FINANCE

Foreign investors from Mauritius likely to keep taxman at bay

Synopsis

One such attempt by the Income tax (I-T) department to lift the 'corporate veil' was struck down this week by a court which ruled that the tricky subject of 'beneficial ownership' (BO) of the Mauritian entity cannot be linked to capital gains.

By Sugata Ghosh, ET Bureau

Last Updated: May 20, 2022, 07:43 AM IST

Foreign **investors** coming from **Mauritius** are often denied capital gains **tax** relief on the grounds that persons controlling the tax haven companies are based in other countries. This may change now.

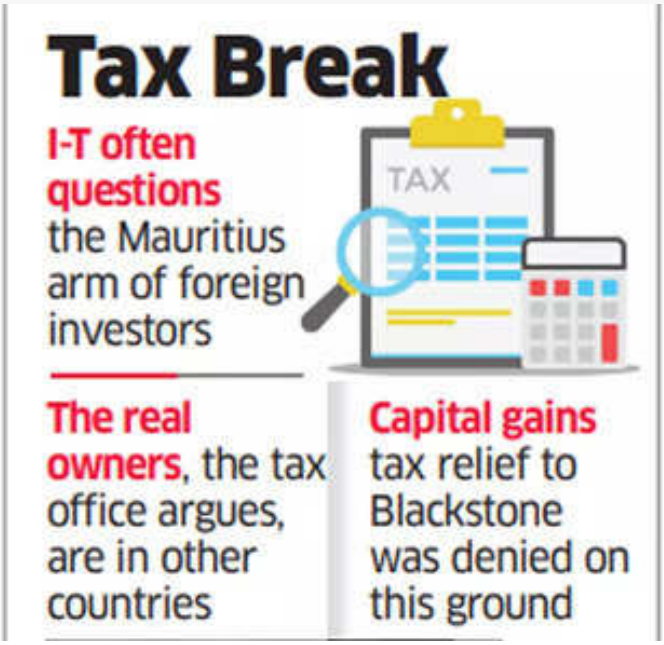
One such attempt by the Income tax (I-T) department to lift the 'corporate veil' was struck down this week by a court which ruled that the tricky subject of 'beneficial ownership' (BO) of the Mauritian entity cannot be linked to capital gains.

The ruling by Income tax Appellate Tribunal (**ITAT**), a quasi-judicial authority, relating to **Blackstone** FP Capital Partners Mauritius V Ltd, pertains to financial year 2015-16 when it booked capital gains of over ₹900 crore after selling stocks of **CMS Info Systems**.

The tax officer's contention was that the effective control of the company in Mauritius lay with entities in the Caribbean tax haven Cayman Islands. Thus, Blackstone cannot derive the **capital gains tax** benefits - with no tax required to be paid for sale of stocks bought before 2017 - as provided in the amended treaty between India and Mauritius. The tax officer believed it was a fit case to lift the proverbial corporate veil to point fingers at the real BOs.

'Certificate of Residence Enough'

However, ruling on the appeal by Blackstone, the Mumbai bench of the Tribunal, comprising judicial member Pavan Kumar Gadale and vice president Pramod Kumar, said the "concept of BO of the capital gains" cannot be read into the scheme of Article 13 (dealing with capital gains) of the treaty.



"The Tribunal has held that the Treaty does not require the BO test to be met for capital gains tax exemption. The (apex tax body) CBDT had already issued Circular no. 789 in 2000 stating that wherever a Certificate of Residence is issued by the Mauritian Authorities, such a Certificate will constitute sufficient evidence for accepting the status of residence as well as BO for applying the Treaty. This circular has been upheld by the Supreme Court in the case of Azadi Bachao Andolan as well as in Vodafone. This circular does not appear to be dealt with in the ruling," said Shefali Goradia, Partner (Business Tax) at Deloitte Touche Tohmatsu India.

While the ruling has gone down well, ITAT's decision to send the matter back to the assessing officer (AO) has evoked mixed feelings.

According to Parul Jain, who heads international tax practice at Nishith Desai Associates, tax jurisprudence in the past has also unequivocally upheld that corporate veil of an entity can be pierced only in instances when the transaction appears to be a sham. “Simply because the Mauritius entity is held by a Cayman parent cannot be a prima facie reason for lifting the corporate veil. However, once ITAT established that the beneficial ownership criteria cannot be read into Article 13, the remand of the case back to the AO seems unwarranted, and may prolong litigation,” said Jain.

There is a raging debate globally on BO in the context of treaties. Against this backdrop, ITAT feels it’s not at the whim or fancy of a tax authority to decide what constitutes BO. Agreeing that the Tribunal has rightly observed that requirement of being a BO is not present under Article 13(4) of the Treaty, Sanjay Sanghvi, partner at Khaitan & Co, said it would be interesting to find out what parameters or

principles the tax officer apply to see if the requirement of BO is really inbuilt under Article-13 of the Treaty. The tax officer will now have to show, based on facts, as to why the Mauritius entity should not be treated as BO of the shares and its corporate veil should be lifted, said Goradia.