Tiger Roars, Tax Uncertainty Soars! – The Ultimate “Upside Down” of International Tax Jurisprudence in India

Jan 30, 2026

Deepak Chopra
Senior Partner, AZB & Partners

Priya Tandon
Associate, AZB & Partners

Introduction:

The Lady of Justice, nested within the heart of India’s highest Judicial system, the Supreme Court, champions a modern Judiciary with constitutional rights as its guiding star. For centuries, it stood blind folded, a symbol of impartiality, and wielding a sword, representing authority. Recently, it shed its blind fold, and the Constitution replaced the sword in its one hand. Therefore, it no longer sees no one, but sees everyone equally, consequently, drifting towards an inclusive approach to justice. Further, the Constitution symbolizes a balanced and principled justice system, which values rights over retribution. The scales in its hands continue to represent the balance and impartiality in reaching to a verdict, which are at the core of every Court’s duty. While the Lady of Justice represents a new phase for the Indian justice system – one that is principled on constitutional values, the Judiciary has recently demonstrated itself to be a missile against the very democratic forces it was meant to safeguard. It is at the forefront being scrutinized for usurping the powers of the Legislature and the Executive, that too, in disregard of the principle of stare decisis.

It is against this background that the authors shall analyze the decision of the Supreme Court in ***The Authority for Advance Rulings (Income Tax) and Others vs. Tiger Global International II Holdings***[1]. In the opinion of the authors, the said decision is retrograde, repressive and has the potential of putting a hand brake on attracting foreign investments into India. Further, the said decision strikes against stability, predictability and notice as to what the law is. As has been oft reiterated by distinguished legal illuminists, stability and predictability are hallmarks of an efficient tax administration. The decision in ***Tiger Global*** (Supra) strikes at the very heart of this stability and predictability. It is after

all only if investors know that the legal framework will not alter sporadically, that they stay confident about their investment decisions.

Given the complex nature of the issues involved and large scale ramifications, the authors have thought it prudent to dissect the analysis of the decision in ***Tiger Global*** (Supra) and the analysis, implications and way forward, in parts. The first part deals with the factual context as well as the findings of the various authorities. This shall be followed up with the analysis, implications and way forward, which needless to say, is going to be a litigious one.

Background:

Before dwelling into the key findings of the Supreme Court in ***Tiger Global*** (Supra) and our analysis thereon, it would be pertinent to highlight the factual context as well as the findings of the authorities below, *albeit* briefly:

Factual Context:

Tiger Global International II Holdings, Tiger Global III Holdings and Tiger Global IV Holdings (hereinafter referred to as the "**Taxpayers**") are private limited companies, incorporated under the laws of Mauritius, for undertaking investment activities. They had been granted the Category 1 Global Business License under Section 72(6) of the Financial Services Act, 2007, enacted by the Parliament of Mauritius and were accordingly, regulated by the Financial Services Commission, in Mauritius. Further, they had been granted a valid Tax Residency Certificate ("**TRC**") issued to them by the Mauritian Revenue Authorities, certifying them to be residents of Mauritius.

The business of the Taxpayers was wholly controlled and managed by their Board of Directors. They had 3 Directors on the Board of Directors, out of whom, 2 were residents of Mauritius and 1 was a resident of the United States of America ("**USA**"). Further, they had 2 employees. The Taxpayers maintained their principal bank accounts as well as their accounting records in Mauritius. The Taxpayers engaged Tiger Global Management LLC ("**TGM**"), a company incorporated in the USA, to provide services to them, in connection with their investments. All the services provided by TGM to the Taxpayers were subject to review and approval by the Board of Directors of the Taxpayers. Further, TGM did not have the right to contract on behalf of, or bind the Taxpayers, or take any decisions on their behalf, without prior approval of the Board of Directors of the Taxpayers.

The Taxpayers had acquired certain shares of Flipkart Private Limited ("**Flipkart**"), a private limited company, incorporated under the laws of Singapore between the period

ranging from 2011 to 2015. Subsequently, Flipkart made substantial investments in India, such that, the value of its shares was derived substantially from assets located in India. Thereafter, in April, 2018, the Taxpayers transferred the shares of Flipkart, which were held by them, to Fit Holdings S.A.R.L. ("**Buyer**"), an unrelated company incorporated under the laws of Luxemburg. The said transfers were a part of a broader transaction, involving majority acquisition of Flipkart by Walmart Inc., a company incorporated in the USA, from several shareholders, including the Taxpayers. The consideration for transfer of approximately 1,62,43,010 shares by the Taxpayers was benchmarked at approximately INR 14440,23,44,047/-. The Assesses claimed the capital gains arising to them from the 2018 divestment of their stake in Flipkart as not chargeable to tax in India, in view of Article 13(4) of the Double Taxation Avoidance Agreement ("**DTAA**") between India and Mauritius ("**India – Mauritius DTAA**"). Therefore, prior to the consummation of the disinvestment identified above, the Taxpayers approached the Indian Revenue Authorities, by way of an application dated 02 August, 2018 under Section 197 of the Income-tax Act, 1961 ("**IT Act**"), seeking issuance of a NIL withholding certificate, on the divestment of their stake in Flipkart.

