise these issues.

16. In view of these discussions, and bearing in mind the entirety of the case, we approve the well-reasoned conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

17. In the result and subject to the above observations, the appeal is dismissed. Pronounced in the open court today on the 23rd day of November 2021

Sd/-	***Sd/-***
Ravish Sood	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 23rd day of November 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai