* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: May 16, 2024***
Judgment pronounced on: August 28, 2024

\+ W.P.(C) 6764/2020 & CM APPL. 23479/2020

TIGER GLOBAL INTERNATIONAL III HOLDINGS
..... Petitioner

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Manish Kanth, Ms. Parul Jain, Mr. Afaan Arshad, Mr. Arijit Ghosh, Mr. Anirudh Srinivasan and Mr. Brijesh Ujjainwal, Advs.

versus

THE AUTHORITY FOR ADVANCE RULINGS (INCOME-TAX) & ORS. ..... Respondents

Through: Mr. G. C. Srivastava, Spl. Counsel with Mr. Kalrav Mehrotra and Mr. Mayank Patawani, Advs.
Mr. Chetan Sharma, ASG with Mr. Asheesh Jain, CGSC along with Mr. Gaurav Kumar and Ms. Neha Narang, Advs. for R-2.
Mr. Sunil Agarwal, Sr.SC with Mr. Shivansh Pandya, Jr.SC along with Mr. Utkarsh Tiwari, Adv.

\+ W.P.(C) 6765/2020 & CM APPL. 23481/2020

TIGER GLOBAL INTERNATIONAL II HOLDINGS
..... Petitioner

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Manish Kanth, Ms. Parul Jain, Mr. Afaan Arshad, Mr. Arijit Ghosh, Mr. Anirudh Srinivasan and Mr. Brijesh

Ujjainwal, Advs.

versus

THE AUTHORITY FOR ADVANCE RULINGS(INCOME-TAX) & ORS. ..... Respondents

Through: Mr. G. C. Srivastava, Spl. Counsel with Mr. Kalrav Mehrotra and Mr. Mayank Patawani, Advs.
Mr. Chetan Sharma, ASG with Mr. Asheesh Jain, CGSC along with Mr. Gaurav Kumar and Ms. Neha Narang, Advs. for R-2.
Mr. Sunil Agarwal, Sr.SC with Mr. Shivansh Pandya, Jr.SC along with Mr. Utkarsh Tiwari, Adv.

\+ W.P.(C) 6766/2020 & CM APPL. 23483/2020

TIGER GLOBAL INTERNATIONAL IV HOLDINGS ..... Petitioner

Through: Mr. Porus Kaka, Sr. Adv. with Mr. Manish Kanth, Ms. Parul Jain, Mr. Afaan Arshad, Mr. Arijit Ghosh, Mr. Anirudh Srinivasan and Mr. Brijesh Ujjainwal, Advs.

versus

THE AUTHORITY FOR ADVANCE RULINGS (INCOME-TAX) & ORS. ..... Respondents

Through: Mr. G. C. Srivastava, Spl. Counsel with Mr. Kalrav Mehrotra and Mr. Mayank Patawani, Advs.

Mr. Chetan Sharma, ASG

with
Mr. Asheesh Jain, CGSC along with Mr. Gaurav Kumar and Ms. Neha Narang, Advs. for R-2
Mr. Sunil Agarwal, Sr.SC with Mr. Shivansh Pandya, Jr.SC along with Mr. Utkarsh Tiwari, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J.

S. NO.	SUB-HEADING	PARAGRAPH NOS.
A.	INTRODUCTION	1 to 3
B.	THE FACTUAL NARRATIVE	4 to 23
C.	IMPUGNED ORDER- SALIENT FINDINGS	24 to 33
D.	SUBMISSIONS OF THE PETITIONERS	34 to 60
E.	ARGUMENTS OF THE RESPONDENTS	61 to 92
F.	THE PRELIMINARY OBJECTIONS	93 to 106
G.	ORGANISATIONAL STRUCTURE OF THE PETITIONERS	107 to 115
H.	THE MAURITIUS ROUTE	116 to 119
I.	DECISIONS RENDERED BY THE SUPREME COURT	120 to 143
J.	THE HIGH COURT DECISIONS	144 to 155
K.	TAX AVOIDANCE AND TREATY	156 to 182

A. INTRODUCTION

1. These three writ petitions impugn the order dated 26 March 2020 of the **Authority for Advanced Rulings**[1] pursuant to which three applications numbered as AAR Nos. 04/2019, 05/2019 and 07/2019 have come to be dismissed with the AAR holding that the transaction in respect of which the ruling was sought was prima facie designed for the avoidance of tax and thus falling within the scope of clause (iii) of the Proviso to Section 245R(2) of the **Income Tax Act, 1961**[2]. In view of the aforesaid, the AAR held that it was not obliged to render any findings on the merits of the question which stood posited, namely of whether the petitioner was entitled to avail the

[1] AAR
[2] Act

benefits of the **Double Tax Avoidance Agreement**[3] between India and Mauritius in respect of the sale of shares of Flipkart Private Limited, a private company limited by shares and incorporated under the laws of Singapore [hereinafter to be referred to as "Flipkart Singapore"] and the question of taxability of capital gains connected therewith.

2. It would appear that the petitioner had essentially sought to derive benefit from Article 13(3A) of the India-Mauritius DTAA and which had subjected to tax capital gains arising from an alienation of shares acquired on or after 01 April 2017. The petitioner had principally urged that Paragraph 3A of Article 13 had thus grandfathered all acquisition of shares prior to 01 April 2017 and the gains arising from their transfer would thus be exempt from taxation. The petitioner had sought exemption from the levy of capital gains tax by virtue of it having admittedly acquired the shares of Flipkart Singapore prior to 01 April 2017. The AAR has essentially held that the petitioners were mere conduit companies and disentitled to claim benefits of the DTAA since the transaction lacked commercial substance and the establishment of an entity in Mauritius was principally aimed at deriving undue benefits under the DTAA.

3. For the sake of brevity, we propose to take note of the salient facts as they emanate from W.P.(C) 6765/2020 confining them to those necessary for answering the challenge which stands laid.

B. THE FACTUAL NARRATIVE

4. The petitioner is stated to be a private company limited by shares incorporated under the laws of the Mauritius and having its

[3] DTAA

principal office in that country. As per the petitioner, it had been set up with the primary objective of undertaking investment activities with the intention of earning long term capital appreciation and investment income. As per the disclosures made in the writ petition, the immediate shareholders of the petitioner are also Mauritian companies whose shareholders in turn are private equity funds who had raised funds from several investors across the globe. According to the petitioner, the indirect shareholders of the petitioner consisted of almost 500 investors residing in an as many as 30 jurisdictions spread across the globe. **Tiger Global Management LLC**[4], a company incorporated in terms of the laws of Delaware USA was asserted to be the petitioner's Investment Manager and has thus at various places of these proceedings also been referred to as the management company.

5. The Investment Manager, TGM LLC, according to the petitioners, had not placed any investments with them and it is categorically asserted in this regard that neither TGM LLC nor any of its affiliates have either invested in the petitioner or the private equity funds that had indirectly invested with them. The petitioner has been granted a **Category 1 Global Business License**[5] and is also a tax resident of Mauritius. In evidence of the aforesaid, the petitioners have also placed on the record the **Tax Residence Certificate**[6] issued by the Mauritius revenue authorities dated 22 June 2018. The activities of the petitioner are regulated by the **Financial Services Commission**[7] of Mauritius.

6. As per the Constitution of the petitioner, the management of the

[4] TGM LLC
[5] Category 1- GBL
[6] TRC
[7] FSC

company is vested in its **Board of Directors**[8] and which is in turn empowered to delegate such of its powers as it may deem necessary to a Director, a **Committee of Directors**[9] or such other professional functionaries or persons as may be resolved. The original directors who were the signatories of the Charter are stated to be Mr. Moussa Taujoo, Mr. Mohammad Akshar Maherally and Mr. Steven D. Boyd.

7. The petitioner was incorporated on 15 June 2011 and has been domiciled since then in Mauritius. As per the disclosures made in its Audited Financial Statement, its principal shareholders are **Tiger Global Five Parent Holdings**[10], **Tiger Global Six Parent Holdings**[11], **Tiger Global Seven Parent Holdings**[12], **Tiger Global Eight Holdings**[13] and **Tiger Global Principals**[14]. All of the above entities are stated to be Mauritius based private companies. The individual shareholding of the aforenoted entities in the petitioner is declared and disclosed in its audited financial reports and the relevant part whereof is extracted hereinbelow:-

> "**1. Organization and Purpose**
> Tiger Global International II Holdings (the "Company") is a private company incorporated on June 15, 2011 and is domiciled in Mauritius. The Company holds a Category I Global Business License under the Financial Services Act 2007 and is regulated by the Financial Services Commission.
>
> The principal objective is to act as an investment holding company for a portfolio investment domiciled outside Mauritius.
>
> The Company has a Board of Directors (the "Directors") consisting of one non-resident director who is related to Tiger Global

[8] BoD
[9] CoD
[10] TG Five Holdings
[11] TG Six Holdings
[12] TG Seven Holdings
[13] TG Eight Holdings
[14] TG Principals

Management, LLC and two directors who are residents of Mauritius. The activities of the Company are managed by the Directors.

The Company is owned by Tiger Global Five Parent Holdings, Tiger Global Six Parent Holdings, Tiger Global Seven Parent Holdings, Tiger Global Eight Holdings and Tiger Global Principals (the "Shareholders"), Mauritius private companies. Tiger Global Five Parent Holdings owns 61.5%. Tiger Global Six Parent Holdings owns 12.1%, Tiger Global Seven Parent Holdings owns 14.7%, Tiger Global Eight Holdings owns 8.5%, and Tiger Global Principals owns 3.2% of the Company. Tiger Global Five Parent Holdings is majority owned by Tiger Global Private Investment Partners V, L.P.. a Cayman Islands exempted limited partnership. Tiger Global Six Parent Holdings is majority owned by Tiger Global Private Investment Partners VI, L.P. a Cayman Islands exempted limited partnership. Tiger Global Seven Parent Holdings is majority owned by Tiger Global Private Investment Partners VII, L.P., a Cayman Islands exempted limited partnership. Tiger Global Eight Holdings is majority owned by Tiger Global Private Investment Partners VIII, L.P., a Cayman Islands exempted limited partnership. Tiger Global Management, LLC is the management company of Tiger Global Private Investment Partners V, L.P, Tiger Global Private Investment Partners VI, L.P., Tiger Global Private Investment Partners VII, L.P and Tiger Global Private Investment Partners VIII. L.P. Tiger Global Principals is wholly owned by Tiger Global Side Fund LLC, a Delaware Limited Liability Company. All members of Tiger Global Side Fund, LLC are afflicted with Tiger Global Management, LLC."

8. The petitioner acquired 2,36,70,710 shares of Flipkart Singapore between October 2011 to April 2015. It is the assertion of the petitioner that its shareholding in Flipkart Singapore had been acquired between 04 October 2011 and 17 April 2015 and thus undisputedly prior to 01 April 2017, the determinative date which finds mention in Article 13(3A) of the India-Mauritius DTAA.

9. The aforenoted DTAA was signed and executed originally on 06 December 1983. The Protocol for Amendment of the India-Mauritius DTAA was signed on 10 May 2016 which principally sought to introduce the taxation of capital gains arising in India.

Thereafter, and by virtue of a notification dated 10 August 2016, Paragraphs 3A and 3B came to be inserted in Article 13(3) and were ordained to come into effect from 01 April 2017 and thus corresponding to **Assessment Year**[15] 2018-19.

10. As was noticed hereinabove, it was by virtue of Paragraph (3A) and its insertion in Article 13 that the gains from the alienation of shares in a company that is a resident of a Contracting State became subject to a capital gains tax. Article 13 as it stands post the amendments noted above is reproduced hereinbelow:-

"ARTICLE 13
CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.
3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

[*3A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.*

Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.

3B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period

[15] A.Y.

beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated;]

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.]

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States."

11. The Notes to the Financial Statement submitted for the period ending on 31 December 2017 acknowledged the amendments in the DTAA and declared that capital gains arising on sale of shares acquired in an Indian tax resident company between 01 April 2017 to 31 March 2019 would be subject to tax at the rate of 50% of the domestic tax rate, subject to the fulfilment of the **Limitation of Benefits**[16] clause in the DTAA. The petitioner further averred in those Notes that the capital gains on sale of shares acquired in an Indian tax resident company post 31 March 2019 would be taxed in India and the capital gains arising out of sale of shares of a foreign company which though not a tax resident of India but one whose shares derive their value substantially from assets situated in India may not be taxable under the DTAA.

12. The Notes to the Financial Statement further took the position that the sale of shares in respect of investments made directly or indirectly in Indian entities on or after 01 April 2017 would be subject to **General Anti Avoidance Rules**[17] under Indian domestic tax laws. The relevant section of the Notes to the Financial Statement and which

[16] LOB
[17] GAAR

deals with taxation is reproduced hereinbelow:-

"**4. Taxation**
The Company conducts its investment activities as a tax resident of Mauritius and holds one investment in a Singapore company with Indian subsidiaries. The Company expects to obtain benefits under the double taxation treaty between Mauritius and India and between Mauritius and Singapore.

Under the treaty between Mauritius and India, subject to certain conditions, an entity which is a tax resident in Mauritius, but has no branch or permanent establishment in India, should not be subject to capital gains tax in India on the sale of securities. On May 10, 2016, India and Mauritius signed a protocol to amend their tax treaty with the objective of providing India with the taxing right of the capital gains. As per the protocol, while gains derived from the direct sale of shares in Indian companies acquired on or after April 1, 2017 will be subject to tax at domestic rates, shares acquired in the Indian tax resident companies prior to April 1, 2017, should be grandfathered. Accordingly, this change may not have an impact on tax position of the Company as at December 31, 2017.

Capital gains arising on sale of shares acquired in an Indian tax resident company between April 1, 2017 and March 31, 2019 will be subject to tax at 50% of the domestic rate in India subject to the Limitation of Benefit ("LOB") clause Capital gains on sale of shares acquired in an Indian tax resident company post March 31, 2019 will be taxed in India. Capital gains on sale of shares in a foreign company which is not a tax resident of India and which derives its value substantially from the assets situated in India may not be taxable in India under the India-Mauritius treaty subject to fulfilment of certain conditions. However, the sale of shares, in respect of investments made directly or indirectly in Indian entities on or after April 1, 2017, will be subject to General Anti Avoidance Rules under Indian domestic tax laws.

Under the treaty between Mauritius and Singapore, subject to certain conditions, an entity which is a tax resident in Mauritius, but has no branch or permanent establishment in Singapore, is not subject to tax on its Singaporean source dividend, interest income, or royalties and should not be subject to capital gains tax in Singapore on the sale of securities.

The Company is subject to tax in Mauritius at the rate of 15% on its net income. However, on the basis that the Company is a Global Business Category I company, the Company should be entitled to a deemed tax credit equivalent to the higher of actual foreign tax

suffered or a presumed foreign tax equivalent of 80% of the Mauritian tax on its foreign source income. Where the Mauritius entity holds more than 5% of the underlying investee company, a foreign tax credit should be available for the underlying tax and dividend distribution tax paid by the investee company.

Gains or profits derived from the sale of units or of securities by the Company are specifically exempt from income tax in Mauritius. Dividends paid by a company resident in Mauritius are exempt from withholding tax.

No provision for tax expense has been made in the financial statements for the year ended December 31, 2017, as the Company has accumulated tax losses of $164,266.

The accumulated tax losses which will be available for offset against future taxable profits are as follows:

Up to the year ended December 31.		Accumulated Tax Losses
2018	$	38,354
2019		45,356
2020		42,725
2021		37,831
2022		-
	$	$ 164,266

The Directors intend to continue the operations in a manner that the Company continues to: (i) comply with the requirements of the tax treaty between India and Mauritius and between Singapore and Mauritius: (ii) be a tax resident of Mauritius, and (iii) maintain that its central management and control resides in Mauritius. In addition, the Company intends to obtain a Tax Resident Certificate in Mauritius every year. Accordingly, no provision for Indian or Singaporean income taxes has been made in the financial statements of the Company for taxes related to capital gains, if any."

13. On 09 May 2018, a **Share Purchase Agreement**[18] came to be executed between Walmart International Holdings, Inc., a Delaware Corporation, which was described as the 'purchaser' and the

[18] SPA

shareholders of **Flipkart Singapore**, which was identified in Schedule I to that agreement and collectively described to be the 'sellers', and Fortis Advisors LLC, a Delaware limited liability company, which was described as the 'sellers' representative'. As per the SPA, the sale of the shares held by the petitioner is stated to have been approved by the Board in its meeting held on 04 May 2018. The aforesaid subject appears to have arisen for discussion in the meeting of 12 June 2018, when the Board took note of the offer of Walmart to purchase a controlling stake in Flipkart Singapore for USD 16 billion and **Tiger Global International III Holdings**[19] [the petitioner in W.P.(C) 6764/2020], **Tiger Global International IV Holdings**[20] [the petitioner in W.P.(C) 6766/2020] and the present petitioner having considered to sell 74% of their stake in Flipkart Singapore and close that transaction.

14. These facts are also taken note of in the impugned order passed by the AAR and which captures details of the shareholding of the petitioner, TG III and TG IV as well as the number of shares sold and the gross consideration received. The shareholding pattern of the petitioner, TG III and TG IV was set forth in a tabular form in the impugned order and which is reproduced hereinbelow:-

S. No.	Applicants	Number of shares acquired	Period/ date of acquisition
1.	Tiger Global International II Holdings, Mauritius	23,670,710	October, 2011 to April, 2015
2.	Tiger Global International III Holdings, Mauritius	2,282,825	23rd June 2014
3.	Tiger Global	105,928	24th April, 2012

[19] TG III
[20] TG IV

	International IV Holdings, Mauritius		

15. The number of shares sold and gross consideration received was additionally captured in the following table:-

S. No.	Applicants	Number of shares sold	Gross consideration received
1.	Tiger Global International II Holdings, Mauritius	14,754,087	USD 1,893,510,103.82 equivalent to INR Rs. 13122,02,50,194/-
2.	Tiger Global International III Holdings, Mauritius	1,422,897	USD 1,81,782,633.10 equivalent to INR Rs. 1259,75,36,473.83
3.	Tiger Global International IV Holdings, Mauritius	66,026	USD8,435,171.44 equivalent to INR Rs. 58,45,57,380.79

16. Thereafter, the petitioner appears to have approached the tax authorities on 02 August 2018 for grant of a 'nil' withholding tax certificate in terms as contemplated under Section 197 of the Act. The petitioner in this application had asserted that although the shares held by it and constituting 13.48% of the share capital of Flipkart Singapore derived their value substantially from assets in India, since those shares were acquired prior to 01 April 2017, they would not be taxable or subjected to a capital gains tax in light of the TRC held by the petitioner read along with Article 13 of the DTAA. The petitioner with this application also enclosed its Certificate of Incorporation, Category 1 GBL, TRC along with Form 10F, a PAN card and a copy of the SPA.

17. The aforesaid application came to be disposed of on 17 August 2018 with the respondent holding that the petitioner would not be entitled to the benefits of the DTAA. This was based on the competent authority being of the opinion that the petitioner was not independent

in its decision making with regard to various capital assets held by it. It was accordingly informed that the certificate under Section 197 would be issued subject to the payer deducting tax at the rate of 10% plus surcharge and applicable cess. The order dated 17 August 2018 disposing of the Section 197 application is extracted hereinbelow:-

> "Sir,
>
> **Sub:** Your application in form 13 for issuance of lower/ Nil deduction certificate dated 2.8.2018 and 13.8.2018- in the case of Tiger Global International II Holding- Regd.
>
> Please refer to the above.
>
> 2. As per the details filed by you on 13.8.2018 and the material on record, it is found that all the control over the decision making over the purchase and sale of shares mentioned in the Share Purchase Agreement (SPA) does not lie with you.
>
> 3. It is seen that you are not independent in the decision making with regard to the capital assets held by you. Accordingly, the benefits of the India- Mauritius DTAA treaty is not available to you on the sale of Shares for which you have filed an application in Form 13 for issuance of lower/NIL deduction certificate u/s 197 of the Income Tax Act, 1961.
>
> 4. As per your submission dated 13.8.2018, you have that the proposed transaction is expected to close on 17.8.2018 (i.e) today. Hence, the capital gains shall be taxed as per the Income Tax Act, 1961 and certificate u/s: 197 shall be issued requiring the payer to deduct tax, accordingly at the rate of 10% plus surcharge and health and education cess as applicable. In this regard, considering the time limit of closure of the transaction, it is requested that your reply shall reach this office by way of email/fax **within 1 PM today, i.e 17.8.2018**
>
> Yours faithfully,
>
> **(M.P. DWIVEDI)**
> Dy. Commissioner of Income Tax
> InetrnationaITaxation-4(1)(2),Mumbai"

18. It becomes pertinent to note that on 18 August 2018, the petitioners transferred their shareholding in Flipkart Singapore to Fit

Holdings SARL, a Luxembourg entity. The total number of shares forming subject matter of this transaction were 1,47,54,087 and at a transaction value of around INR 131,22,02,50,194/-.

19. It is thereafter that the petitioner along with TG III and TG IV moved the AAR on 19 February 2019 seeking its opinion on the taxability of the transaction in question. Aggrieved by the failure of the AAR to dispose of the said application even though the period of six months as contemplated under Section 245R(6) had expired, the petitioner approached this Court by way of W.P.(C) 12145/2019, which came to be disposed of on 19 November 2019 with the direction that the AAR would deal with the application moved by the petitioners in an expeditious manner and dispose of the same within two months. That period came to be extended by a subsequent order of the Court dated 24 January 2020.

20. During the course of consideration of the said application, the AAR also called for a report from the **Commissioner of Income Tax (International Taxation)-4**[21]. The said authority submitted its report on 03 January 2020 and where it opined as follows:-

> "7.3 As per the notes to financial statements of the year ending 31.12.2011, The Applicant is owned by Tiger Global Five Parent Holdings, Tiger Global Six Parent Holdings, and Tiger Global Principals (the "Shareholders"), Mauritius private companies. Tiger Global Five Parent Holdings owns 79.3%, Tiger Global Six Parent Holdings owns 16.7% and Tiger Global Principals owns 4.0% of the Company. Tiger Global Five Parent Holdings is wholly owned by Tiger Global Private Investment Partners V, L.P., a Cayman Island exempted limited partnership. Tiger Global Six Parent Holdings is wholly owned by Tiger Global Private Investment Partners VI, L.P., a Cayman Island exempted limited partnership. Tiger Global Management, L.L.C. is the management company of Tiger Global Private Investment Partners V, L.P. and

[21] CIT (International Taxation)

Tiger Global Private Investment Partners VI, L.P. Tiger Global Principals is wholly owned by Tiger Global Side Fund, LLC, a Delaware Limited Liability Company. All members of Tiger Global Side Fund, LLC are affiliated with Tiger Global Management, LLC.

7.4 As per the notes to the financial statement for the year ending 31.12.2017, The Company is owned by Tiger Global Five Parent Holdings, Tiger Global Six Parent Holdings, Tiger Global Seven Parent Holdings, Tiger Global Eight Holdings and Tiger Global Principals (the "Shareholders"), Mauritius private companies. Tiger Global Five Parent Holdings owns 61.5%, Tiger Global Six Parent Holdings owns 12.1%, Tiger Global Seven Parent Holdings owns 14.7%, Tiger Global Eight Holdings owns 8.5%, and Tiger Global Principals owns 3.2% of the Company. Tiger Global Five Parent Holdings is majority owned by Tiger Global Private Investment Partners V, L.P., a Cayman Islands exempted limited partnership. Tiger Global Six Parent Holdings is majority owned by Tiger Global Private Investment Partners VI, L.P., a Cayman Islands exempted limited partnership. Tiger Global Seven Parent Holdings is majority owned by Tiger Global Private Investment Partners VII, L.P., a Cayman Islands exempted limited partnership. Tiger Global Eight Holdings is majority owned by Tiger Global Private Investment Partners VII, L.P., a Cayman Islands exempted limited partnership. Tiger Global Management, LLC is the management company of Tiger Global Private Investment Partners V, L.P., Tiger Global Private Investment Partners VI, L. P., Tiger Global Private Investment Partners VII, L.P and Tiger Global Private Investment Partners VIII, L.P. Tiger Global Principals is wholly owned by Tiger Global Side Fund, LLC, a Delaware Limited Liability Company. All members of Tiger Global Side Fund, LLC are affiliated with Tiger Global Management, LLC.

7.5 From the date of inception to the financial year ending 31.12.2017, the applicant is part of Tiger Global Management LLC, USA and its affiliates, through a web of entities based out of Cayman Islands and Mauritius.

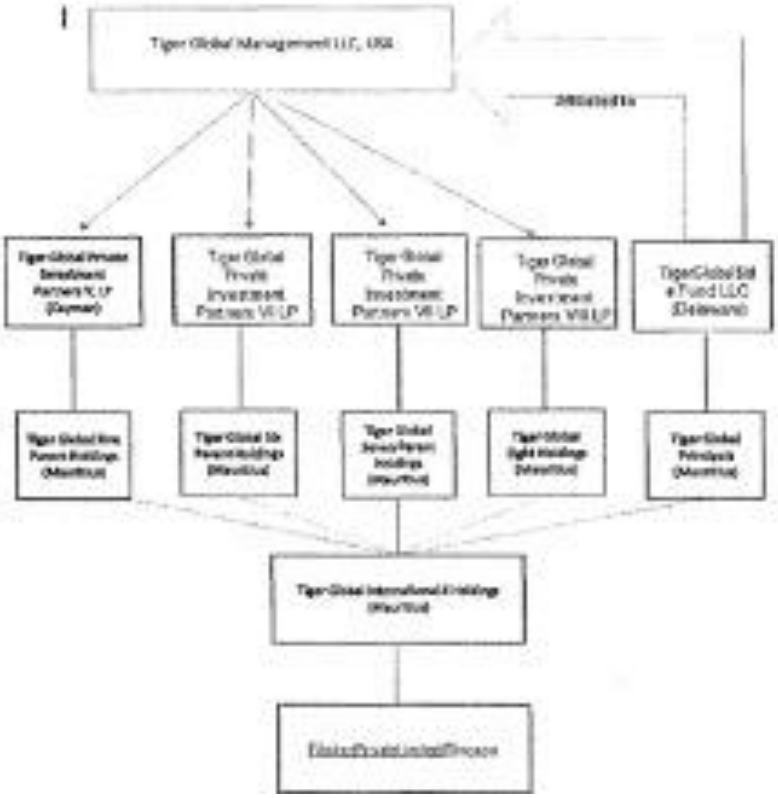
7.6 As per the business plan of the applicant dated 6.6.2011, it is stated that the Tiger Global Six Parent Holdings, Mauritius is the promoter of the applicant. It has also been stated that the applicant is being set up for making investments in India through the applicant. It is also stated that the promoter shall provide the applicant with funds for making investments in India.

xxxx xxxx xxxx

10.1. <u>SHAREHOLDING PATTERN:</u>

As per the Financial Statement for the year ending 31.12.2017, the

structure of the applicant is as below



On perusal of the share holding pattern of the applicant, it is observed that the applicant is held by Tiger Global Management LLC, a Delaware Corporation through a web of entities based out of Cayman Islands and Mauritius. It indicates that the real control of the company does not lie within Mauritius.

xxxx xxxx xxxx

10.3 BENEFICIAL OWNER OF THE SHARES:

The applicant, in its application for Category 1 Global Business License has not mentioned any beneficial owner of the Shares of the holding company. However, **it is pertinent to note that in the case of Tiger Global International III holdings, which has applied for the lower/NIL deduction certificate before the Dy. CIT-IT-4(1), has submitted in the one of the document, that Mr. Charles P Coleman as the Beneficial Owner of the Tiger Global Six Parent Holdings, which is the promoter company in the case of the applicant. Therefore, from the documents submitted by the applicant, it is appears that Mr. Charles P Coleman is the beneficiary owner of the shares and it can be said that the real**

control does not lie with the directors based out of Mauritius but the directors based out of mauritius appear to be just name lenders.

xxxx xxxx xxxx

10.5 COMPANY WITH NO INCOME

On perusal of the financial statements of the applicant, it is observed that the applicant does not have any income from the date of inception and the sources of fund for the investment in Flipkart Private Limited has been from the entities based out of Mauritius, which are controlled by entities based out of Cayman Islands and ultimately controlled by Tiger Global Management, LLC, USA.

10.8 On analysis of the financial statements of the applicant, it is found that the initial source of investment and subsequent sources of investment in Flipkart P Ltd have been capital contributions from the shareholders. The applicant has no income of its own and the sources of fund for investment and expenses are capital contributions from the entities based out of Mauritius, which are held by entities based out of Cayman Islands and ultimately controlled by the entity, Tiger Global Management LLC, USA. **The source of investment and instructions for a specified amounts given by a person,** ie. **Mr. Charles P Coleman, who is not in the board of directors and the top executives of the Tiger Global management LLC, i.e. Justin Horan present in the minutes of the meeting clearly shows that the applicant is only a conduit for the investment of US Based Entity, Tiger Global Management LLC, through a web of other conduit companies based out of Mauritius and Cayman Islands.**

10.9 The above facts prima facie indicates that the applicant is not acting "INDEPENDENTLY" but as a conduit for the real beneficial owners based out the USA. **Further, the facts of the case are squarely covered by the observations made by the Hon'ble AAR in its ruling in the case of AB Mauritius in AAR No, 1128 of 2011 dated 8.11.2017.** Therefore, considering the above facts and the ruling of the AAR and also the judgement of the Hon'ble HC of Bombay in the case of Aditya Birla Nuvo Limited Vs DDIT(2012) 342 ITR 0308, the treaty benefits of the india- Mauritius DTAA are not available to the applicant, the ultimate beneficiary of the shares of Indian Company is Tiger Global Management LLC, a company incorporated in the United States of America. Hence the applicant can not be provided any benefit under the Treaty of India- Mauritius DAA due to the fact that prima facie the said transaction appears to be designed for avoidance of tax."

21. Seeking to controvert the various adverse comments appearing in the report of the CIT (International Taxation), the petitioner submitted its response dated 16 January 2020 before the AAR. The chronology of events leading up to the acquisition and sale of Flipkart shares was disclosed as under:-

Date	**Particulars**
15.06.2011.	Date of incorporation of the Applicant
17.06.2011	GBL-1 granted to the Applicant
19.10.2011 - 17.04.2005	Shares of Singapore Co acquired by the Applicant over time
09.05.2018	Pursuant to a Share Purchase Agreement by and among Wai-Mart International Holdings Inc, the Shareholders of Singapore Co, Fortis Advisors LLC, and Walmart Inc, the Applicant agreed to sell 14,754,087 shares of Singapore Co to the Buyer for a total consideration of USD
02.08.2018	The Applicant approached the tax authorities for a certificate of nil withholding under section 197 of the Act, in relation to the Transfer seeking a certification of nil withholding prior to consummation of the transaction.
17.08.2018	The tax authorities issued a letter informing the Applicant that it would not be permitted to avail benefits under the India - Mauritius DTAA, on the basis that the "*control over the decision making over the purchase and sale of*" shares did not lie with the Applicant. Subsequently, on the same day, the tax authorities issued the 197 Certificate directing the Buyer to withhold tax at rates which vary from 6.05% (exclusive of surcharge and cess) on the consideration payable to the Petitioner in respect of the Transfer.
18.08.2018	Sale of shares to the Buyer (Transfer Date)

19.02.2019	Date of filing the present Application.

22. While controverting the allegation that the transaction was prima facie designed for avoidance of tax, the petitioners asserted as follows:-

> "It may also be noted that Courts have consistently held that a *prima facie* finding must be arrived at based on the evidence and material available on record, and mere pleading would not be sufficient. In the present case, it can be seen that as far as the allegations regarding beneficial ownership are concerned, the CIT has not submitted any basis or material to justify the allegation the beneficial ownership of shares sold as part of the Transfer does not lie with the Applicant. The CIT has merely referred to the case of Tiger Global International III Holdings in support of his allegation. The Applicant submits that this reference is wholly inappropriate and legally unsustainable for several reasons: *first*, the bars to admission under section 254R(2) of the Act have to determined on a case by case basis, for each individual applicant. It is not legally permissible or appropriate for the CIT to argue against admissibility with reference to the case of any other person. In the present case, not a single finding of fact in relation to the Applicant has been put forth by the CIT to justify his unsubstantiated allegation that the beneficial ownership of the shares does not lie with the Applicant. The *Second*, in any event, the allegation in the case of Tiger Global International III Holdings was made in the course of proceedings under section 197, and not under section 245R of the Act. As held by the Supreme Court in *Transmission Corporation of AP Ltd v. CIT* and in countless cases since, it is well settled that deduction of tax at source is in the nature of tentative determination and the final view has to be taken in the course of regular assessment. As such, a tentative determination under section 197 in the case of some other entity would not in any way fetter the jurisdiction of this Hon'ble Authority to proceed with the present Application, which has been filed by a wholly different entity. In fact, rejection of the Application at the admission stage for this reason would be tantamount to failure to exercise the jurisdiction vested by the Act in this Hon'ble Authority. For this reason, it is submitted the CIT's allegation in respect of beneficial ownership of shares is devoid of legal merit and should therefore be disregarded completely by this Hon'ble Authority.
>
> The CIT's allegation that the "*real control*" of the Applicant did not lie in Mauritius is wholly erroneous and without substance, factual support, or legal merit. The CIT's reliance on the fact that a person

from the USA has been authorised to give instructions regarding the operation of the Applicant's bank account is misplaced and counter intuitive, since it is in fact the *Board of Directors* of the Applicant that has provided this authorization. Contrary to the CIT's claim, this demonstrates that the Board of Directors has in fact exercised its authority, control and management over the affairs of the Applicant. If the argument of the CIT is taken to its logical conclusion, the Board of Directors of a company would virtually be required to undertake all day to day administrative tasks itself in order to demonstrate its control over the affairs of the company, resulting in an absurd outcome unintended by law.

xxxx xxxx xxxx

From a perusal of the above, a transaction can be considered 'designed' for the avoidance of tax only if the facts involved in the transaction show that the transaction was not based on sound commercial or business rationale but was entered into for the purpose of avoidance of tax by 'illegal or improper means' without any real and genuine business purpose. By contrast, the CIT has not identified or proved even a single fact that contradicts the assertions made in the Application or establishes even a single element of artificiality in the transaction undertaken by the Applicant. In fact, the sole basis for the allegations made in the R2 Report is that the Applicant is owned by intermediate entities in Mauritius and the Cayman Islands, and ultimately owned by one or more entities resident in the United States. It is submitted that this holding structure of the Applicant is of no relevance if the transaction is not prima facie found to be designed for the avoidance of income-tax. In the present case, the CIT has deemed the holding structure of the Applicant to be ipso facto determinative of whether the transaction is designed for the avoidance of income-tax, which is not the standard to be applied to invoke clause (iii) of the proviso to section 245R(2). Instead, it must be proven that the transaction itself (and not the structure of the entity undertaking the transaction) is designed for the avoidance of income-tax in order to invoke clause (iii). The CIT has failed to discharge this burden of proof.

xxxx xxxx xxxx

In the present case, the Applicant has set out the complete details relating to the business and commercial purpose of the transaction in the Application itself. Further, as detailed above and as evidenced by the documentation placed before this Hon'ble Authority in support, the Applicant is managed and controlled by its Board of Directors in Mauritius in accordance with its constitution. The Directors are involved in and responsible for all actions and business activities of the companies. The Applicant has

its registered office in Mauritius and obtains secretarial and support services from Mauritius based service providers. The decision to invest into and ultimately sell the shares of Singapore Co was taken by the Directors of the Applicant in Mauritius after proper discussions and deliberations. Necessary resolutions have been passed by the Board of Directors of the Applicant in this regard. Moreover, the funds invested by the Applicant in Singapore Co as well as the sale proceeds received by the Applicant from the Transfer were legally and beneficially owned by the Applicant in its sole, independent and exclusive capacity. Both in law and in fact, the Applicant beneficially held the shares of Singapore Co and was not contractually, legally, or economically obliged or accountable to any other third party with respect to the consideration received for the Transfer. It is clear that the sole object of the Transfer was to execute a strategic exit, maximize return on investment and enhance value to the Applicant's shareholders.

xxxx xxxx xxxx

In conclusion, it is submitted as follows:

(i) The CIT has not established prima facie tax avoidance based on the materials on record. Further, the CIT has not discharged his burden of establishing on the basis of the materials as to why there is *prima facie* tax avoidance. There has been no attempt by the CIT to reason or explain why the present transaction was designed *prima facie* for tax avoidance.

(ii) The reference made by the CIT to the case of Tiger Global International III Holdings is wholly inappropriate and unjustified. The finding under clause (iii) of the proviso to section 245R(2) has to be made based on the evidence and material available on record in the case at hand, and not with reference to the facts relating to some other entity.

(iii) For the bar under clause (iii) of the proviso to be attracted, it must be shown that the transaction was 'designed' specifically for tax avoidance which is apparent *prima facie* i.e., with a premediated object of tax avoidance that is evident from the record. The CIT has not identified or proved even a single fact that contradicts the assertions made in the Application or establishes even a single element of artificiality in the transaction undertaken by the Applicant.

(iv) The transaction entered into by the Applicant is commercially driven and has been undertaken within the four corners of the law. In such circumstances, Courts including the Hon'ble Supreme Court and this Hon'ble Authority have held that a transaction of

this nature is legal and permissible and is neither illegal or improper.

(v) The Applicant's claim for exemption from tax is predicated solely on the allocation of tax to Mauritius under the provisions of the Mauritius Treaty. It is settled law that in such circumstances, clause (iii) of the proviso to section 245R(2) is not attracted."

23. Subsequent to the submission of the aforesaid replies, written submissions appear to have been tendered by respective sides and whereafter the impugned order came to be passed by the AAR.

C. IMPUGNED ORDER- SALIENT FINDINGS

24. Proceeding firstly to deal with the explanation which was proffered by the petitioner of the transaction being restricted to a mere transfer of shares, the AAR in the impugned order observes:

> **"34.** The applicants have contended that the transaction involved in the present application was sale of shares simpliciter undertaken between two unrelated independent parties which cannot be considered as being designed for avoidance of tax. The contention of the applicants is too simplistic to be accepted. The precise question raised in the application is chargeability of capital gains on sale of shares under the Act read with DTAA between India and Mauritius. The capital gain is not dependent on mere sale of shares. As per the mechanism of computation of capital gains, the cost of acquisition of shares is to be reduced from the sale price of shares. Therefore, in the mechanism of capital gains computations what is relevant is not only the sale of shares but also the purchase of shares. We have to, therefore, look at the entire transaction of acquisition as well as sale of shares as a whole and we cannot adopt only a dissecting approach by examining the sale of shares as suggested by the applicants.
>
> **35.** The design for avoidance of tax may be a long drawn process. It is found from the Notes to Financial Statement that the principal objective of the applicant companies was to act as an investment holding company for a portfolio investment domiciled outside Mauritius. The investment made by the applicants in the Singapore Company, with Indian subsidiary, was with a prime objective to obtain benefits under the double taxation treaty between Mauritius and India and between Mauritius and Singapore. The organization structure of the applicants, as described in the Notes to Financial Statement, has been depicted by the Revenue in the form of chart reproduced earlier, which is not denied by the applicants. The

> applicants are part of Tiger Global Management LLC USA and have been held through its affiliates through web of entities based in Cayman Islands and Mauritius. Though the holding subsidiary structure might not be a conclusive proof for tax avoidance, the purpose for which the subsidiaries were set up does indicate the real intention behind the structure. From the materials brought on record, the fact that the applicants were set up for making investment in order to derive benefit under the DT AA between Mauritius and India is an inescapable conclusion."

25. It proceeded further to find that apart from Mr. Charles P Coleman, who was, according to it, representing TGM LLC on the Board, all other members were "*mere puppets*". This becomes evident from a reading of paragraph 36, which is extracted hereinbelow:

> "**36.** The Revenue has pointed out, by citing evidences from the Minutes of the Meeting of Board of Directors of the applicants, that the key decisions were taken by Mr. Steven Boyd, the non-resident Director, who was also General Counsel of Tiger Global Management LLC and that the other Directors were not independent but mere puppets. It is found that Mr. Steven Boyd was the non-resident Director of the applicant companies. Under the circumstance no adverse inference can be drawn if he was privy to the crucial decisions taken in the Board meetings. Further, the Supreme Court has held in the case of *Vodafone (supra)* that there was nothing wrong if the funds for making FDI by Mauritius companies/individuals had not originated from Mauritius but had come from investors of third countries. In view of this judgement, the Revenue's submission that funds had come not from the applicants but from the promoters in USA, so as to treat the arrangement as tax avoidance, has to be rejected."

26. The AAR then proceeded to examine the question of the situs of control and management of the writ petitioners. It ultimately came to hold against them principally on account of the signing authority which stood conferred on Mr. Coleman as would be evident from a reading of the following passages forming part of the impugned order:

> "**37.** What is relevant to consider here is the control and management of the applicant companies. Though the applicants have submitted that their control and management was with the Board of Directors in Mauritius, what is material is not the routine control of the affairs of the applicants but their overall control. The

control and management of applicants does not mean the day-to-day affairs of their business but would mean the head and brain of the Companies. Therefore, it will be relevant to examine whether the head and brain of the applicants was in Mauritius.

38. The fact that the authority to operate the bank accounts for transaction above US$ 2,50,000 was with Mr. Charles P. Coleman, countersigned by one of the Mauritius based Directors, has not been disputed by the applicants. As per clause 31 of the Constitution document of the applicant companies, the principal bank account of the companies had to be maintained in Mauritius. Further clause 30.2 of the said document stipulated that *all* cheques *or orders for payment shall be signed by any two directors or by such other person or persons* as *the directors may from time to time appoint.* Thus, the cheques were required to be signed by two directors or such other persons as appointed by the Board of Directors. The applicants have submitted that there was nothing wrong with Mr. Charles P. Coleman being appointed by the Board of Directors as signatory of cheques above a particular limit. Apparently, the argument of the applicants may seem logical. However, as the principal bank account of the applicants was maintained in Mauritius, it would have made sense if a local person based in Mauritius was appointed to sign the cheques on behalf of the Directors. The applicants have not explained as to why Mr. Charles P. Coleman, who was not based in Mauritius was appointed to sign the cheques of Mauritius bank account. In this regard it is relevant to consider that Mr. Charles P. Coleman was the beneficial owner as disclosed by the applicants in the application form for Category "I" Global Business Licence filed with Mauritius Financial Services Commission. Mr. Coleman was also the authorized signatory for the immediate parent company of the applicants viz. Tiger Global Five Percent Holdings and Tiger Global Six Percent Holdings and was also the sole Director of ultimate holding company Tiger Global PIP Management V Limited and Tiger Global PIP Management VI Limited. In view of these facts the appointment of Mr. Charles P. Coleman as authorized signatory of bank cheques above a limit can't be considered as a mere coincidence.

39. The applicants have contended that authorization to certain person to operate its bank account doesn't ipso facto mean that the applicants had no control over its funds. It must be considered that authorization given by the applicants to operate its bank account was not to certain person but to Mr. Charles P. Coleman, whose influence over the group has been described in the preceding para. Mr. Charles P. Coleman and another authorized signatory Mr. Anil Castro, though being not on the Board of Directors of the applicants, were the key personnel of the Group and were managing and controlling the affairs of the entire organization

> structure. From the evidences brought on record by the Revenue, it is evident that the funds of the applicants were ultimately controlled by Mr. Charles P. Coleman and the applicants had only a limited control over their fund. Apparently, the decision for investment or sale was taken by the Board of Directors of the applicants but the real control over the decision of any transaction over USD 2,50,000 was exercised by Mr. Charles P. Coleman only. Obviously, he was controlling the decision of the Board of Directors of the applicants through the non-resident Director Mr. Steven Boyd who was accountable to him. We have, therefore, no hesitation to conclude that the head and brain of the companies and consequently their control and management was situated not in Mauritius but outside in USA."

27. While dealing with the argument of the writ petitioners that their holding structure would not be determinative of whether the transaction was designed to avoid tax, the AAR observed as follows:

> "**40.** The applicants have contended that the holding structure of the applicants has no relevance to determine whether the transaction was *prima facie* designed for avoidance of tax. In our opinion it is not the holding structure only that would be relevant. The holding structure coupled with *prima facie* management and control of the holding structure, including the management and control of the applicants, would be relevant factors for determining the design for avoidance of tax. As discussed earlier, the real management and control of the applicants was not with their respective Board of Directors but with Mr. Charles P. Coleman, the beneficial owner of the entire group structure. The applicant companies were only a "see through entity" to avail the benefits of India-Mauritius DTAA."

28. The AAR then proceeded to make the following observations with respect to the amendments which were introduced in the DTAA and the grandfathering clause comprised in sub-paragraph 3(A) of Article 13 of the said DTAA:

> **41.** The applicants have submitted that a claim for treaty eligibility does not tantamount to tax avoidance. The applicants' claim for exemption of capital gains was in accordance with the provisions of Article-13 of India- Mauritius treaty. It was contended that under the circumstances, it cannot be said that the question raised in the application related to a transaction or issue designed *prima facie* for avoidance of income-tax. It is a settled principle that a treaty is to

be interpreted in good faith. The context and purpose of the treaty must be determined on the basis of preamble and *annexure* including agreement, subsequent agreement regarding interpretation of terms of the treaties, relevant international rules applicable to the agreement etc. The Circular No. 682 dated 30.03.1994 issued by the CBDT had clarified that any resident of Mauritius deriving income from alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per the Mauritius tax law and will not have any capital gains tax liability in India. It was imperative from this Circular that what was exempted for a resident of Mauritius was the capital gains derived on alienation of shares of Indian company. In the present case capital gains has not been derived by alienation of shares of any Indian company rather the applicants have come before us in respect to capital gains arising on sale of shares of Singapore Company. The Protocol for Amendment of Convention for Avoidance of Double Taxation between India and Mauritius was Signed on 10.05.2016 which provided that taxation of capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India will be taxed on source basis with effect from financial year 2017-18. At the same time investment made before 1st April, 2017 was grandfathered and not subject to capital gains tax in India. Thus as per the amended DTAA between India & Mauritius as well, what was not taxable was capital gains arising on sale of shares of a company resident in India. It is thus crystal clear that exemption from capital gains tax on sale of shares of company not resident in India was never intended under the original or the amended DTAA between India and Mauritius. In view of this clear stipulation in the India-Mauritius DTAA, the applicants were not entitled to claim benefit of exemption of capital gains on the sale of shares of Singapore Company. Thus, the applicants have no case on merits and fail on the ground of treaty eligibility as well."

29. In the context of the perceived control and holding pattern of the writ petitioners, the AAR held that in light of the decision of the Supreme Court in **Vodafone International Holdings B.V. v. Union of India & Anr.**[22]**,** as well as Circular No. 789 dated 13 April 2000 the Income Tax authorities would be entitled to discard a device adopted by an assessee and to proceed to take into consideration the essence of the transaction between the parties. Ruling on this aspect

[22] [(2012) 6 SCC 613]

the AAR held:

> "**42.** The applicants have disputed the contention of the Revenue that the tax residency in Mauritius was established only to take advantage of India- Mauritius DTAA. The applicants submitted that Mauritius comprehensive tax treaty network with various countries (and not just India) facilitated efficient asset management and achieved a competitive return for their investors. According to the applicants, the mere fact of obtaining a TRC to avail the treaty benefits does not make it a colourable device for tax avoidance. It had been held by the Hon'ble Supreme Court in the case of *Vodafone (supra)* that DTAA and Circular No. 789 dated 13.4.2000 would not preclude the Income Tax Department from denying the tax treaty benefits in suitable cases. It was further held that the Department is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company was interposed as a device, it was open to the Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. *It is relevant to consider here that though the tax residency is stated to be established to take benefit of Mauritius tax treaty network with various countries and not just India, in effect the entire investment made by the applicants was with Singapore company only, in respect of which the benefit of India-Mauritius DTAA is being claimed.* As is evident from their financial statements filed with the application, all the three applicants had not made any other investment other than in the shares of Flipkart. Thus, the real intention of the applicants was to avail the benefit of India-Mauritius treaty, whatever be the stated objective."

30. In paragraph 44, the AAR distinguished a decision rendered by it in the case of **Moody's Analytics Inc. USA, In re (AAR)**[23] observing that since that decision pertained to capital gains derived from the transfer of shares of an Indian company, it was clearly distinguishable. It also chose to explain away its own decision in **Golden Bella Holdings Ltd. v. Deputy Commissioner of Income-tax (International Taxation)-2(3)(2)**[24], as well as **Star Television Entertainment Ltd., In re**

[23] [(2012) 348 ITR 205 (AAR)]
[24] ITA 6958/Mum/2017

(AAR)[25], on similar grounds. Paragraph 44 of the impugned order reads thus:

> "**44.** The applicants have also relied upon the ruling of this Authority in the case of *Moody's Analytics Inc. USA*. It is found that the issue involved in that case was capital gains arising to Mauritius company on transfer of its shares in Indian company to a foreign company, which was held as not chargeable to tax in India. As the issue involved there was capital gain on transfer of shares of Indian company, the facts are found to be distinct as the applicant has not transferred the shares of Indian Company but that of a Singapore company. In the case of *Golden Bella Holdings Ltd*, also relied by the applicants, the facts were different as the investment was made in CCDs of an Indian Private Limited company and the interest income derived therefrom was held as not taxable under the beneficial provision of DTAA between India and Cyprus. The facts of the case of *STAR Television Entertainment Limited (supra)* are also found to be different as the issue involved therein was capital gain arising on amalgamation. The other judicial pronouncements relied upon by the applicants are also found to be different and distinct on facts and the ratio of those decisions can't be imported to the facts of the present case."

31. We also deem it apposite to extract paragraphs 47 and 48 of the impugned order and which are reproduced hereinbelow:

> "**47.** The applicants fail miserably if we apply the yardsticks as laid down by the Hon'ble Supreme Court in the case of *Vodafone (supra).* There was no foreign direct investment made by the applicant companies in India and, therefore, there cannot be any question of participation in investment. The applicants had made investment in shares of Flipkart which was a Singapore company and thus the immediate investment destination was in Singapore and not in India. In view of this fact the applicants also fail on other yardsticks viz. the period of business operation in India, the generation of tax revenue in India, timing of exit and continuity of business on such exit. In the absence of any strategic foreign direct investment in India there was neither any business operation in India nor they ever generated any taxable revenue in India. In the absence of any direct investment in India one can only conclude that the arrangement was a pre-ordained transaction which was created for tax avoidance purpose.
>
> **48.** In view of the foregoing, we are of the considered opinion that the issue involved in the question raised in the present applications was *designed prima facie* for avoidance of tax. The applicants have

[25] [(2010) 321 ITR 1 (AAR)]

> contended that shares of the Singapore Company derived their value substantially from assets located in India and, therefore, it was eligible to take benefit of Article 13 (4) of India - Mauritius Treaty. Even if the Singapore Company derived its value from the assets located in India, the fact remains that what the applicants had transferred was shares of Singapore Company and not that of an Indian company. The objective of India-Mauritius DTAA was to allow exemption of capital gains on transfer of shares of Indian company only and any such exemption on transfer of shares of the company not resident in India, was never intended by the legislator. Further, as discussed earlier the actual control and management of the applicants was not in Mauritius but in USA with Mr. Charles P. Coleman, the beneficial owner of the entire group structure. Therefore, we have no hesitation to conclude that the entire arrangement made by the applicants was with an intention to claim benefit under India - Mauritius DTAA, which was not intended by the lawmakers, and such an arrangement was nothing but an arrangement for avoidance of tax in India. Therefore, the bar under clause (iii) to proviso to Section 245R(2) of the Act is found to be squarely applicable to the present cases. Accordingly, the applications are rejected."

32. As would be evident from a reading of the aforesaid extracts, although the AAR accepts that the investments made were in respect of Flipkart Singapore, and consequently the immediate investment destination being recognized to be Singapore and not India, it observed that even if it were to accept the contention of the petitioner that the shares of Flipkart derived their value substantially from assets located in India, the fact that the transfer was in respect of shares of a Singapore company as distinguished from an Indian company, would remain unimpacted. The AAR holds that the objective of the DTAA was confined to the grant of exemption from capital gains arising from the transfer of shares of an Indian company only and that exemption on transfer of shares of a company not resident in India was never intended or contemplated under the DTAA.

33. It was on an overall consideration of the above, that it ultimately came to conclude that the transaction was entered into with

an intent to derive benefits from the DTAA in a manner which was never intended by the two contracting States and that consequently clause (iii) of the Proviso to Section 245R(2) would be attracted. It was on the aforesaid basis that the applications of the present petitioner as well as TG III and TG IV came to be rejected.