By way of letter dated 17 August, 2018, the Indian Revenue Authorities informed the Taxpayers that they were not entitled to the benefit of the India – Mauritius DTAA, since they were not independent in their decision making, specifically, concerning purchase and subsequent transfer of the shares in Flipkart by them. The Indian Revenue Authorities issued certificates dated 17 August, 2018, prescribing applicable rates of income-tax @ 6.05%, 6.92% and 8.47%, respectively.

It is against the above set out background that the Taxpayers approached the Authority for Advance Rulings ("**AAR**") by way of applications under Section 245Q(1) of the IT Act ("**Applications**"), seeking a ruling on the below set out question:

"Whether, on the facts and circumstances of the case, gains arising to the Taxpayers (private companies incorporated in Mauritius) from the sale of shares held by them in Flipkart Pvt. Ltd (a private company incorporated in Singapore) to Fit Holdings S.A.R.L. (a company incorporated in Luxembourg) would be chargeable to tax in India under the Act read with the DTAA between India and Mauritius?"

The AAR:

By way of decision dated 26 March, 2020[2], the AAR concluded that the Applications related to a transaction or an issue, which is *prima facie* designed for the avoidance of income-tax and consequently, proceeded to reject the same at the threshold for being hit by the jurisdictional bar to maintainability, captured under Proviso (iii) to Section 245R(2) of the IT Act. The said Proviso (iii) to Section 245R(2) of the IT Act is reproduced below:

"*245R…(2) The Authority may, after examining the application and the records called*

for, by order, either allow or reject the application :

...

(iii) relates to a transaction or issue which is designed prima facie for the avoidance of income-tax [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N or in the case of an applicant falling in sub-clause (iiia) of clause (b) of section 245N]"

In reaching to this conclusion, the AAR made some significant observations, which are summarized as under:

i. At the stage of admission, it is not required to conclusively establish tax avoidance, rather, the probability of avoidance of tax has to be decided on the basis of evidences and materials on record and drawing inferences therefrom.
ii. Tax avoidance itself is not illegal *per se*. It may be legal in the event the transactions are planned and relief obtained, even though it is not as per the intent of lawmakers. This is subject to a taxpayer disclosing all relevant facts to the Revenue Authorities and claiming benefits, as provided for under the law.
iii. The entire transaction of purchase and sale of shares has to be looked into and a dissecting approach cannot be adopted for examining taxability.
iv. The Taxpayers are a part of TGM and have been held through its affiliates through a web of entities based in Cayman Islands and Mauritius. Even though the holding-subsidiary may not be conclusive proof of tax avoidance, the purpose for which the subsidiaries were set up indicates the intention behind the structure.
v. What is relevant to examine while classifying a structure as a tax avoidant one, is where the head and the brain of the person claiming a benefit is. On facts, Mr. Charles P. Coleman, not based in Mauritius, controlled the funds as well as the decision of the Board of Directors of the Taxpayers, through Mr. Steven Boyd, the non-resident Director of the Taxpayers and the General Counsel of TGM. This is because Mr. Charles P. Coleman was:

a. appointed to sign the cheques of the Mauritius bank account.
b. authorised signatory of the Mauritius bank account for transactions above US$ 2,50,000, counter-signed by one of the Mauritius based Directors.
c. beneficial owner, as disclosed in the application form for Category I Global Business Licence, filed with the Mauritius Financial Services Commission.
d. authorised signatory for the immediate parent companies of the Taxpayers.
e. sole Director of the ultimate holding company.

vi. From the material on record, the fact that the Taxpayers were "see-through

entities", set up for making investments to derive the benefit of the India – Mauritius DTAA, is an inescapable conclusion.

vii. In ***Vodafone International Holding BV vs. Union of India***[3], it has been held that there is nothing wrong if funds for making foreign direct investment by a Mauritian company or an individual had not originated from Mauritius, but had come from investors of third countries. Even if as per the Minutes of Meeting of the Board of Directors of the Taxpayers, the key decisions were taken by Mr. Steven Boyd, no adverse inference can be drawn basis such fact.

