TIGER ROARS, TAX UNCERTAINTY SOARS! –THE ULTIMATE "UPSIDE DOWN" OF INTERNATIONAL TAX JURISPRUDENCE IN INDIA

(Part – 2)

In the first part of this series of articles, the authors have critically examined the facts of ***Tiger Global*** (Supra) and the key findings of all the authorities, including those of the Supreme Court. In this part, the authors endeavour to identify the core issues and address them, while being careful of the prestige of the Supreme Court. However, one thing is stark – the oscillating stands before the Supreme Court, which create an atmosphere of uncertainty and is counter-productive to the overall business environment. Since India is at the threshold of establishing its credibility as an investment hub in the current geopolitical atmosphere, these kinds of decisions are repressive and retrograde. India should not be perceived as a country that, when in need of investments, looks the other way and, when its economy has stabilised and mushroomed, it retracts its commitments.

In the above context, this part analyses the decision in ***Tiger Global*** (Supra), identifies the implications and most importantly, suggests the way forward. The Supreme Court's decision has immense potential of being misused and misquoted, without really appreciating the context in which it was rendered, more specifically, on the facts of ***Tiger Global*** (Supra). Needless to say, the way forward is litigative and it would take years to undo this damage.

Analysis:

In the opinion of the authors, the judgment of the Supreme Court contains various *obiter dicta*, capable of opening the pandora's box of unintended consequences. As regards the *obiter* contained in a judgment, the law is well-settled that if, in the absence of an *obiter,* the conclusion of the Court would remain the same, then such an *obiter* is not at the same pedestal as the conclusion itself.[1]

At the outset, the below-mentioned *obiter dicta* are well-regarded, being founded on established principles of law:

i. It is only once taxability under the domestic law is established that the question whether such taxability stands overridden by an applicable DTAA would arise.

ii. Section 90(2A) of the IT Act is the only impediment to the DTAA override provision, *i.e.*, Section 90(2) of the IT Act. The impact of the applicability of Section 90(2A) of the IT Act is that the benefit of treaty override is negated.

iii. The LOB clause or SAAR contained under Article 27B only applies to cases falling under Article 13(3B) of the India – Mauritius DTAA. However, on the facts of ***Tiger Global*** (Supra), Article 13(3B) has no applicability.

iv. The burden of proof for evidencing that a transaction is a *prima facie* tax avoidant arrangement for the purpose of Section 245R(2) of the IT Act is on the AAR. However, the level of satisfaction to arrive at the said conclusion is much less compared to a case where a fact must be proved. In contradiction, it is on the taxpayer to rebut the presumption of tax avoidance under GAAR.

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[1] ***Estate Officer, Haryana Urban Development Authority and Others vs. Nirmala Devi***, Civil Appeal No. 7707 of 2025, decision dated 14.07.2025 (Supreme Court); and ***Property Owners Association and Others***, Civil Appeal No. 1012 of 2002, decision dated 05.11.2024 (Supreme Court).

At this juncture, it is apposite to deal with the other *obiter dicta*, which, in the respectful opinion of the authors, are antithetical to the spirit of certainty. The same are set out below:

i. ***Interplay of JAAR, GAAR and SAAR:***

a. The Supreme Court observed that since JAAR applies in parallel and as an alternative to GAAR, it is entitled to be invoked, even if a transaction does not qualify as an "impermissible avoidance arrangement" under GAAR.

b. The above observation of the Supreme Court runs contrary to the averment made for the Indian Revenue Authorities, that GAAR is nothing but statutorily codified JAAR. It also runs contrary to the intention of the Legislature, which is reflected in the Memorandum to the Finance Bill, 2012, as under:

> "…*In an environment of moderate rates of tax, it is necessary that the correct tax base be subject to tax in the face of aggressive tax planning and use of opaque low tax jurisdictions for residence as well as for sourcing capital.* ***Most countries have codified the "substance over form" doctrine in the form of General Anti Avoidance Rule (GAAR)****.*
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> ***In the above background and keeping in view the aggressive tax planning with the use of sophisticated structures, there is a need for statutory provisions so as to codify the doctrine of "substance over form"*** *where the real intention of the parties and effect of transactions and purpose of an arrangement is taken into account for determining the tax consequences, irrespective of the legal structure that has been superimposed to camouflage the real intent and purpose. Internationally several countries have introduced, and are administering statutory General Anti Avoidance Provisions. It is, therefore, important that Indian taxation law also incorporate a statutory General Anti Avoidance Provisions to deal with aggressive tax planning*."