D. SUBMISSIONS OF THE PETITIONERS

34. Appearing for the writ petitioners, Mr. Kaka, learned senior counsel submitted that Article 13(4) of the DTAA exempts all residents of Mauritius from capital gains tax that may accrue or arise in India. It was Mr. Kaka's submission that the term 'resident' would clearly be guided by the CBDT Circulars as well as the concept of TRCs' which came to be adopted in the Convention. Mr. Kaka firstly drew our attention to CBDT Circular No. 789 dated 13 April 2000 and which reads as follows:

> **"734. Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)**
>
> **1.** The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article 4 of the DTAC defines a resident of one State to mean "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 a similar nature." Foreign Institutional Investors and other investment funds, etc., which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritius Tax law and are, therefore, to be considered as residents of Mauritius in accordance with the DTAC.
>
> **2.** Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income-tax Act, 1961. Under the DTAC, tax was deductible at source on the gross dividend paid out at the rate of 5% or 15% depending upon the extent of shareholding of the Mauritius resident. Under the Income-tax Act, 1961, tax was deductible at source at the rates specified under section 115A, etc. Doubts have been raised regarding the taxation of dividends in the

hands of investors from Mauritius. It is hereby clarified that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly.

3. The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accordingly, FIIs, etc., which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of article 13.

Circular : *No. 789, dated 13-4-2000."*

35. Mr. Kaka laid emphasis on the Circular itself acknowledging that a TRC once issued by the Mauritian authorities would constitute sufficient evidence of the status of residence as well as the issue of beneficial ownership for the purposes of applying the DTAA. It was pointed out that paragraph 3 of the aforesaid Circular, specifically alludes to the aforesaid prescription being equally applicable in respect of income in the form of capital gains arising from the sale of shares. Mr. Kaka pointed out that the CBDT had accordingly clarified that **Foreign Institutional Investors**[26] resident in Mauritius would not be taxed on income from capital gains arising in India consequent to a sale of shares in terms of Article 13(4).

36. It was then submitted by Mr. Kaka that the TRC remains the primary and constant requirement for the purposes of claiming treaty benefits and that the perceived motives underlying the incorporation or establishment of an entity in Mauritius would be wholly irrelevant. Mr. Kaka in this regard drew our attention to the following passages from the decision of the Supreme Court in **Union of India v. Azadi Bachao Andolan**[27]:

[26] FII
[27] [(2004) 10 SCC 1]

"**114.** It is urged by the learned counsel for the appellants, and rightly in our view, that if it was intended that a national of a third State should be precluded from the benefits of DTAC, then a suitable term of limitation to that effect should have been incorporated therein. As a contrast, our attention was drawn to Article 24 of the Indo-US Treaty on Avoidance of Double Taxation which specifically provides the limitations subject to which the benefits under the Treaty can be availed of. One of the limitations is that more than 50% of the beneficial interest, or in the case of a company, more a than 50% of the number of shares of each class of the company, be owned directly or indirectly by one or more individual residents of one of the contracting States. Article 24 of the Indo-US DTAC is in marked contrast with the Indo-Mauritius DTAC. The appellants rightly contend that in the absence of a limitation clause, such as the one contained in Article 24 of the Indo-US Treaty, there are no disabling or disentitling conditions under the Indo-Mauritius Treaty prohibiting the resident of a third nation from deriving benefits thereunder. They also urge that motives with which the residents have been incorporated in Mauritius are wholly irrelevant and cannot in any way affect the legality of the transaction. They urge that there is nothing like equity in a fiscal statute. Either the statute applies proprio vigore or it does not. There is no question of applying a fiscal statute by intendment, if the expressed words do not apply. In our view, this contention of the appellants has merit and deserves acceptance. We shall have occasion to examine the argument based on motive a little later.

115. The decision of the Chancery Division in *F.G. (Films) Ltd., In re* was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to prevent "fraud". This decision only emphasises the doctrine of piercing the veil of incorporation. There is no doubt, that, where necessary, the courts are empowered to lift the veil of incorporation while applying the domestic law. In the situation where the terms of DTAC have been made applicable by reason of Section 90 of the Income Tax Act, 1961, even if they derogate from the provisions of the Income Tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the court. As we have already emphasised, the whole purpose of DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income Tax Act. In our view, therefore, the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us."

37. Learned senior counsel then drew our attention to a Press Release dated 01 March 2013 and which was published in the context

of certain amendments which were proposed to Section 90 by virtue of Finance Bill, 2013. It becomes pertinent to note that Clause 21 of that Bill had proposed the following amendments to Section 90:

> **"21**. In section 90 of the Income-tax Act,—
>
> (*a*) sub-section (*2A*) shall be omitted;
>
> (*b*) after sub-section (*2*), the following sub-section shall be inserted with effect from the 1st day of April, 2016, namely:—
>
> "(*2A*) Notwithstanding anything contained in sub-section (*2*), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.";
>
> (*c*) after sub-section (*4*) and before *Explanation* 1, the following sub-section shall be inserted, namely:—
>
> "(*5*) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (*4*), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."

38. Mr. Kaka submitted that a huge furore arose in light of the proposed insertion of sub-section (5) in Section 90 and which had stipulated that while a TRC would be necessary, it would not be a sufficient condition for claiming relief under a DTAA. On account of the vociferous objections which were raised with respect to the proposed amendments, a Press Release came to be issued on 01 March 2013 and which carried the clarification tendered by the Finance Ministry that Section 90(5) was not intended to be utilized as a tool for the Income Tax authorities in India to question the validity of a TRC. The Finance Ministry clarified that since that was never the intention behind the proposed introduction of sub-section (5) in Section 90, a TRC produced by a resident of a contracting State would be accepted as evidence and that Income Tax authorities would not be entitled to "*question*" or "*go behind*" the said certificate. It was additionally clarified that Circular No. 789 dated 13 April 2000 would

continue to hold the field.

39. The aforenoted Press Release is reproduced hereinbelow:

FINANCE MINISTRY'S CLARIFICATION ON TAX RESIDENCY CERTIFICATE (TRC)
PRESS RELEASE, DATED 1-3-2013

> Concern has been expressed regarding the clause in the Finance Bill that amends Section 90 of the Income tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of section 90 was introduced last year by Finance Act, 2012. That subsection requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.
>
> DTAAs recognize different kinds of income. The DTAAs stipulate that a resident of a contracting state will be entitled to the benefits of the DTAA.
>
> In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA. The same words are proposed to be introduced in the Income-tax Act as sub-section (5) of section 90. Hence, it will be dear that nothing new has been done this year which was not there already last year.
>
> However, it has been pointed out that the language of the proposed sub-section (5) of section 90 could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India. The government wishes to make it clear that that is not the intention of the proposed sub-section (5) of section 90. The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.
>
> In the case of Mauritius, circular no. 789, dated 13-4-2000 continues to be in force pending ongoing discussions between India and Mauritius.
>
> However, since a concern has been expressed about the language of sub-section (5) of section 90, this concern will be addressed suitably when the Finance Bill is taken up for consideration."

40. It becomes pertinent to note that proposed sub-section (5) never came to be introduced or incorporated in Section 90 thereafter. This becomes evident from the amendments which were ultimately adopted

in Section 90 and which are extracted hereinbelow:

> "**Amendment of section 90.**
>
> **23.** In section 90 of the Income-tax Act.
>
> (*a*) sub-section (2A) shall be omitted;
>
> (*b*) after sub-section (2) the following sub-section shall be inserted with effect from the 1st day of April, 2017, namely:—
>
> "(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.":
>
> (*c*) in sub-section (4), for the words "a certificate, containing such particulars as may be prescribed, of his being a resident", the words "a certificate of his being a resident" shall be substituted'
>
> (d) after sub-section (4) and before *Explanation I*, the following sub-section shall be inserted, namely:—
>
> "(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed"."

As would be manifest from the above, the proposed clause (5) to Section 90 which formed part of Finance Bill 2013 does not appear to have been tabled and in any event failed to find passage.

41. Insofar as the validity and conclusiveness of a TRC is concerned, Mr. Kaka drew our attention to the following pertinent observations as rendered by the Punjab and Haryana High Court in **Serco BPO P. Ltd. v. Authority For Advance Ruling and Ors.**[28]:

> "**30.** In view of the circular, it is incumbent upon the authorities in India to accept the certificates of residence issued by the Mauritian authorities. Circular No. 789 is a statutory circular issued under section 119 of the Act. It is obviously based upon the trust reposed by the Indian authorities in the Mauritian authorities. Once it is accepted that the certificate has been issued by the Mauritian authorities, the validity thereof cannot be questioned by the Indian authorities. This is a convention/treaty entered into between the two sovereign States. A refusal to accept the validity of a certificate issued by the Contracting States would be contrary to the

[28] 2015 SCC OnLine P&H 20324

> convention and constitute an erosion of the faith and trust reposed by the Contracting States in each other. It is for the Government of India to decide whether or not such a certificate ought to be accepted. Once it is established that it has been issued by the Contracting State, i.e., Mauritius, a failure to accept the residence certificate issued by the Mauritian authorities would be an indication of break down in the faith reposed by the Government of India in the Government of Mauritius and the Mauritian authorities reiterated in and evidenced by statutory circulars issued under section 119 of the Act."

42. Our attention was also drawn to a decision rendered by the Bombay High Court in **Commissioner of Income-Tax (International Taxation)-3 v. JSH (Mauritius) Ltd.**[29] and where it was observed as under:

> "**13.** The reliance placed on Section 9(1)(i) and Explanation 5 thereto by the learned counsel for the Petitioner would not be of any avail to the Petitioner. In the present case, the Respondent has placed reliance on the Double Taxation Avoidance Agreement between India and Mauritius. It is clear from the said Agreement that the capital gains from alienation of the shares situated in India could only be taxed in Mauritius and not in India. The Apex Court in a case of Azadi Bachao Andolan (supra) has clearly observed that the terms and provisions of the Agreement i.e. DTAA shall operate even if they are inconsistent with the provisions of the Income Tax Act. The Petitioner could have relied on Section 9(1)(i) and Explanation 5 if the present case would have not been covered by the DTAA."

43. Mr. Kaka also laid emphasis on the following principles which came to be enunciated by the Andhra Pradesh High Court in **Sanofi Pasteur Holdings SA v. Department of Revenue & Ors**[30].

> "**118.** On no rational interpretive principle is it legitimate to consider provisions of article 14(5) as permitting a "see through". The provision, on a true, fair and non-manipulative interpretation, does not accommodate reckoning of the inherence of control by an intermediary/interpositioned joint venture company (ShanH), of the affairs, management and assets of its subsidiary (SBL), as alienation of shares by or of the control over the affairs, management and assets of the subsidiary (SBL), by one or all of the distinct participants of the interpositioned joint venture, i.e., by

[29] 2017 SCC OnLine Bom 8875
[30] [(2013) 354 ITR 316 (AP)]

> MA/GIMD, who are distinct and French resident corporate entities themselves."

44. It was then submitted by Mr. Kaka that the unilateral amendments which came to be introduced in Section 9 by virtue of Finance Act, 2012, and which incorporated principles of indirect transfer tax, cannot be interpreted or enforced so as to have the effect of overriding existing tax treaties. It was Mr. Kaka's submission that Parliament itself had not intended those amendments having the effect of depriving an assessee of benefits which could otherwise be claimed under a DTAA. This, according to Mr. Kaka, would clearly emerge from the speech of the Finance Minister made during the debates surrounding the Finance Bill, 2012. The relevant extracts of the aforenoted speech are reproduced hereinbelow:

> "Hon. Members are aware that a provision in the Finance Bill which seeks to retrospectively clarify the provisions of the Income Tax Act relating to capital gains on sale of assets located in India through indirect transfers abroad, has been intensely debated in the country and outside. I would like to confirm that clarificatory amendments do not override the provisions of Double Taxation Avoidance Agreement (DTAA) which India has with 82 countries. It would impact those cases where the transaction has been routed through low tax or no tax countries with whom India does not have a Double Taxation Avoidance Agreement.
>
> The retrospective clarificatory amendments which are now under consideration of Parliament will not be used to reopen any cases where assessment orders have already been finalized. I have asked the Central Board of Direct Taxes to issue a policy circular to clearly state this position after the passage of the Finance Bill."

45. According to learned senior counsel this principle in any way cannot possibly be doubted bearing in mind the following pertinent observations which were rendered by this Court in **Director of Income Tax v. New Skies Satellite BV**[31].

[31] 2016 SCC OnLine Del 796

"**41.** This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible.

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45. At the very outset, it should be understood that it is not as if the double taxation avoidance agreements completely prohibit reliance on domestic law. Under these, a reference is made to the domestic law of the Contracting States. Article 3(2) of both double taxation avoidance agreements state that in the course of application of the treaty, any term not defined in the treaty, shall, have the meaning which is imputed to it in the laws in force in that State relating to the taxes which are the subject of the Convention.

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The treaties therefore, create a bifurcation between those terms, which have been defined by them (i.e the concerned treaty), and those, which remain undefined. It is in the latter instance that domestic law shall mandatorily supply the import to be given to the word in question. In the former case however, the words in the treaty will be controlled by the definitions of those words in the treaty if they are so provided.