viii. It has also been held in ***Vodafone International Holding BV*** (Supra), that Circular No. 789/ 2000 dated 13 April, 2000 issued by the Central Board of Direct Taxes ("**CBDT**") does not preclude the Indian Revenue Authorities from denying the benefit under an applicable DTAA, notwithstanding a valid TRC, in suitable cases, *viz*., where the Mauritian entity is interposed as a mere device. On facts, the Taxpayers have not made any investment, other than in the shares of Flipkart, in respect of which, the benefit of the India – Mauritius DTAA is being claimed. Therefore, the Taxpayers fail on the yardsticks, *viz*., participation in investment, period of business operations in India, generation of tax revenue in India, timing of exit and continuity of business on exit. Consequently, the arrangement was a preordained transaction, created for the tax avoidant purpose of availing the benefit of the India – Mauritius DTAA, whatever be the stated objective.

ix. In view of the above, the entire arrangement made by the Taxpayers was with the intention to claim the benefit under the India – Mauritius DTAA, which was not intended by lawmakers, being an arrangement for avoidance of tax in India. Therefore, the bar under the Proviso (iii) to Section 245R(2) of the IT Act becomes applicable. Consequently, the Taxpayers Applications stand rejected at threshold itself.

x. On merits, Circular No. 682/ 1994 dated 30 March, 1994 issued by the CBDT and the India – Mauritius DTAA, as amended by the Protocol for Amendment of the India – Mauritius DTAA[4] ("**Protocol**"), exempt a resident of Mauritius from capital gains tax taxability in India, only on capital gains arising from alienation of shares of an Indian company. On facts, capital gains did not arise from alienation of shares of an Indian company, rather, of a Singaporean company. Hence, the benefit of capital gains taxability under the India – Mauritius DTAA was not available to the Taxpayers.

The Taxpayers challenged the decision of the AAR by filing Writ Petitions before the Delhi High Court.

The Delhi High Court:

The Delhi High Court, by way of decision dated 28 August, 2024[5], allowed the said Writ Petitions, holding that the Taxpayers were entitled to the benefit of the India – Mauritius DTAA and consequently, capital gains from the 2018 divestment of their stake in Flipkart, were not chargeable to tax in India. In reaching to this conclusion, the Delhi High Court alluded to some well-settled principles[6], which are summarized as under:

i. While the decision of the AAR was a decision under section 245R(2) of the IT Act, the view expressed therein was neither tentative, nor one formed on a preliminary examination. The decision of the AAR and the report from the Indian Revenue

Authorities, which was filed before the AAR, clearly appeared to be imbued with trappings of finality and conclusive determination and therefore, there was no embargo for the Delhi High Court also to entertain Writ Petitions on merits.

ii. Merely because a parent entity may exercise shareholder influence over its subsidiary entity, that would not lead to an assumption that the subsidiary entity in question was operating as a mere puppet, or that it was wholly subservient to the parent entity.

iii. The mere factum of an entity being situated in Mauritius and of investments being routed through Mauritius cannot result in a default adverse inference, or raise a presumption of illegality, or of such an entity being a colourable device, nor are Mauritian entities required to satisfy any separate standard of legitimacy, or stricter standard of proof.

iv. It would be wholly erroneous to presume that investments originating from Mauritius are inherently suspect or that fiscal residence of an entity in Mauritius would require viewing such entities through a tainted prism. The establishment of investment vehicles in tax friendly jurisdictions cannot be considered to be an anomaly, or give rise to a presumption of being situated in those destinations for the purpose of evading tax or engaging in treaty abuse. There cannot be an assumption of treaty shopping and treaty abuse, merely because a subsidiary or any related entity is established in a tax friendly jurisdiction.

v. The issuance of a TRC by the Competent Authority must be considered to be sacrosanct and due weightage must be accorded to the same, since it constitutes certification of the entity being a *bona fide* entity, having beneficial ownership domiciled in a Contracting State, to pursue a legitimate business purpose in a Contracting State.

Other observations of the Delhi High Court, which in the considered opinion of the authors, were legally flawed, are summarized as under:

i. *The transaction in question stood duly grandfathered by virtue of Article 13(3A) of the India – Mauritius DTAA*: Notably, the transaction involved sale (in 2018) by a Mauritian entity of shares held by it in a Singaporean entity (acquired prior to 01 April, 2017), which in turn held shares in an Indian entity. Article 13(3A) of the India – Mauritius DTAA allocates taxing rights to both India and to Mauritius, on capital gains derived by a Mauritian resident from alienation of shares of an Indian entity, which shares are acquired on or after 01 April, 2017. Therefore, in the opinion of the authors, Article 13(3A) of the India – Mauritius DTAA, is limited to direct alienation of Indian shares, which was not the case before it.[7] By observing otherwise, the Delhi High Court read indirect transfer provisions within the construct of Article 13(3A) of the India – Mauritius DTAA, which, in the opinion of the authors, was not the correct position.