c. Therefore, by upholding the applicability of JAAR, notwithstanding the codification of GAAR, in a way, the Supreme Court seems to have blessed JAAR, irrespective of the fact that GAAR applies. The checks, balances and exceptions on the exercise of such power, contained in Chapter X-A of the IT Act itself, have been rendered redundant. Needless to state, this observation of the Supreme Court has clear trappings of an *obiter* and should not be considered as having any precedential value, especially when the Supreme Court had already accepted the applicability of GAAR.

ii. ***Grandfathering under GAAR:***

a. The Supreme Court has clearly erred in observing that the grandfathering clause under GAAR[2] applies to capital gains "***from transfers made on or before 01 April, 2017***". This interpretation runs contrary to the plain language of Rule 10U(1)(d) of the Rules, which uses the phrase "***transfer of investments made before the 1st day of April, 2017***". The error is writ large in the observation of the Supreme Court, since GAAR was in any case not

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[2] Refer Para 41 of ***Tiger Global*** (Supra). The authors believe that given the context of the preceding and the succeeding Paras, the Supreme Court probably has inadvertently use the term "GAAR", instead of the term "Article 13(4)".

applicable before 01 April, 2017 and therefore, the necessity for grandfathering such investments would not arise.[3]

b. The Supreme Court further observed that Rule 10U(2) of the Rules dilutes the grandfathering benefit under Rule 10U(1)(d) of the Rules, such that, in the event a tax benefit is obtained after the cut-off date of 01 April, 2017, GAAR shall be applicable. As per the Supreme Court, this interpretation shall ensure that while pre-existing investments are grandfathered, arrangements that continue to yield benefits post the cut-off date come within the ambit of GAAR.

c. It would be relevant to note the construct of Rules 10U(1)(a), 10U(1)(d) and 10U(2) of the Rules, with specific attention to the factum of Rule 10U(2) being a "without prejudice" provision. The said Rules are reproduced below:

Chapter X-A not to apply in certain cases.

10U. (1) The provisions of Chapter X-A shall not apply to-

(a) an arrangement where the tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does not exceed a sum of rupees three crore;

…

(d) any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before the 1st day of April, 2017 by such person.

(2) Without prejudice to the provisions of clause (d) of sub-rule (1), the provisions of Chapter X-A shall apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from the arrangement on or after the 1st day of April, 2017.

d. The manner in which Rule 10U(2) has been interpreted, to make Rule 10U(1)(d) otiose, conflicts with the phrase "without prejudice to the provisions of clause (d) of sub-rule (1)" used in Rule 10U(2) of the Rules.[4] The clear intent of the law was that all investments made under an arrangement before 01 April, 2017 would stand protected. What Rule 10U(2) of the Rules does is to take away the benefit in respect of such a continuing arrangement, where investments have been made after 01 April, 2017. The objective of this clause was to accord protection to investments made before 01 April, 2017 and not

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3 Even if it is considered that the observation in Para 41 are in respect of Article 13 of the India – Mauritius DTAA, as amended by the Protocol, the interpretation that grandfathering applies to "***transfers made on or before 01 April, 2017***", is also contrary to the amended Article 13 of the India – Mauritius DTAA, which uses the phrase, "***gains from the alienation of shares acquired on or after 01 April, 2017***".

4 ***Kamleshkumar Ishwardas Patel vs. Union of India***, [1995] 4 SCC 51 (Supreme Court); ***Union of India vs. Pfizer Limited and Others,*** [2018] 2 SCC 39 (Supreme Court); and ***Dharani Sugars and Chemicals Limited vs. Union of India and Others***, [2019] 5 SCC 480 (Supreme Court).

where an investment was made subsequently, but under an arrangement that existed before 01 April, 2017.

e. It is a trite law that a provision of law must be interpreted harmoniously in a manner that makes the entire law workable. No interpretation should be adopted that results in a conflict and renders any provision otiose.[5]

f. Strangely, the Supreme Court relied on the Report dated 30 September, 2012, by the Shome Committee, which serves as legislative guidance in respect of GAAR. The said Report itself draws a distinction between an "investment" [which, as per Rule 10U(1)(d) of the Rules, enjoys grandfathering protection] and a continuing "arrangement" (which does not enjoy any grandfathering protection). It cautions that in the event an arrangement (and not an investment) is grandfathered, then all future investments within such investment shall enjoy exemption for an indefinite future. The Supreme Court obliterated the difference between an "investment", envisioned under Rule 10U(1)(d) of the Rules, and an "arrangement", envisioned under Rule 10U(2) of the Rules. Relevant portion of the Report of the Shome Committee, as under:

> "*Grandfathering an existing arrangement (instead of existing investments) may inadvertently keep many future advance tax avoidance schemes out of examination under GAAR since a tax avoidance structure itself would receive indefinite protection, and diminish the effectiveness of GAAR. In other words, it would allow an impermissible arrangement to exist in perpetuity if created before commencement of GAAR and grandfathered under GAAR provisions. For instance, if a conduit company (says a letter box company) is incorporated in a favourable jurisdiction in 2008 and this arrangement is grandfathered, then, all future investments made by it would also enjoy tax exemption for the indefinite future. Once this was explained, stakeholders agreed that the intention should be to grandfather investments rather than arrangements.*
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> *It was also suggested to grandfather only those investments which have remained invested in India for a number of years (say five years or so), this would be unfair to those who invested within the last five years, considering the existing law at that point of time. Thus it is important to grandfather all investments.*
>
> *In view of the above, the Committee recommends that* ***all investments (though not arrangements) made by a resident or non-resident and existing as on the date of commencement of the GAAR provisions should be grandfathered so that on exit (sale of such investments) on or after this date, GAAR provisions are not invoked for examination or denial of tax benefit****.*"

g. Clearly, there is a stark error in the interpretation of Rule 10U of the Rules. What the Supreme Court has also missed is that all along, the atmosphere of tax certainty was being created for the investors and the interpretation of Rule

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5 ***Fertilizer Corporation of India Limited and Others vs. Coromandal Sacks Private Limited***, Civil Appeal No. 5366 of 2024, decision dated 26.04.2024; and ***Radhika T. vs. Cochin University of Science and Technology and Others***, Special Leave Petition (C) No. 10079-10080 of 2025, decision dated 18.12.2025 (Supreme Court).

10U(2) of the Rules, as endorsed, runs contrary to the intent of the Executive itself.

iii. ***Applicability of CBDT Circulars and Instructions:***

a. The Supreme Court observed that various Circulars and Instructions issued by the CBDT[6] on TRC are all inapplicable post the coming into force of the statutory amendments in light of ***Vodafone International Holding BV*** (Supra).

b. The said Circulars and Instructions have been issued by the CBDT in terms of the authority delegated to it in terms of Section 119 of the IT Act and reflect the Executive's position. The Executive was well within its power to whittle down the effect of these Circulars and Instructions by making suitable amendments. In the absence of such action by the Executive, it was not open to the Supreme Court to place a restrictive covenant, to negate the effect of these Circulars and Instructions. This is nothing but a transgression by the Judiciary into an arena reserved solely for the Legislature.

iv. ***Indirect Transfer of Capital Assets Situated in India:***

a. The Supreme Court observed that indirect transfer of a capital asset situated in India is not covered under any of the provisions relating to capital gains taxability in the India – Mauritius DTAA, including Article 13(4), since the *property and shares forming the subject-matter of the transaction were not directly held by the Mauritian entities*. Thus, the Supreme Court held that the right to tax capital gains arising from an indirect transfer of a capital asset situated in India is with India, being the source State.

