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Past, Present and Future of Tax Residency Certificate – Part 2

Date: October 19,2018

Priti Shah (Partner, T.P Ostwal & Associates LLP)

Mitali Shah

. Pl y - Judicial precedents

i. In the case of **Universal International Music B.V.**[1], the Bombay High Court while determining beneficial owner of royalty income received by Netherlands company for applying treaty benefits concluded that certificate of residence issued by the tax authorities of Netherlands shall be a sufficient document to show beneficial ownership of the assessee in Netherlands. Similar view was taken by the Mumbai Tribunal in the case of **HSBC Bank (Mauritius) Limited**[2], by giving reference to the aforesaid High Court decision, wherein it held that TRC issued by the Mauritian Revenue authorities was sufficient evidence to accept that the "beneficial ownership" of the interest income was with the assessee.

ii. In the ruling of **Serco BPO Private Ltd.**[3]**,** the Punjab and Haryana High Court ("High Court") concluded that sellers holding the TRCs are to be regarded as the tax residents of Mauritius and eligible to claim the benefits of the India-Mauritius tax treaty since the validity of the TRC was not challenged and also because the TRC is a conclusive evidence to establish the residency of the sellers in Mauritius. Consequently, the income arising to sellers from the sale of shares in Indian company would not be taxable in India and the taxpayer would not be required to withhold tax thereon.

iii. Thereafter, similar issue was dealt with AAR at two occasions simultaneously when two Mauritius companies (AB Holdings Mauritius-II and AB Mauritius) transferred their respective investments in the form of shares of two Indian companies to a Singapore group company. The moot question before the AAR was on the taxability of the capital gains in India, in light of beneficial provisions of India-Mauritius tax treaty.

In one ruling[4], the AAR observed that Mauritian company possessed a valid TRC from Mauritius tax authorities, had on-going business of investment for almost 7 years, and was not a mere fly-by-night operator. The AAR placed thrust on the initial investment being done by Mauritian company out of its own resources, through proper banking channels, and had adequate documentation in place to demonstrate the same. For these reasons, the AAR held that the capital gains arising on the sale of Indian company shares would not be taxable in India under India-Mauritius tax treaty.

In the other ruling[5], while the Mauritian company possessed a valid TRC from Mauritian tax authorities, the AAR accentuated on the *modus operandi* at the time of the acquisition of shares by the Mauritian company. It was observed that neither the Mauritian company was able to demonstrate that the decision to purchase the Indian company shares was taken by it acting on its own behalf, nor the investment flowed from Mauritius to India. Taking entire fact pattern into consideration, the AAR held that Indian company shares did not actually belong to the Mauritius company but to the US based holding company, hence India-Mauritius tax treaty benefit was denied to it.

The above evidences that merely having a TRC shall not make a non-resident eligible to claim treaty benefits but the activities in substance shall matter the most.

iv. Recently this year, the Bangalore Tribunal, in the case of **Google India Private Limited**[6], examined the clarification issued by the Ministry of Finance through Circular No. 789 and the Press Release dated 01.03.2013. It held that through the said Circular No.789, it has been made clear that wherever certification of registration is issued by Mauritius authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA. Through the Press Release dated 01.03.2013, it has been clarified that the TRC produced by a resident of a contracting state shall be accepted as evidence that he is a resident of that contracting state and income-tax authorities in India will not go behind the TRC and question the resident status, meaning thereby, through this Press Release, it has been made clear that TRC is the final word with regard to residential status of the party and the Revenue cannot go beyond it unless and until they have some other evidence.

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v. Recently, the Ahmedabad bench of the Income Tax Appellate Tribunal ("Tribunal"), in the case of**Skaps Industries India Private Limited**[7] ("the Company" or "the assessee"), observed that the provisions of section 90(4) do no start with a *non-obstante* clause vis-à-vis section 90(2) of the ITA. In the absence of such non-obstante clause, the Tribunal has held that section 90(4) cannot be construed as a limitation to the tax treaty superiority as stipulated in section 90(2) of the ITA. Thereby, the Tribunal has held that in the absence of a valid TRC, provisions of section 90(4) could not be invoked to deny tax treaty benefits. This decision affirms the position that the tax treaty benefits cannot be denied merely on the basis of non-availability of TRC. Further it also affirms that when a non-resident assessee has substantiated its residential status by way of sufficient and reasonable documentary evidence, the requirement of furnishing TRC would be persuasive and not mandatory.

Therefore, it appears that any document apart from TRC would also suffice for proving residency in a foreign country. But, what constitutes sufficient and reasonable documentary evidence is still not clear. Would a certificate of incorporation be sufficient? Or a certificate of citizenship? Uncertainty looms large on this question and it shall be resolved only with time.

. Pa se - Proving Tax Residency- The Worldwide Scenario

It shall be interesting to pause at this moment and see what other countries around the world require for the purpose of proving overseas tax residency. The requirements of a few countries have been listed hereunder:

i. United Kingdom

In UK, non-resident companies are required to apply for relief or repayment of UK Income tax in Form DT-Company for claiming tax treaty benefits. Similarly, Form DT-Individual is to be submitted by non-resident individuals for the same. Then the non-residents need to send such filled forms to the taxation authorities of Resident country for their certification and additional documents regarding the transaction may also be required by HMRC. Further, HMRC generally do not issue a TRC however, on special request, the same can be obtained by UK residents as well. Therefore, there is no requirement to submit a TRC to HMRC to claim tax treaty benefits.