ii. *The allegation that the Taxpayers were not "beneficial owners" of capital gains derived by them was bereft of any merit, being based on pure conjectures:* The Delhi High Court took into consideration a great deal of international jurisprudence on the concept of beneficial ownership, ignoring that the concept of beneficial ownership is irrelevant for the application of Article 13 of the India – Mauritius DTAA. The above aspect was acknowledged by the Delhi High Court itself in ***Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd. vs. ACIT[8]***.

iii. *Domestic tax legislation cannot be interpreted in a manner, which brings it in direct*

*conflict with a provision contained in an applicable DTAA.**[9]** Therefore, incorporation of Limitation on Benefits ("**LOB**") clause [or Specific Anti-Avoidance Rule ("**SAAR**")] in a DTAA will result in SAAR being determinative of allegations of treaty abuse and illegitimate claims of treaty benefit. The General Anti-Avoidance Rule ("**GAAR**"), contained in Chapter X-A of the IT Act, and allied rules made under the Income-tax Rules, 1962 ("**Rules**"), specifically Rule 10U(2) of the Rules, cannot be interpreted in a manner so as to bring it in direct conflict with the provisions of the India – Mauritius DTAA.**[10]** The Taxpayers satisfied SAAR under Article 27A of the India – Mauritius DTAA:* It escaped the attention of the Delhi High Court that in terms of its own conclusion, the Taxpayers were covered under Article 13(3A) and SAAR under Article 27A exists for the purpose of Article 13(3B) of the India – Mauritius DTAA alone. Even otherwise, India follows a "dualist" approach, *i.e.*, international treaties are not automatically assimilated into India's domestic law upon their ratification, but require an independent enabling domestic legislation for their incorporation within India's domestic law. Further, national courts are to enforce international law, only when it does not conflict with the domestic law.[11] However, Section 90(2) read with Section 90(1) of the IT Act is an exception, providing an overriding effect to the provisions of a DTAA over the corresponding provisions of the IT Act, to the extent the same are more beneficial to a taxpayer. At the same time, Section 90(2A) of the IT Act overrides the said Section 90(2) of the IT Act, allowing the operation of GAAR, irrespective of whether the provisions of an applicable DTAA are more beneficial to a taxpayer. Consequently, the Legislative mandate is in the favour of the applicability of GAAR, notwithstanding the contents of the corresponding provisions of an applicable DTAA.[12] That said, in the opinion of the authors, even if the Delhi High Court were to hold the supremacy of the provisions of GAAR over the provisions of the India – Mauritius DTAA, the conclusion reached at by it would have been the same, in view of Rule 10U(1)(d) of the Rules, grandfathering the investments in question.

Aggrieved with the decision of the Delhi High Court, the Indian Revenue Authorities preferred an appeal before the Supreme Court. The arguments of the Indian Revenue Authorities and the Taxpayers as well as the key findings of the Supreme Court are addressed below.

The Supreme Court:

Arguments of the Indian Revenue Authorities and the Taxpayers:

S. No.	Arguments	
	Indian Revenue Authorities	**Taxpayers**
i.	Section 197 order and the decision of the AAR were *prima facie* tentative views and hence, the Delhi High Court erred in adjudicating the issues on merits.	The statutory bar under Proviso (iii) to Section 245R(2) of the IT Act requires clear evidence of premeditated tax avoidance design, which is absent.
ii.	Although residence under a DTAA	Article 4 of the India – Mauritius