b. The key issues to be considered here are the construction of Article 13 of the India – Mauritius DTAA and whether it was open for the Supreme Court to read the condition of "directly held", so as to exclude indirect transfers from the scope of Article 13(4) of the India – Mauritius DTAA.

c. Proceeding clinically, one would have to appreciate that if the Supreme Court was of the view that the Mauritian entities, at the very outset, were ousted from claiming the benefit of the India – Mauritius DTAA, owing to them not qualifying the residence criteria, then, what necessitated the Supreme Court to examine the scope of Article 13 of the India – Mauritius DTAA? In the opinion of the authors, since the entire energy of the AAR and the Supreme Court was focused on denying the benefit of the India – Mauritius DTAA, the observation relating to capital gains arising from indirect transfers not being covered under Article 13 was totally uncalled for.

d. Without prejudice, Article 13(4) of the India – Mauritius DTAA is reproduced, as under:

> "*4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident*."

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6 Circular No. 682/ 1994, Circular No. 789/ 2000 and Circular No. 1/ 2003, stating that production of TRC is conclusive evidence of residency and beneficial ownership, for claiming the benefit under the India – Mauritius DTAA.

e. A bare perusal of the above reveals that capital gains arising from alienation of ***any property***, which is ***not specifically dealt with*** under the foregoing clauses of Article 13 of the India – Mauritius DTAA, fall within the ambit of Article 13(4). Consequently, the right to tax such capital gains is with the State of which the alienator is a resident. It is undisputed that the case before the Supreme Court did not fall under any specific clause of Articles 13(1) to 13(3B) of the India – Mauritius DTAA. Therefore, by necessary implication, it being a case of ***property not covered under Articles 13(1) to 13(3B) of the India – Mauritius DTAA***, capital gains arising in this transaction could be taxed only in Mauritius. The insertion of the term "directly" by the Supreme Court does not emanate from the plain reading of the Article, and the decision is stoically silent as to how the Supreme Court paved its way to reach the said conclusion.

v. ***Liable to Taxation vs. Subject to Taxation:***

a. The Supreme Court observed that since the object of a DTAA is to grant relief against double taxation and not to facilitate tax avoidance or tax evasion, for the DTAA to apply, a taxpayer must prove that the transaction in question is taxable in the resident State. The above observation of the Supreme Court does not emanate from a single Para, but when the contents of Para 19 are read with Para 49, the above is the inescapable conclusion. In the opinion of the authors, there was no reason to comment on this aspect of the matter, since residency and the applicability of the India – Mauritius DTAA itself were being questioned, and as such, there was no requirement to examine the phrase "liable to taxation", as contained in Article 4(1) of the India – Mauritius DTAA.

b. The benefit of a DTAA is granted only to a resident of a Contracting State. The term "resident" is defined under Article 4(1) of the India – Mauritius DTAA, as under:

> "*1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State,* ***is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of similar nature****. The terms "resident of India" and "resident of Mauritius" shall be construed accordingly*."

c. Therefore, as per Article 4(1) of the India – Mauritius DTAA, for establishing residency of a person in Mauritius, such a person should be "liable to taxation" (*emphasis supplied*) in Mauritius, based on the Mauritian law. This means that it is enough that Mauritius has the right to tax such a person, whether or not such a right is actually exercised.[7] Viewed in this light, since Mauritius had the right to tax the Taxpayers, they were liable to taxation therein, and the fact of their actually being taxed in Mauritius is an irrelevant consideration for both the determination of their residency as well as entitlement to the benefits under the India – Mauritius DTAA.

d. Even otherwise, if the phrase "liable to taxation" is interpreted strictly, it would mean that a resident of Mauritius may have different sources of income and if such resident is taxed in respect of any source of income based on the criterion contained in Article 4(1), *i.e.*, domicile, residence, place of management or any

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[7] ***Azadi Bachao Andolan*** (Supra); and ***General Electric Pension Trust, in Re***., [2006] 280 ITR 455 (Authority for Advance Rulings), which relies upon the United Kingdom Her Majesty's Revenue and Custom's International Manual and has consistently been followed by Courts in India.