ii. USA

USA tax authorities require non-resident tax payers to file Form W-8BEN-E which is a certificate of status of beneficial owner for United States tax withholding and reporting. The said form requires the non-resident to quote his U.S. taxpayer identification number, if not available the non-resident can even quote tax identification number of his resident state. This form is used by non-resident tax payers to substantiate tax residency in a foreign country to claim treaty benefits. Further, IRS also provides US residency certificate to its US tax residents in Form 6166 for claiming US treaty benefits. Hence, even in USA, no specific provisions have been laid with regards to submission of TRC to claim treaty benefits.

iii. Canada

In order to claim DTAA benefits in Canada, one is merely required to submit a prescribed form giving a declaration of eligibility for benefits (reduced tax) under a tax treaty.

iv. Italy

In Italy, the foreign resident has to provide the documents to the withholding agent (or, in case of reimbursement, to the Italian Tax Authorities) for the purpose of lower or no withholding tax deduction. It is also pertinent to note that the withholding agent (i.e. the Italian Company) is required to possess the requisite documents immediately before the tax is to be withheld. The documents usually requested are *inter alia* foreign tax authority's certification. The certificate is mandatory because in case of a tax audit the withholding agent has to prove the foreign subject was entitled to ask the exemption/the reduced rate.

v. Australia

In Australia, relief at source in accordance with the double tax treaty is granted automatically if the recipient of income informs the payer about the state of residence, with which a double tax convention has been concluded. Therefore, there is no mandatory requirement to submit a TRC to claim treaty benefits in Australia.

vi. Russia

Generally, Russian tax authorities require a certificate of residence issued by foreign countries for the purpose of granting tax treaty benefits. However, it is interesting to note that banks which are tax resident of foreign countries are not be

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required to submit a certificate of residence while claiming treaty benefits if the tax residence is confirmed by publicly available information sources such as the international directory “the banker’s Almanac”, the international catalogue “International bank identifier code”, the “BIC directory” guide or the information system of Bloomberg.

vii. Malta

In Malta, for the purpose of claiming withholding tax relief under the tax treaty, non-resident tax payers are required to send request in writing directly to the Commissioner of Inland Revenue, Floriana, Malta.

viii. New Zealand

In New Zealand, if a non-resident tax payer has to claim relief in accordance with a tax treaty, he can do so merely by informing the payer of the income about his country of residence and a tax residency certificate is not required to claim treaty benefits.

ix. Other countries

Some countries require a declaration by the non-resident claimant along with the certificate of residence, while in some, only providing the certificate of residence would suffice. A few of such countries and their requirements have been listed below:

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Sr. No.	Country	Requiring Certificate of Residence	Requiring a Declaration by the non-resident claimant
1	Albania	a	-
2	Austria	a	-
3	Belarus	a	-
4	Belgium	a	-
5	Bosnia and Herzegovina	a	-
6	Bulgaria	a	a
7	China	a	a
8	Croatia	a	a
9	Cyprus	a	a
10	Czech Republic	a	a
11	France	a	-
12	Germany	a	a
13	Greece	a	a
14	Hong-Kong	a	-
15	Indonesia	a	a
16	Israel	a	a
17	Kazakhstan	a	a
18	Latvia	a	-
19	Lithuania	a	a
20	Malaysia	a	-
21	Norway	a	-
22	Portugal	a	-
23	Romania	a	-
24	Serbia	a	-
25	Singapore	a	-
26	Slovakia	a	-
27	Spain	a	a
28	Turkey	a	-
29	Ukraine	a	-

. Forward - What the future beholds:

The future of TRC is still on an uncertain path. While this vexed issue remains unresolved as such, the Ahmedabad Tribunal ruling in Skaps Industries India Private Limited (supra) has rolled out a welcome mat for acceptance of documents apart from TRC to substantiate tax residency in a foreign country. It would be interesting to understand which other documents can fulfil this requirement since India is amongst the few countries who have shown signs of acceptance of documents apart from certificate of residency for proving tax residency in a foreign country.

There is a need to initiate an alternative mechanism as it can take tax authorities some time to issue formal certificates of residence to taxpayers and this delay can make it difficult for taxpayers who wish to use these certificates to claim tax treaty benefits. Such alterative proofs could include self-certification by the investor and/or residence documentation gathered by financial intermediaries (sometimes referred to as "Know Your Customer" rules) or any other registration number or reference number which may be allotted by the local authorities of the foreign jurisdiction or a return of income assessed by the foreign tax authorities which establishes the residence of the taxpayer. Such alternative procedures could result in

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savings in administrative cost as well as precious time of the revenue authorities.

Based on the above, another interesting facet to note is the “Common Application Form” introduced by the Government of India for the Foreign Portfolio Investors vide Notification No. F. No. 4/15/2016-ECB dated 21st August 2018 issued by Department of Economic Affairs. This has been introduced with a view to enhance the operational flexibility and to ease out the various compliances with a number of regulatory authorities like filing the form with the Securities and Exchange Board of India (‘SEBI’) for registration, approach banks for opening of bank accounts, approach income tax department for allotment of Permanent Account Number (‘PAN’) and market intermediaries for Demat accounts. It is pertinent to note that the aforesaid form requires the TRC number of the applicant as part of the KYC information. Would this take us back to the foundation laid down by the Supreme Court? Will the TRC be considered as a conclusive evidence of tax residency? Or which other documents would suffice? A clarification from the Indian tax authorities in this regard is awaited.

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[1] [TS-56-HC-2013(BOM)]

[2] TS-460-ITAT-2018 (Mum.)

[3] [TS-484-HC-2015(P & H)]

[4] [TS-634-AAR-2017]

[5] [TS-635-AAR-2017]

[6] [2018] (Bangalore - Trib.)

[7] [TS-330-ITAT-2018(Ahd)]