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	Indian Revenue Authorities	**Taxpayers**
	must be determined according to the domestic law of the State of residence, but such determination may independently be examined by the Revenue Authorities of the other Contracting State. As per Article 4(1) of the India – Mauritius DTAA, India, being the source State, is vested with sovereign taxing powers, including, the authority to determine taxability under its domestic law.	DTAA begins with the phrase "For the purposes of this Convention, the term 'resident of a Contracting State' means…", hence, prescribing a mandatory exclusive rule for determination of residency. Thereafter, the phrase, "any person who, under the laws of that State, is liable to taxation therein", means that the India – Mauritius DTAA permits the Contracting State to apply its own tests or criterion to determine residency and liability to taxation within its jurisdiction.
iii.	The source State, which has the primary right to tax income arising within its jurisdiction, also retains the right to examine treaty abuse. Grant of treaty benefit does not *ipso facto* divest the source State of the power to examine whether the underlying transaction lacks commercial substance.	In the event treaty abuse exists, it is for the Contracting States to amend the applicable DTAA, that too, prospectively.
iv.	The transaction constitutes an indirect transfer of assets situated in India, taxable under Section 9(1) read with Explanations 4 and 5 of the IT Act, which codify a "look through" provision. Once taxability under the IT Act stands established, the question of relief under DTAA, including whether TRC is conclusive, arises.	Circular No. 789/ 2000 and the Press Release dated 01 March, 2013 precludes the Indian Revenue Authorities from going behind a TRC, issued after due examination of control and management. Proposal to treat TRC as "necessary but not sufficient" deserves to be abandoned. Hence, upon production of a TRC, the provisions of the IT Act, including Sections 5 read with Sections 45 and 9 of the IT Act, shall have no application.
v.	Even after introduction of Sections 90(4) and 90(5) of the IT Act, TRC constitutes only a *prima facie* evidence of residency and cannot override the principle of "substance over form" [or, Judicial Anti-Avoidance Rule ("**JAAR**")]. Reliance was placed on ***Azadi Bachao Andolan*** (Supra) and ***Vodafone International Holdings B.V.*** (Supra). The test of control and management is key to ascertaining residency and *bona fides* of a	As per Section 90(4) of the IT Act, the question whether a person is a resident of a foreign State should be decided by that State alone and such a person shall obtain a certificate from the foreign State, which certificate shall be evidence of residency. Further, as per Section 90(5) of the IT Act, such person shall provide additional documents, as may be prescribed. Hence, the documents required to claim the benefit under an

S. No.	Arguments	
	Indian Revenue Authorities	**Taxpayers**
	transaction. Circular No. 789/ 2000 and Circular No. 1/ 2003 dated 10 February, 2003 issued by the CBDT as also ***Azadi Bachao Andolan*** (Supra), were policy measures to provide certainty to Foreign Institutional Investors ("**FIIs**") and similarly placed investors. The same do not extend to business investments, or indirect transfers. In fact, the said Circular pre-dates the introduction of Global Business Licences by the Financial Services Act, 2001.	applicable DTAA are exhaustively enumerated. The validity of Circular No. 789/ 2000 was affirmed in ***Azadi Bachao Andolan*** (Supra), observing that had the Contracting States intended to restrict the benefit of a DTAA for nationals of a third country, a suitable SAAR would have been inserted. Further, the corporate structure of the Taxpayers is consistent with those adopted by FIIs and similarly placed investors. Their investment structure is long-standing, commercially viable and generated tax revenue and hence, classifying the same as a preordained tax avoidant structure, contradicts ***Vodafone International Holdings B.V.*** (Supra). Even otherwise, the averment that Circular No. 789/ 2000 applies only to FIIs and similarly placed investors is contrary to the language of the said Circular, which uses the phrase "other investment funds, etc." and while referring broadly to "investors from Mauritius", does not draw any artificial distinction between various classes of Mauritian entities.
vi.	JAAR is an independent anti-abuse safeguard. Reliance in this regard was placed on Sections 72(2)(b) and 73A of the Mauritius Income Tax Act [*pari-materia* to Section 6(3) of the IT Act] and Section 71 of the Financial Services Act, 2007, which recognises control, management and Place of Effective Management to be determinative of residency, even prior to October, 2018.	In the absence of SAAR in an applicable DTAA, the same cannot be judicially introduced. Enquiry initiated by the Indian Revenue Authorities into the "head and brain" of the Taxpayers was not on the footing that their corporate structure deserved to be disregarded or they be treated as conduits, since such averment could only arise in the event the Cayman holding entities were being taxed. Such enquiry was directed at challenging the validity of TRC, on a flawed premise, that the Indian Revenue Authorities are entitled to interpret the Mauritian laws, to determine the liability to tax.