other criterion of similar nature, then such resident would qualify to be treated as the resident of Mauritius. The India – Mauritius DTAA does not provide that the source of income in respect of which a benefit is claimed should have been taxed in Mauritius. The way the issue has been addressed by the Supreme Court demonstrates a very broad-brushed approach, not appreciating the finer nuances of the law.

vi. ***Exemptions and DTAA Benefits:***

a. The Supreme Court observed that if a taxpayer seeks an exemption from tax both in the resident and the source State, such a position runs contrary to the spirit of DTAAs and provides a strong basis for the Tax Authorities to question the availability of a benefit under DTAAs in the Source state.

b. In regard to the above, an exemption from taxation presupposes a charge to taxation, *i.e*., the right to taxation.[8] It was on this basis that the Supreme Court, in ***Azadi Bachao Andolan*** (Supra), held the Mauritian entities to be eligible for the benefit under the India – Mauritius DTAA, notwithstanding the exemption under the Mauritian law.

c. It may also be relevant to point out that the objective of a DTAA is to allocate taxing rights between Contracting States, and once such a right has been allocated, the other jurisdiction's right to taxation (and resulting consequences) is completely ousted.[9] Once having allocated such taxing rights, a grant of exemption in respect of a specific item of income would not compromise the phrase "liable to taxation" under Article 4(1) of a DTAA.

vii. ***Judicial Legislation:***

Pursuant to ***Tiger Global*** (Supra), the Judiciary is at the forefront, being scrutinised for acting as the super Parliament, against the basic structure of the Constitution, as well as the other established principles of the rule of law. In ***Tiger Global*** (Supra), the Supreme Court introduced restrictions, which were the sole prerogative of the Executive, while simultaneously disrupting the well-established principles of statutory interpretation. One stark example is that after the amendments in Section 90 of the IT Act, if the Executive intended to diminish the evidentiary value of a TRC, then nothing prevented them from amending, modifying, or withdrawing the Circulars or Instructions issued earlier by it. Thus, to conclude whether the amendments curtailed the evidentiary value of a TRC was clearly within the realm of the Executive and the Supreme Court's reading of restrictions tantamount to judicial legislation, which is impermissible.

The concurring judgment speaks at length about constitutional tax sovereignty, which, respectfully, was entirely irrelevant for deciding the legal issue at hand. Further, while cautioning against dilution of the separation of powers, the concurring judgment itself proceeds to transgress into the designated Legislative function. It undermines the authority of the Executive in bargaining DTAAs. Therefore, even though ***Tiger Global*** (Supra) talks about "India as a destination for future growth and progress", it is antithetical to the spirit of certainty, impeding the growth of India as an investment hub.

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8 ***Associated Cement Companies Ltd. vs. State of Bihar***, [2004] 7 SCC 642 (Supreme Court).

9 ***Azadi Bachao Andolan*** (Supra); and ***CIT vs. P.A.V.L. Kulandagan Chettiar***, [2004] 267 ITR 654 (Supreme Court).

On a side note, one wonders whether arguments advanced on behalf of the Indian Revenue Authorities could be in conflict with the Circulars or Instructions issued by the CBDT and Clarifications, which clearly reflected the intention of the Executive!!!

Implications:

The immediate implications of ***Tiger Global*** (Supra) could be articulated as under (notwithstanding that in the opinion of the authors, some of these are *obiter*):

i. TRC is not determinative for establishing residency under a DTAA.

ii. Investments made prior to 01 April, 2017 are not shielded from scrutiny under GAAR.

iii. Irrespective of the codification of the anti-abuse provisions in India, it would be open for the Indian Revenue Authorities to apply JAAR.

iv. Capital arising from indirect transfers is not covered under the residual clause of Article 13 of the India – Mauritius DTAA.

v. To avail the benefit of an applicable DTAA, it is incumbent upon a non-resident to be actually taxable in its State of residence.

vi. If a stream of income is exempt from tax in both home and host jurisdictions, this would be reason enough to question the claim of benefits under a DTAA.