46. Though this has been the general rule, much discussion has also taken place on whether an interpretation given to a treaty alters with a transformation in, or amendments in, domestic law of one of the State parties. At any given point, does a reference to the treaty point to the law of the Contracting States at the time the treaty was concluded, or relate to the law of the States as existing at the time of the reference to the treaty ? The former is the "static" approach while the latter is called the "ambulatory" approach. One opportunity for a State to ease its obligations under a tax convention comes from the ambulatory reference to domestic law. States seeking to furtively dodge the limitations that such treaties impose, sometimes, resort to amending their domestic laws, all the while under the protection of the theory of ambulatory reference. It

thereby allows itself an adjustment to broaden the scope of circumstances under which it is allowed to tax under a treaty. A convenient opportunity sometimes presents itself in the form of ambiguous technical formulations in the concerned treaty. States attempting to clarify or concretise any one of these meanings, (unsurprisingly the one that benefits it) enact domestic legislation which subserves such purpose.

47. In this context, recently in Sanofi Pasteur Holding SA v. Department of Revenue (2013) 354 ITR 316 (AP), the Andhra Pradesh High Court discussed and subscribed to the ratio of the Supreme Court of Canada in R. v. Melford Developments Inc. 82 DTC 6281 (1982) with respect to the applicability of domestic amendments to international instruments. In R. v. Melford Developments Inc. 82 DTC 6281 (1982), the Canadian Supreme Court held that the ambulatory approach is antithetical to treaty obligations:

> "There are 26 concluded and 10 proposed tax conventions, treaties or agreements between Canada and other nations of the world. If the submission of the appellant is correct, these agreements are all put in peril by any legislative action taken by Parliament with reference to the revision of the Income-tax Act. For this practical reason one finds it difficult to conclude that Parliament has left its own handiwork of 1956 in such inadvertent jeopardy. That is not to say that before the 1956 Act can be amended in substance it must be done by Parliament in an Act entitled 'An act to Amend the Act of 1956'. But neither is the converse true, that is that every tax enactment adopted for whatever purpose, might have the effect of amending one or more bilateral or multilateral tax conventions without any avowed purpose or intention so to do."

48. In CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom), the Bombay High Court citing R. v. Melford Developments Inc. held that (page 333 of 310 ITR):

> "The ratio of the judgment, in our opinion, would mean that by a unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Such income would not be subject to tax under the expression 'laws in force'.. .
>
> While considering the Double Tax Avoidance Agreement the expression 'laws in force' would not only include a tax already covered by the treaty but would also include any other tax as taxes of a substantially similar character subsequent to the date of the agreement as set out in article I(2). Considering the express language of article I(2) it is not possible to accept the broad proposition urged on

behalf of the assessee that the law would be the law as applicable or as define when the double taxation avoidance agreement was entered into.".

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52. Thus, an interpretive exercise by Parliament cannot be taken so far as to control the meaning of a word expressly defined in a treaty. Parliament, supreme as it may be, is not equipped, with the power to amend a treaty. It is certainly true that law laid down by Parliament in our domestic context, even if it were in violation of treaty principles, is to be given effect to ; but where the State unilaterally seeks to amend a treaty through its Legislature, the situation becomes one quite different from when it breaches the treaty. In the latter case, while internationally condemnable, the State's power to breach very much exists; courts in India have no jurisdiction in the matter, because in the absence of enactment through appropriate legislation in accordance with article 253 of the Constitution, courts do not possess any power to pronounce on the power of the State to enact a law contrary to its treaty obligations. The domestic courts, in other words, are not empowered to legally strike down such action, as they cannot dictate the executive action of the State in the context of an international treaty, unless of course, the Constitution enables them to. That being said, the amendment to a treaty is not on the same footing. Parliament is simply not equipped with the power to, through domestic law, change the terms of a treaty. A treaty to begin with, is not drafted by Parliament; it is an act of the executive. Logically therefore, the executive cannot employ an amendment within the domestic laws of the State to imply an amendment within the treaty. Moreover, a treaty of this nature is a carefully negotiated economic bargain between two States. No one party to the treaty can ascribe to itself the power to unilaterally change the terms of the treaty and annul this economic bargain. It may decide to not follow the treaty, it may chose to renege from its obligations under it and exit it, but it cannot amend the treaty, especially by employing domestic law. The principle is reciprocal. Every treaty entered into be the Indian State, unless self-executory, becomes operative within the State once Parliament passes a law to such effect, which governs the relationship between the treaty terms and the other laws of the State. It then becomes part of the general conspectus of domestic law. Now, if an amendment were to be effected to the terms of such treaty, unless the existing operationalising domestic law states that such amendments are to become automatically applicable, Parliament will have to by either a separate law, or through an amendment to the original law, make the amendment effective. Similarly, amendments to domestic law cannot be read into treaty provisions without amending the treaty itself."

46. Learned senior counsel submitted that the aforesaid issue in any case has been rendered a quietus in light of the following principles propounded by the Supreme Court in **Engineering Analysis Centre of Excellence Pvt. Ltd. v. Commissioner of Income Tax and Another**[32]:

> "**31.** That such transaction may be governed by a DTAA is then recognised by Section 5(2) read with Section 90 of the Income Tax Act, making it clear that the Central Government may enter into any such agreement with the Government of another country so as to grant relief in respect of income tax chargeable under the Income Tax Act or under any corresponding law in force in that foreign country, or for the avoidance of double taxation of income under the Income Tax Act and under the corresponding law in force in that country. What is of importance is that once a DTAA applies, the provisions of the Income Tax Act can only apply to the extent that they are more beneficial to the asses see and not otherwise. Further, by Explanation 4 to Section 90 of the Income Tax Act, it has been clarified by Parliament that where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied. This position has been recognised by this Court in *Azadi Bachao Andolan*, which held: (SCC pp. 25 & 27, paras 21 & 28)
>
> **xxxx xxxx xxxx**
>
> **64.** There is no doubt that Section 9 of the Income Tax Act refers to persons who are non-residents and taxes their income as income which is deemed to accrue or arise in India, thus, making such persons assessees under the Income Tax Act, who are liable to pay tax. There is also no doubt that the "person" responsible for paying" spoken of in Section 195 of the Income Tax Act is not a non-resident assessee, but a person resident in India, who is liable to make deductions under Section 195 of the Income Tax Act when payments are made a by it to the non-resident assessee.
>
> **xxxx xxxx xxxx**
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> **66.** What is made clear by the judgment in *GE Technology* is the fact that the "person" spoken of in Section 195(1) of the Income Tax Act is liable to make the necessary deductions only if the non-resident is liable to pay tax as an assessee under the Income Tax Act, and not otherwise. This judgment also clarifies, after referring to CBDT Circular No. 728 dated 30-10-1995, that the tax deductor must take into consideration the effect of the DTAA provisions.

[32] (2022) 3 SCC 321

> The crucial link, therefore, is that a deduction is to be made only if tax is payable by the non-resident assessee, which is underscored by this judgment, stating that the charging and machinery provisions contained in Sections 9 and 195 of the Income Tax Act are interlinked.
>
> **xxxx xxxx xxxx**
>
> **156.** The DTAAs that have been entered into by India with other Contracting States have to be interpreted liberally with a view to implement the true intention of the parties. This Court, in *Azadi Bachao Andolan* put it thus: (SCC pp. 44 & 52-53, paras 98 & 130-31)……..."

47. It was then contended that the AAR failed to bear in consideration the indubitable fact that the DTAA in question does not embody an enabling provision and which may authorize Indian Tax authorities to tax an indirect transfer of assets. Mr. Kaka sought to highlight instances where tax treaties to which India was a party specifically incorporate provisions levying a tax on capital gains arising from indirect transfer of assets.

48. Our attention was drawn to the following provisions as contained in DTAAs between India and Colombia, Fiji, and Indonesia:

> "**AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE REPUBLIC OF COLOMBIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME**
>
> **ARTICLE 13**
>
> **CAPITAL GAINS**
>
> 1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
>
> 2. Gains derived from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for

the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains derived from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains derived by a resident of a Contracting State from the alienation of shares or other corporate rights, of the capital stock of a company the property of which consists directly or indirectly principally (more than 50 percent of the aggregate value of assets owned by the company) of immovable property situated in a Contracting State, may be taxed in that State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable only in the Contracting State of which the alienator is a resident.

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AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF FIJI FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

ARTICLE 13

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the

operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable in accordance with the domestic tax law of the Contracting State in which such gains arise.

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AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF INDONESIA FOR THE AVOIDANCE OF DOUBLETAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

ARTICLE 13

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that Contracting State in which the place of effective management of the enterprise is situated.

4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in the other

Contracting State maybe taxed in that other State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident."

49. It was submitted by Mr. Kaka that although the India-Mauritius DTAA was renegotiated as late as in 2016 and by which time indirect transfer provisions had come to be incorporated in the Act, no corresponding or enabling provisions were added. According to learned senior counsel, the AAR has thus committed a manifest illegality in failing to bear in mind these significant aspects.

50. Mr. Kaka then submitted that the AAR has in effect questioned the validity of the TRC produced and has thus incorrectly and illegally proceeded to deny it benefits of the DTAA. This, according to learned senior counsel, is not only contrary to the CBDT Circulars referred to hereinabove, but also in the teeth of what the Supreme Court had held in *Azadi Bachao Andolan*, *Vodafone* as well as the exposition of the legal position by the Punjab and Haryana High Court in *Serco BPO*.

51. Apart from the CBDT Circular No. 789 which has been noticed in the preceding parts of this decision, Mr. Kaka also drew our attention to the CBDT Circular No. 682 dated 13 March 1994 and which is reproduced hereinbelow:

"1605B. Clarification regarding agreement for avoidance of double taxation with Mauritius

1. A Convention for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes of income and capital gains was entered into between the Government of India and the Government of Mauritius and was notified on 6-12-1983. In respect of India, the Convention applies from the assessment year 1983-84 and onwards.

> **2.** Article 13 of the convention deals with taxation of capital gains and it has five paragraphs. The first paragraph gives the right of taxation of capital gains on the alienation of immovable property to the country in which the property is situated. The second and third paragraphs deal with right of taxation of capital gains on the alienation of movable property linked with business or professional enterprises and ships and aircrafts.
>
> **3.** Paragraph 4 deals with taxation of capital gains arising from the alienation of any property other than those mentioned in the preceding paragraphs and gives the right of taxation of capital gains only to that State of which the person deriving the capital gains is a resident. In terms of paragraph 4, capital gains derived by a resident of Mauritius by alienation of shares of companies shall be taxable only in Mauritius according to Mauritius tax law. Therefore, any resident of Mauritius deriving income from alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per Mauritius tax law and will not have any capital gains tax liability in India.
>
> **4.** Paragraph 5 defines 'alienation' to mean the sale, exchange, transfer or relinquishment of the property or the extinguishment of any rights in it or its compulsory acquisition under any law in force in India or in Mauritius.
>
> **Circular :** *No. 682, dated 30-3-1994."*

52. Mr. Kaka argued that the AAR in questioning the TRC held by the petitioner has ignored precedents which bound that authority itself bearing in mind what was held in *Moody Analytics*, **GEA Refrigeration Technologies GMBH, In re (AAR)**[33] and **KSPG Netherlands Holding B.V., In re (AAR)**[34].

53. Proceeding then to assail the findings of the AAR in the impugned order, that the petitioner, TG III and TG IV constituted conduit companies, Mr. Kaka firstly drew our attention to the LOB clause as embodied in the DTAA and more particularly Article 27A which reads thus:

"ARTICLE 27A

[33] (2018) 401 ITR 115 (AAR)
[34] (2010) 322 ITR 696 (AAR)

LIMITATION OF BENEFITS

1. A resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 13(3B) of this Convention.

2. A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention. A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.

3. A resident of a Contracting State is deemed to be a shell/conduit company if its expenditure on operations in that Contracting State is less than Mauritian Rs.1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.

4. A resident of a Contracting State is deemed not to be a shell/conduit company if:

(a) it is listed on a recognized stock exchange of the Contracting State; or

(b) its expenditure on operations in that Contracting State is equal to or more than Mauritian Rs.1,500,000 or Indian Rs.2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.

Explanation: The cases of legal entities not having bona fide business activities shall be covered by Article 27A(1) of the Convention."

54. It was submitted that the writ petitioners clearly qualify Paragraph 4 of Article 27A since the expenditure incurred for a period of twelve months immediately preceding the date when gains accrued qualified the criteria as prescribed. It was pointed out with reference to the facts as obtaining in the case of the petitioner that it had incurred an expenditure of USD 1,063,709 and the converted expenditure thus amounting to approximately MUR 36,436,182. This according to learned senior counsel was sufficient to dispel any notion of the petitioner, TG III and TG IV being conduit companies.

55. More fundamentally, according to Mr. Kaka, once the DTAA itself came to incorporate LOB conditions it would be wholly impermissible for taxing authorities of Contracting States to conjure up additional grounds of disqualification and which may then be used for the purposes of denial of treaty benefits. According to learned senior counsel, once the prescriptions of Paragraph 4 of Article 27A were met, it was wholly impermissible for AAR to treat the petitioners as shell or conduit companies. Mr. Kaka also laid emphasis of the deeming fiction which forms part of paragraph 4 and which creates a legal fiction in the negative if conditions contained in clauses (a) and (b) are fulfilled. In view of the aforesaid, learned senior counsel submitted that the orders impugned are rendered wholly illegal and are liable to be quashed.