S. No.	Arguments	
	Indian Revenue Authorities	**Taxpayers**
vii.	JAAR stands statutorily codified by Chapter X-A, or GAAR. As per Section 90(2A) of the IT Act (read with Sections 95 and 100 of the IT Act), GAAR overrides DTAAs, in cases involving impermissible avoidance arrangement. GAAR is a supervening anti-abuse code, efficacy whereof cannot be diluted by interpretative carve-outs. Hence, Circular No. 789/ 2000 cannot override Section 90(2A) of the IT Act, or GAAR. GAAR was not accorded blanket grandfathering, for doing so would tantamount to immunising transactions, which, even under the pre-existing jurisprudence, were open to scrutiny. As per Sections 97(1)(b)(iv) and 97(1)(c) of the IT Act and Rule 10U of the Rules, only limited categories of FIIs and similarly placed investors are excluded from GAAR scrutiny, and not business investments, or indirect transfers.	A DTAA constitutes a complete code and unless it expressly incorporates the domestic law, changes in domestic law cannot alter the interpretation under a DTAA. Hence, principles of residence and allocation of taxing rights should be ascertained strictly within the framework of a DTAA. A DTAA is notified under Section 90 of the IT Act and under Section 90(2) of the IT Act, such DTAA prevails to the extent the same is more beneficial to a taxpayer. Against the said construct, domestic law doctrines, such as JAAR, not being more beneficial, cannot be superimposed in a DTAA. Even Section 90(2A) of the IT Act, providing for override of GAAR, cannot be judicially extended to JAAR.
viii.	The averment that in view of Rules 10U(1) and 10U(2) of the Rules, every purchase of shares prior to 01 April, 2017 constitutes an “investment”, immune from GAAR, even if the transfer takes place thereafter, is fundamentally flawed. This is since Chapter X-A of the Act, including Section 97 thereunder, is not confined to passive investments, but extends to structures lacking commercial substance. Acceptance of the said interpretation would enable structures put in place prior to 01 April, 2017, to escape scrutiny, against Shome Committee’s recommendations. Therefore, post GAAR, Rule 10U(2) of the Rules attracts GAAR, notwithstanding the vintage of the initial investment. In this regard, the distinct expressions in Rule 10U of the Rules, namely, “arrangement” in Rules 10U(1)(a) and Rule 10U(2), and “investment”	Rule 10U(2) of the Rules does not dilute the operation of Rule 10U(1)(d) of the Rules. Therefore, only income from transfer of pre-2017 investments stand grandfathered.

S. No.	Arguments	
	Indian Revenue Authorities	**Taxpayers**
	in Rule 10U(1)(d) of the Rules, cannot be ignored, inasmuch as Rule 10U(1)(d) of the Rules concerns genuine investments, while Rule 10U(2) of the Rules targets abusive arrangements, irrespective of their historical origin.	
ix.	Treaty benefit may be denied, where capital gains arise in a source State, but escape taxation elsewhere due to absence of capital gains tax.	An exemption under a DTAA is entitled to be claimed based on allocation of taxing rights within the DTAA.
x.	Direct transfers are governed by Articles 13(3A) and 13(3B) and indirect transfers under Article 13(4) of the India – Mauritius DTAA. Article 13(4) of the India – Mauritius DTAA neither contains SAAR, nor any grandfathering protection. The present case involves an indirect transfer and hence, the same is not subject to SAAR. Consequently, once treaty abuse is established, the transaction in question ceases to be governed by a DTAA, and stands to be tested under the provisions of the IT Act.	Treaty abuse under the India – Mauritius DTAA is comprehensively addressed by way of the Protocol. The Protocol operates prospectively and does not affect capital gains arising from investments made prior to 01 April, 2017.

Key Findings of the Supreme Court:

Having regard to the averments above, the key findings of the Supreme Court in the decision authored by Hon'ble Mr. Justice R. Mahadevan, are summarized as under:

i. ***Para 11.1:*** The Supreme Court articulated the core issue before it as under:

"*Whether the AAR was right in rejecting the applications for Advance Ruling on the ground of maintainability, by treating the capital gains arising out of a transaction of sale of shares of a Singapore Co., which holds the shares of an Indian company, by a Mauritian company controlled by an American company, to be prima facie an arrangement for tax avoidance, and hence, whether it can be enquired into to ascertain whether the capital gains would be taxable in India under the Income Tax Act read with the relevant provisions of the Mauritius Treaty or not?*"

ii. ***Paras 23 and 24:*** In terms of Entries 10 and 14 to List 1 of the Constitution of India, the power to legislate in respect of a treaty lies with the Parliament. Further, such a treaty has to be approved by an enactment of the Parliament, if it operates to restrict the rights of citizens, or modifies the law of the land. However, a special

provision was enacted for Section 90 of the IT Act, empowering the Central Government to make provisions for the implementation of a DTAA, by way of a notification, so as to, *inter-alia*, avoid double taxation. Section 90(2) of the IT Act provides for precedence to the provisions of a DTAA, insofar as the same are more beneficial than the corresponding provisions of the IT Act. This is the DTAA override principle.

iii. ***Para 28:*** Once domestic taxability is established, the second limb of the analysis considers whether taxability is overridden by an applicable DTAA.

iv. ***Para 12.24:*** Section 90(2A) creates an exception to the DTAA override principle under Section 90(2) of the IT Act, ensuring that a taxpayer friendly DTAA does not translate into promotion of aggressive tax planning. The said provision states that GAAR shall apply, even if the provisions thereunder are not more beneficial to an assessee.