Way Forward:

i. ***Residency:***

Needless to say, in all cases where a benefit of a DTAA is claimed, the Indian Revenue Authorities are likely to question the residency. The immediate consequence of this would be that, apart from obtaining a TRC, a taxpayer would have to equip itself with all supporting documentation to establish that its effective management and control lies in the home State. There are clear indicators emanating out of the ***Tiger Global*** (Supra) controversy, such as documentation related to Board Meetings; presence of Board of Directors; operations of bank accounts; etc., which were relied upon to establish that the head and brain were not in the home State, *i.e.*, in Mauritius, and lay elsewhere.

One more factor that must be catered to is that such entities should have some sources of income emanating from the location itself, which are subject to taxation in that location. Having said so, merely because one source is exempt from tax, ideally, should not result in such an entity losing its benefit under a DTAA.

ii. ***Invocation of GAAR:***

Once residency is established, benefits under a DTAA can be denied by invoking GAAR. Here, the onus is on the taxpayer concerned to establish that there was no impermissible avoidance arrangement and the arrangement did not lack commercial substance. In the opinion of the authors, commercial substance can be established by providing contemporaneous evidence of the entire group structure; how business has been structured and executed; whether the entity acts as a regional hub and/ or has a diversified portfolio, reflecting its investments; whether the entity focusses in a specific industry or sector for making investments; and how the entity has dealt with its gains. Needless to say, these are all indicators, and there may be other factors also,

which can establish that neither was the arrangement an impermissible avoidance, nor did it lack commercial substance. Simultaneously, given the scope of GAAR, the parameters of satisfying commercial substance would have to be met.[10] If these safeguards are followed, then the onus, which lies on the taxpayer concerned, would stand sufficiently discharged. Note that commercial substance is a common theme, which would have to be met right from the time of making investments till exist.

To assuage any apprehensions in respect of matters pending in appeal, in the opinion of the authors, the stage for making a reference under Chapter X-A of the IT Act has gone by, since the reference can be made at any stage of assessment or reassessment proceedings before Assessing Officers. Thus, in any original proceeding, which pertains to AY 2018-19 onwards, if GAAR had not been invoked, it would not be open for the Indian Revenue Authorities to plead the applicability of Chapter X-A of the IT Act.

iii. ***Invocation of JAAR:***

As has been held by the Supreme Court, it is open for the Indian Revenue Authorities, in spite of codified GAAR, to apply JAAR, and as such, JAAR is entitled to be applied alternately or in parallel. However, the onus of proof would be on the Indian Revenue Authorities to establish abuse, *i.e.*, tax avoidance in the creation and/ or use of structures.[11] Notably, here the requisite onus is not qualified by the term "*prima facie*"[12]. What follows as a *sequitur* is that for the invocation of JAAR, the Indian Revenue Authorities would have to bring in material, which establishes that the main purpose, or one of the main purposes of the arrangement in question, is to avail a tax benefit. ***Tiger Global*** (Supra), being based on a *prima facie* view alone, may have only a limited application in such a pursuit.

Conclusion:

In conclusion, the language in ***Tiger Global*** (Supra) has the potential to embolden the Indian Revenue Authorities, without any ostensible domain. Even though it is true that bad facts make for bad precedents, yet, the said decision seems to have been rendered outside the permissible scope of judicial review, in disregard of the principle of separation of power and even otherwise, *per incuriam* well-founded precedents. Further, the various *obiter* therein may have unintended knock-on effects on the perception of India, globally.

Needless to state, upholding an attractive tax policy is a key puzzle in making a country a magnet for foreign investment, particularly, when many countries are competing for the same bucket of investment. This is for the reason that an investor is empowered to navigate complexities and make informed decisions in both the home as well as the host jurisdiction. In the considered opinion of the authors, this is the stimulus for growth and overall economic development, making a country an appealing destination for conducting business.

<end of Part – 2>

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10 Section 97 of the IT Act.

11 ***Vodafone International Holding BV*** (Supra). Specific Para 79 quoted at Para 12.11 of ***Tiger Global*** (Supra).

12 As has been appreciated at Paras 34 and 35 of ***Tiger Global*** (Supra), the level of satisfaction required to form a *prima facie* view is much less compared to where a fact has to be proved.