56. Mr. Kaka additionally submitted that the AAR had adopted a wholly erroneous approach when it sought to question and doubt or even seek to discover the real motive for incorporation of the petitioner in Mauritius, the situs of control and management of the petitioner and aspects relating to beneficial ownership. All of the above, according to learned senior counsel, were wholly irrelevant to the claim of eligibility as raised by the writ petitioners quite apart from being contrary to the law as settled by both *Azadi Bachao Andolan* and *Vodafone*.

57. Without prejudice to the above, and in the alternative Mr. Kaka submitted that even if aspects relating to control and management were conceded to be relevant, the petitioners on facts had clearly established that they were managed and controlled by an independent BoD situate in Mauritius. Mr. Kaka sought to highlight the fact that

the BoD of the petitioners was comprised of individuals with expertise in varied fields and the said Directors governing and managing the petitioner in accordance with the charter documents. Our attention was drawn to the detailed Board Minutes which came to be drawn in respect of as many as 70 meetings which were convened over a 10 year period. Taking us through those Minutes, Mr. Kaka pointed out that they would evidence the BoD of the petitioner having duly deliberated and discussed various aspects pertaining to the management of the petitioner. It was submitted that the AAR without alluding to any specific details has unjustifiably held that the directors were "*mere puppets*".

58. Mr. Kaka also assailed the findings rendered by the AAR with respect to the shareholdings of the petitioner and the flow of funds. It was submitted that the petitioner as well as TG III and TG IV were all set up as pooling vehicles for funds received from investors. It was submitted that the petitioners had aggregated funds from more than 500 investors and who were situate across 30 jurisdictions. Mr. Kaka also vehemently contended that the conclusion of the AAR that the petitioners' funds were ultimately controlled by Mr. Coleman or that the invested funds belonged to the said individual, is factually incorrect and contrary to the record. It was submitted that Mr. Coleman does not even have a controlling equity interest in the petitioner or any of its shareholders quite apart from it being the consistent stand of the writ petitioners that TGM LLC neither held equity nor had invested in them.

59. It was submitted that the conclusions of the AAR are rendered wholly erroneous and unsustainable since they have come to be

rendered in complete ignorance of the fact that the funds which the petitioner ultimately deployed were obtained from aggregated investments received from various investors spread across different jurisdictions.

60. It was then submitted that the AAR while adopting a wholly erroneous approach has sought to impute principles of beneficial ownership ignoring the fact that the said concept is not even adopted by Article 13 of the DTAA. It was highlighted that although the concept of beneficial ownership finds mention in Articles 10, 11 and 12A of the DTAA, the same is not adopted in Article 13. Articles 10, 11 and 12A of the DTAA are reproduced hereinbelow:

"ARTICLE 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed—

(a) five per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 per cent of the capital of the company paying the dividends ;

(b) fifteen per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. Notwithstanding the provisions of paragraph (2), dividends paid by a company which is a resident of Mauritius to a resident of India may be taxed in Mauritius and according to the laws of Mauritius, as long as dividends paid by companies which are residents of Mauritius are allowed as deductible expenses for determining their taxable profits. However, the tax charged shall not exceed the rate of the Mauritius tax on profit of the company paying the dividends.

4. The term "dividends" as used in this Article means income from

shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident.

5. The provisions of paragraphs (1), (2) and (3) shall not apply if the beneficial owner of the dividends, being a resident of the Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein or performs in that other State independent personal services from a fixed base situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of article 7 or article 14, as the case may be, shall apply.

6. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

ARTICLE 11

INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

[*2. However, subject to provisions of paragraphs 3, 3A and 4 of this Article, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 7.5 per cent of the gross amount of the interest;*]

3. Interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by :

(a) the Government or a local authority of the other Contracting State ;

(b) any agency or entity created or organised by the Government of the other Contracting State ; or

(c) [***]

[*3A. Interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by any bank resident of the other Contracting State carrying on bona fide banking business. However, this exemption shall apply only if such interest arises from debt-claims existing on or before 31st March, 2017.*]

4. Interest arising in a Contracting State shall be exempt from tax in that Contracting State to the extent approved by the Government of that State if it is derived and beneficially owned by any person [other than a person referred to in paragraph (3)] who is a resident of the other Contracting State provided that the transaction giving rise to the debt-claim has been approved in this regard by the Government of the first-mentioned Contracting State.

5. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and, in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

6. The provisions of paragraphs (1), (2), (3) and (4) shall not apply if the recipient of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

7. Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, apolitical sub-division, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by that permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

8.Where, by reason of a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In that case, the excess part of the

payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

xxxx xxxx xxxx

[*ARTICLE 12A*

FEES FOR TECHNICAL SERVICES

1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the beneficial owner of the fees for technical services is a resident of the other Contracting State the tax so charged shall not exceed 10 per cent of the gross amount of the fees for technical services.

3. The term "fees for technical services" as used in the Article means payments of any kind, other than those mentioned in Articles 14 and 15 of this Convention as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

4. The provisions of paragraph 1 and 2 shall not apply if the beneficial owner of the fees for technical services being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise, 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 fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the fees for technical services was incurred, and such fees for technical services are borne by such permanent establishment or fixed base, then such fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the fees for technical services exceeds the

amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.]"

In any case, according to Mr. Kaka, CBDT Circular No. 789 is itself a complete answer to the aforesaid conclusion, since once a Mauritius resident were to produce a TRC, the test of beneficial ownership would be fully satisfied.

E. ARGUMENTS OF THE RESPONDENTS

61. Appearing for the respondents, Mr. Srivastava, learned special counsel, commenced his submissions by raising the following preliminary objections with regard to the maintainability of the challenge as mounted.

62. Mr. Srivastava firstly contended that undoubtedly the jurisdiction of the AAR stands circumscribed by virtue of the Proviso to Section 245R. According to learned counsel, it was thus incumbent upon the AAR to evaluate whether the transaction is one which is prima facie designed for the avoidance of tax. Bearing the aforesaid in mind, Mr. Srivastava contended that the AAR has essentially come to form a prima facie opinion on the issue of avoidance of tax which can neither be said to be manifestly erroneous or perverse. Mr. Srivastava submitted that bearing in mind the principles which inform the exercise of power under Article 226 of the Constitution, this Court would be justified in refusing to interfere with the ultimate view taken by the AAR bearing in mind the fact that the petitioners have failed to establish that it suffers from a patent error, procedural irregularity or

plagued by errors apparent on the face of the record.

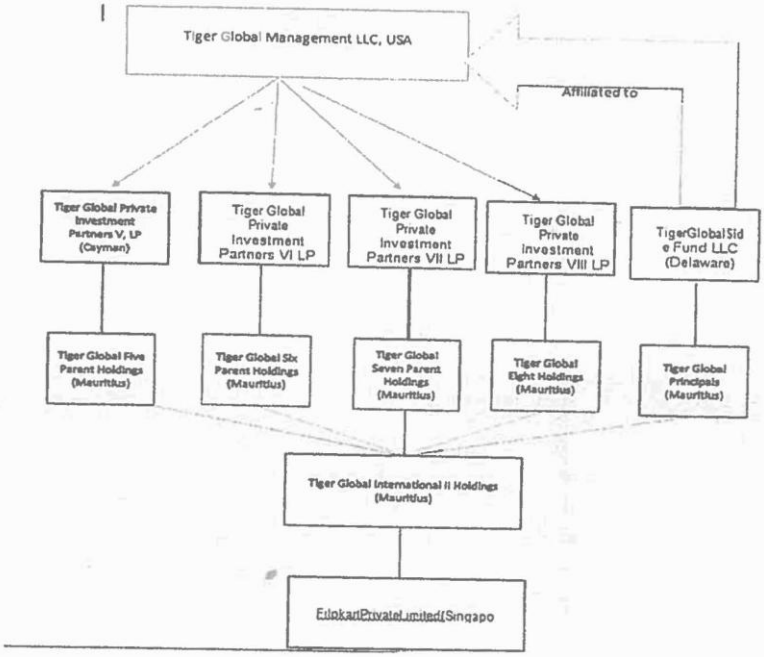
63. It was also Mr. Srivastava's submission that the order of the AAR which stands impugned herein is only a preliminary opinion formed with respect to avoidance of tax and does not rule on the issue of chargeability. According to learned counsel, the AAR has left the ultimate decision with respect to exigibility to tax open to be examined in any assessment that may be undertaken. In view of the aforesaid, it was his submission that since the basic issue of chargeability has been left open, no justification exists for this Court to exercise its power of judicial review.

64. Proceeding then to the merits of the challenge which stands raised, Mr. Srivastava submitted that the writ petition essentially gives rise to the following two principal issues:- (a) whether the transaction was prima facie designed for tax avoidance and (b) whether the income would at all be chargeable to tax in India. Mr. Srivastava underscored the fact that the petitioners had undisputedly held shares of Flipkart Singapore and which had in turn invested in multiple companies in India and consequently the value of those shares being substantially derived from assets situate in India.

65. Mr. Srivastava accordingly drew our attention to the following chart which according to learned counsel is representative of the cooperate structure of the entities forming part of the **Tiger Global Group**[35] and which was also taken note of by the AAR in its impugned order:

[35] TG Group

Organizational structure of Tiger Global International II Holdings



Organizational structure of Tiger Global International III Holdings

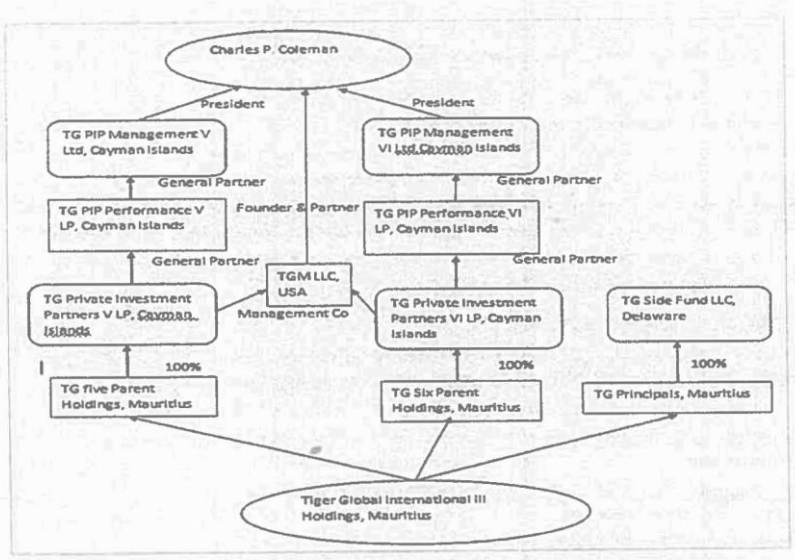
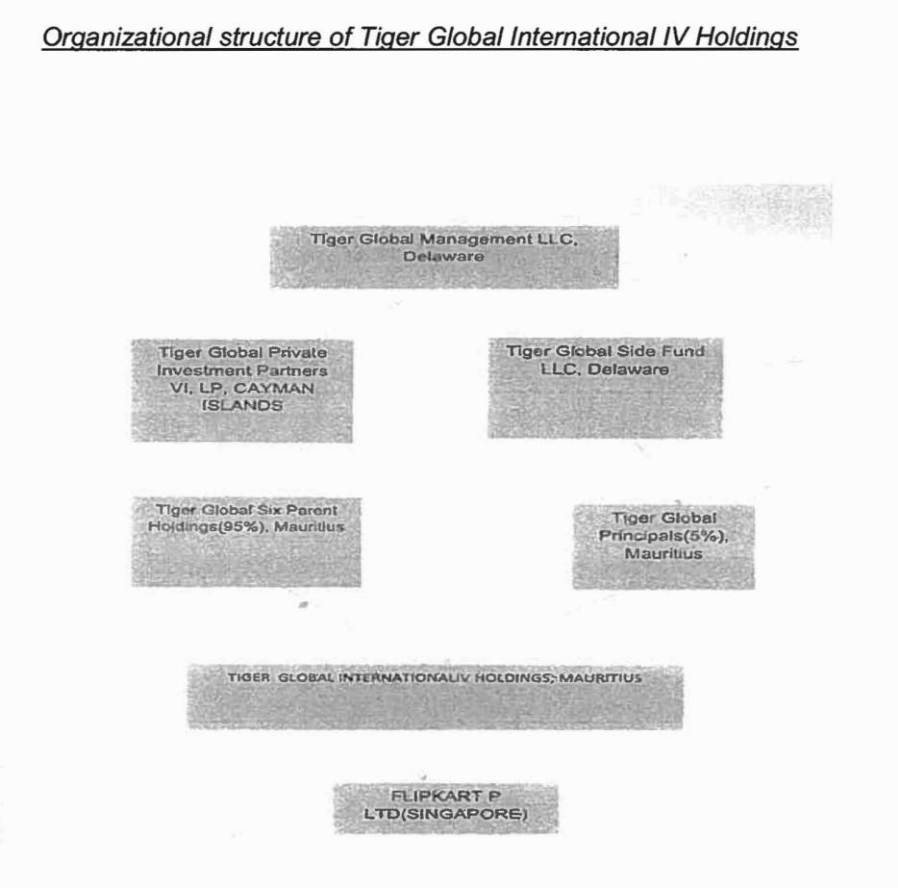
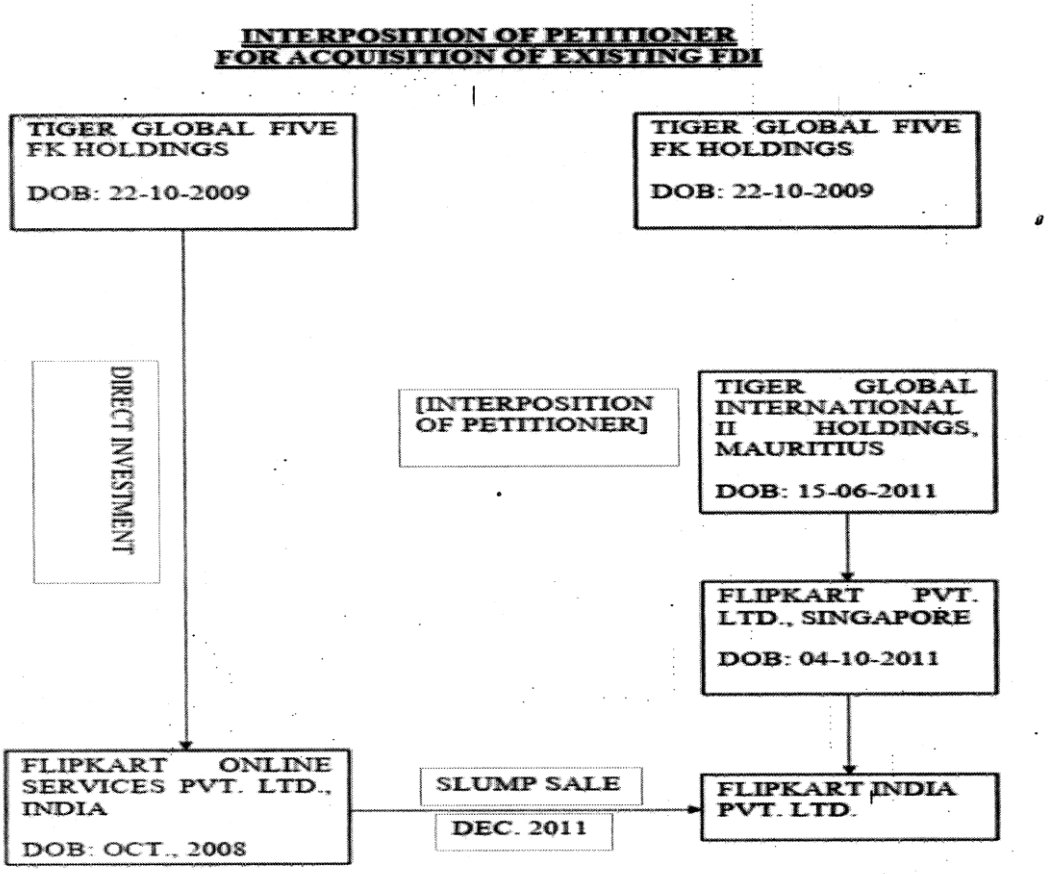