v. ***Paras 12.29 to 12.30 and 46:*** Section 95 of the IT Act read with Rule 10U of the Rules set out the circumstances under which GAAR is applicable. As per Rule 10U(1)(d) of the Rules, in the event an investment is made after the cut-off date of 01 April, 2017, exemption from GAAR is not available. Further, as per Rule 10U(2) of the Rules, an arrangement is not automatically grandfathered. Therefore, irrespective of the date at which an arrangement is entered into, GAAR is applicable if tax benefit from such arrangement is obtained after 01 April, 2017. The prescription of the cut-off date of investment under Rule 10U(1)(d) stands diluted by Rule 10U(2) of the Rules, in the event a tax benefit is obtained basis such arrangement. This interpretation ensures that even though pre-existing investments stand safeguarded, arrangements, which continue to yield tax benefits after the cut-off date, remain within the ambit of GAAR, hence, avoiding abuse of the grandfathering provisions. On facts, the transaction does not stand grandfathered, since the benefit arose post the cut-off date.

vi. ***Para 48:*** Even if GAAR is held to be inapplicable, the Indian Revenue Authorities can invoke JAAR for the purpose of denying the benefit under a DTAA. The above position seems to have been accepted by the Taxpayers, who *suo-moto* furnished documentation concerning their control and management.

vii. ***Paras 25 to 27, 29 and 37 to 38:*** Typically, Circulars and Instructions issued by the CBDT in exercise of powers under Section 119 of the IT Act are binding on the Indian Revenue Authorities, being *contemporanea exposition*, or legitimate aids to construction. However, amendments subsequent to ***Vodafone International Holding BV*** (Supra), *viz*., retrospective introduction of indirect transfer provisions in Section 9 of the IT Act; introduction of GAAR; and retrospective amendment to and introduction of Sections 90(4) and 90(5) of the IT Act, respectively, completely changed the scenario. Circulars and Instructions issued earlier, though binding on the Indian Revenue Authorities at the time of issuance, operated only within the regime in which the same were issued, without overriding the subsequent statutory amendments. Therefore, post the coming in force of the said amendments, TRC alone is not sufficient to avail the benefit under a DTAA. The Indian Revenue Authorities are empowered to determine where the entities are really residents, by investigating the centre of their control and management. In view thereof, pronouncements dealing with Circulars and Instructions in the pre-amendment regime cannot *ipso facto* come to any aid. In the post-amendment era, facts would have to be independently analysed, to decide the applicability of GAAR. In fact, even the pre-amendment pronouncements did not shut out cases involving fraudulent or fictitious transactions.

viii. ***Para 18:*** On a combined reading of Article 13 of the India – Mauritius DTAA, it is

clear that for claiming the benefit under Article 13(4), a person should not only qualify as a resident of the other Contracting State, *i.e.*, Mauritius, but should also establish that the movable property or shares in question, are directly held by such resident. In all other cases, the transaction is taxable in India itself. Hence, an indirect sale of shares would not, at threshold, fall within the protection contemplated under Article 13 of the India – Mauritius DTAA.

ix. ***Para 19:*** The object of a DTAA is to grant relief against double taxation, and not to facilitate avoidance or evasion of taxation. Hence, for a DTAA to apply, a taxpayer must prove that the transaction in question is taxable in the State of residence of such taxpayer, by producing all the relevant documentation.

x. ***Para 49:*** Where a taxpayer seeks exemption from tax in the source State, while simultaneously, contending that the transaction is also exempt from tax in the State of residence, such a position runs contrary to the spirit of DTAAs and provides a strong basis for the Tax Authorities to question the availability of benefits under DTAAs in the Source state.

xi. ***Para 41:*** As per the Protocol, the grandfathering clause in GAAR shall apply to capital gains from transfers made on or before 01 April, 2017, if a taxpayer satisfies the test of residency under its State law, being the Mauritius Income Tax Act and the IT Act.

xii. ***Para 45:*** SAAR under Article 27A of the India – Mauritius DTAA is not applicable on facts, since the same applies only to cases falling under Article 13(3B) of the India – Mauritius DTAA.

xiii. ***Para 42:*** Changes relating to capital gains taxation by the Protocol and insertion of SAAR shall have ripple effects on the DTAA between India and Singapore ("**India – Singapore DTAA**") as well, since the said DTAA provides for tax exemption along the lines of the India – Mauritius DTAA.

xiv. ***Para 34 to 36 and 49:*** *Burden of Proof for Section 245R(2):* The language in Section 245R(2) of the IT Act uses the term "*prima facie*", implying that for rejection of an application at threshold, it is sufficient if the AAR, on an initial examination of the documentation, is satisfied that the transaction in question is for the avoidance of income-tax. The burden at that stage is on the AAR. Further, the level of satisfaction required to arrive at a *prima facie* conclusion by the AAR is less, compared to a case where a fact has to be proved. On facts, there is clear and convincing *prima facie* evidence, to demonstrate that the Taxpayers designed the arrangement with the sole intent of evading tax. Further, they failed to furnish sufficient material to rebut the said presumption. *Burden of Proof for GAAR:* For applicability of GAAR, Section 96(2) of the IT Act places the onus on a taxpayer, to disprove the presumption of tax avoidance, hence, representing a significant shift in the burden of proof.

xv. ***Paras 50 to 52:*** Since the unlisted equity shares on the sale of which capital gains arose, were transferred pursuant to a *prima facie* impermissible tax avoidant arrangement, the Taxpayers were not entitled to the benefit under Article 13(4) of the India – Mauritius DTAA. To this end, Chapter X-A of the IT Act becomes applicable. Therefore, the Applications were rightly rejected as being hit by the threshold jurisdictional bar to maintainability under Proviso (iii) to Section 245R(2) of the IT Act. Consequently, capital gains arising transfers effecting after 01 April, 2017 are taxable in India. Resultantly, the appeals preferred by the Indian Revenue Authorities stand allowed.

Concurring, Hon'ble Mr. Justice J.B. Pardiwala, at the outset, stated that his esteemed brother has penned an ineffable judgment. Thereafter, he dwelled into constitutional tax

sovereignty in the times of global uncertainty, directed at making India a destination for future growth and progress. Interestingly, he also dwelled into how the 3 constitutional organs, *i.e.*, the Judiciary, the Executive and the Legislature, should add strength and vitality to tax sovereignty, without, in any manner, diluting the doctrine of separation of power. In this regard, he stated that the Legislature builds the necessary law; the Executive exercises policy choice and bargaining power; and the Judiciary permits limited judicial review. Immediately thereafter, he stated that strides had not been made to come up with a uniform statutory Legislation and hence, divergent interpretations continue to baffle trade and commerce, without, in any manner, paving way to convergence or pooling of sovereign rights for mutual betterment. Further, yielding or compromising sovereignty should not become a self-defeating interruption. In view thereof, he urged the States to assert and protect their respective sovereign rights, which have none, but self-imposed limitations (*i.e.*, he favoured retention over yielding). For this purpose, he stated that notwithstanding past experiences and practices, the source State should be the default jurisdiction for taxation, even if that means making unilateral moves. Calling any lenience in application of an anti-abuse provision a sign of weakness, he detailed the safeguards to be accounted for at the time of entering into DTAAs.

Since the action of the AAR in rejecting the Applications at threshold now stands affirmed, the Taxpayers would have to participate in the assessment proceedings in India.

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[1] [TS-38-SC-2026].

[2] Tiger Global International II Holdings, In re., [TS-5004-AAR-2020-O].

[3] [TS-23-SC-2012-O].

[4] Signed on 10 May, 2016, notified on 19 July, 2016 and effective from Assessment Year ("AY") 2018-19.

[5] Tiger Global International III Holdings vs. Authority for Advance Rulings, [TS-624-HC-2024(DEL)].

[6] Union of India vs. Azadi Bachao Andolan, [TS-5-SC-2003]; Vodafone International Holdings B.V. (Supra); Serco BPO P. Ltd. vs. Authority for Advance Ruling, [2015] SCC OnLine P&H 20324 (Punjab & Haryana High Court); CIT vs. JSH (Mauritius) Ltd., [2017] Scc OnLine Bom 8875 (Bombay High Court); and Bid Services Division (Mauritius) Limited vs. AAR, 2023 SCC OnLine Bom 2758 (Bombay High Court).

[7] In Sanofi Pasteur Holding SA vs. Department of Revenue and Others, [TS-57-HC-2013(Andhra Pradesh)-O], the Court noted that unlike the DTAA between India and France, the India – Mauritius DTAA has indirect transfer provisions within its construct, on account of the term "alienation" having been defined thereunder.

[8] [TS-6258-HC-2023(Delhi)-O].

[9] CIT vs. Telstra Singapore Pte Ltd., [TS-529-HC-2024(DEL)].

[10] The Delhi High Court, at para 226, stated that its observations are not intended to constitute a broad enunciation on the scope of applicability of Chapter X-A and the extent to which statutory GAAR would override corresponding DTAA provisions.

[11] Gramaphone Co. of India Ltd. v. Birendra Bahadur Pandey & Ors, [1984] 2 SCR 664 (Supreme Court)

[12] Deepak Chopra; and Priya Tandon; November 06, 2023; Taxsutra (republished by AZB & Partners); Dark Days for Treaty Interpretation; available at: https://www.taxsutra.com/dt/experts-corner/dark-days-treaty-interpretation and at: https://www.azbpartners.com/bank/dark-days-for-treaty-interpretation/.