Figure 1: The group structure for Tiger Global International III Holdings



66. It was submitted that the aforesaid holding pattern was never disputed by the petitioners and the organizational structure would lead one to the inevitable conclusion that TGM LLC was the parent and holding company. Mr. Srivastava had additionally placed for our consideration paragraph 8.3 of the counter affidavit and which carried yet another chart depicting the purported "*interposition*" of the petitioner between **Tiger Global Five FK Holdings**[36] and **Flipkart Online Services Pvt. Ltd.**[37], which has been described by learned counsel as the "*original natural investor*" and the "*original natural investee*" respectively. The said chart is accordingly reproduced hereinbelow:

[36] TG Five FK Holdings
[37] Flipkart Online



67. Learned counsel accordingly submitted that it is the case of the respondent that the petitioner, TG III and TG IV were "*mere facades*" of the "*US based parent*", TGM LLC. Learned counsel contended that limited partnerships or for that matter legally exempted partnerships are by default viewed as flow through entities for the purposes of taxation in USA. Viewed in that light, it was his submission that the investee companies constitute the "*head and brains*" of the funds which were held by the petitioners.

68. Mr. Srivastava pointed out that Flipkart Online had been incorporated in 2008 in India as a start up. Referring us to the counter affidavit, it was submitted that **Tiger Global Five FK Holdings**[38] which was incorporated on 22 October 2009 had originally made

[38] TG Five FK Holdings

direct investments through the FDI route in Flipkart Online. Significantly, Mr. Srivastava submitted TG Five FK Holdings was admitted by the petitioners as an associate when they came to be incorporated in 2011. It was then asserted that the petitioner "created" a private company in the shape of Flipkart Singapore on 04 October 2011 and which in turn created a wholly owned subsidiary in India called **Flipkart India Pvt. Ltd.**[39]. In December 2011, Flipkart Online, which was a start-up incorporated in 2008 is stated to have sold its assets to Flipkart India for a consideration of USD 11 million.

69. Mr. Srivastava pointed out that Flipkart Singapore came to issue 12,86,560 ordinary shares and 96,15,450 preferred shares to the petitioner. It was asserted by the respondents that the aforenoted issuance of fresh shares by Flipkart Singapore to the petitioner represented the previous ownership of TG Five FK Holdings in Flipkart Online. Proceeding further, Mr. Srivastava contended that it was only once the petitioners realized the future business potential of Flipkart Online that the Mauritius entities came to be incorporated and interposed. The submission essentially was that the subsequent creation of the petitioner as well as TG III and TG IV was not backed by any commercial rationale.

70. According to learned counsel, the interposing of the petitioners was solely to avoid the incidence of tax which would have arisen on capital gains arising in India at the time of their eventual exit. According to learned counsel, it is these facts which led to the AAR coming to the prima facie conclusion that the transaction was designed to avoid the incidence of tax under the Act. Mr. Srivastava in this

[39] Flipkart India

respect drew our attention to the observations rendered by the AAR in paragraphs 47 and 48 of the order impugned before us and which have been reproduced in the preceding paragraphs of this decision.

71. Proceeding then to address submissions on the issue of ultimate control over the petitioner, TG III and TG IV, Mr. Srivastava submitted that the **Securities and Exchange Commission**[40] Press Release which appears as Annexure R-8 to the counter affidavit acknowledges the fact that post the takeover of Flipkart Singapore by Walmart, the same would result in 77% stake in that company being taken over and the remaining shareholders apart from the original co-founders being a few corporate entities including Tiger Global LLC. According to Mr. Srivastava, it thus becomes apparent that the petitioners held the shares of Flipkart Singapore only on paper, with the principal control being with TGM LLC.

72. Mr. Srivastava argued that the fact that TGM LLC controlled all major decisions to be taken by the writ petitioners is evident from the fact that Mr. Coleman was disclosed as the beneficial owner of the shareholding in TG III namely **Tiger Global Five FK Parent Holdings**[41]. It was contended that Mr. Coleman and other senior employees of TGM LLC were also entrusted with control over the bank accounts of the petitioners and vested with signing powers. This, according to learned counsel, is evident from the indisputable fact that the Mauritian Directors could issue instructions to banks and execute cheques for a maximum of USD 250,000/- and that too when co-signed by either Mr. Coleman or Mr. Anthony Armenio, neither of whom were on the BoD of the writ petitioners.

[40] SEC
[41] TG Five FK Parent Holdings

73. It was further asserted that the writ petitioners have failed to show any administrative expenses that they may have borne in the course of any activity undertaken in Mauritius and that they also do not appear to have engaged any employees. The submission essentially was that no substantial expenditure appears to have been incurred by the petitioners in Mauritius. It was in the aforesaid backdrop that Mr. Srivastava sought to support the ultimate conclusion reached by the AAR of the Mauritian Directors being "*mere puppets*".

74. Mr. Srivastava argued that although Mr. Moussa Taujoo, Mr. Steven Boyd and Mr. Akshar Maherally were asserted to be Directors, the petitioners had failed to place on the record any resolution in terms of which those persons may have been appointed. It was also highlighted that Mr. Stephen Boyd was in fact the General Counsel of TGM LLC.

75. Taking us then through the deliberations of the BoD which appear on the record Mr. Srivastava submitted that in most of those resolutions, the Board is stated to have merely "noted" or "ratified" decisions. This, according to learned counsel, would be irrefutable evidence of the decision making power being vested in and exercised by entities other than the Directors of the petitioners. These aspects, according to Mr. Srivastava, are clearly borne out from the Minutes of the meeting**s** of the Board which were held on 08 July 2011, 24 October 2011 and 19 December 2011. Mr. Srivastava specifically laid emphasis on item 4 of the meeting held on 24 October 2011 and in terms of which the Board is stated to have approved and ratified the prior investments as well as those proposed in Flipkart Singapore.

76. According to Mr. Srivastava, the resolution passed by the Board in this meeting also acknowledges that the extent of investment and funding from each constituent shareholder were aspects which were yet to be finalized. Mr. Srivastava sought to also underscore the resolutions passed in this meeting and which recorded that the Chairman is stated to have advised others of a proposal of additional investments being made in Flipkart Singapore.

77. Similar is the position which, according to Mr. Srivastava, would emerge from the meeting held on 19 December 2011 and where too the Board merely noted the proposed funding and the investments contemplated in Flipkart Singapore. According to learned counsel, it is thus manifest that the Board of the Mauritius companies never resolved or demonstrably took a conscious decision to make investments in Flipkart Singapore. Mr. Srivastava contended that the decision to invest in the Singapore entity was clearly taken by the parent and holding company TGM LLC with the petitioner, TG III and TG IV merely taking note of those decisions and of the investments proposed to be made.

78. Learned counsel argued that the fact that all previous decisions taken in the name of the petitioner, TG III and TG IV were ultimately ratified by a single stroke in this meeting is a clear indication of the petitioners being bereft of any independent decision making power. This, according to learned counsel, is evident from the petitioners being totally unaware of the entities which would be ultimately providing funds for the proposed investments or the level of their individual capital contribution.

79. Insofar as the aspect of management of funds held or standing

in the name of the petitioners is concerned, Mr. Srivastava drew our attention to the meeting of the Board held on 03 November 2014 and where signatories to the bank accounts held with HSBC Bank Mauritius Limited came to be altered. Learned counsel submitted that in terms of the resolutions passed in this meeting, it becomes apparent that Mr. Coleman or Mr. Anil Castro, both of whom were connected to TGM LLC, had to necessarily sign off on all cheques and instructions. According to learned counsel, the aforesaid resolution establishes the complete control that TGM LLC exercised over the petitioners. Our attention was then drawn to the meeting of the Board held on 13 August 2018 and which records the Board having taken note of a proposal for interim dividend being declared in favour of the principal shareholders. This, according to Mr. Srivastava, cannot possibly be viewed or construed as a decision taken by the Board independently. It would in fact, according to learned counsel, be liable to be read as the Board dutifully implementing a proposal mooted by the parent entity, namely TGM LLC.

80. Similarly, Mr. Srivastava referred to the proposal for refund of capital contribution and which is considered under item 2.3. Mr. Srivastava argued that although the ultimate transfer of shares in Flipkart Singapore took place on 18 August 2018, the aforesaid resolution in respect of refund of capital contribution came to be passed on 13 August 2018.

81. It was lastly urged by Mr. Srivastava that the petitioners have nowhere disclosed the identity of the entity who may have received the sale consideration from the transfer of shares in Flipkart Singapore which too, according to learned counsel, is an aspect which clearly

merits a more detailed investigation.

82. Proceeding then to the DTAA and the various issues which arise in respect of investments in Indian companies rooted through Mauritius, Mr. Srivastava submitted that the Supreme Court in *Azadi Bachao Andolan* had clearly held that while treaty shopping may be viewed as a permissible tax avoidance measure, it had clearly frowned upon colourable devices that may be adopted by unscrupulous parties seeking to avoid tax. Mr. Srivastava, in support of the aforenoted submission, drew our attention to paragraphs 136 and 148 of the report which are extracted hereinbelow:-

> "**136.** There are many principles in fiscal economy which, though at the first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping in our view, is another. Despite the sound and fury of the respondents over the so-called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when the lndo-Mauritius DTAC was entered e into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.
>
> **xxxx xxxx xxxx**
>
> **148.** We may also refer to the judgment of the Gujarat High Court in *Banyan and Berry v. CIT* where referring to *McDowell*, the Court observed: (ITR p. 850 E-H)
>
> > "The court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in *McDowell case*. The ratio of any decision has to be understood in the context it has

> been made. The facts and circumstances which lead to *McDowell* decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity"."

83. According to learned counsel, Circular No. 789/2000 dated 13 April 2000 does not detract from the power of authorities under the Act to assess or inquire into a particular transaction. According to learned counsel, this would be manifest from the observations of the Supreme Court appearing in *Vodafone* and where their Lordships had spoken of the power and the authority of income tax authorities to inquire into aspects such as independent status, piercing of the corporate veil and adopting the look through approach.

84. Mr. Srivastava relied upon the following passages as appearing in *Vodafone:-*

> "**70.** Reading *McDowell*, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between *McDowell* and *Azadi Bachao* or between *McDowell* and *Mathuram Agrawal*.
>
> **xxxx xxxx xxxx**
>
> **74.** However, where the subsidiary's executive Directors' competences are transferred to other persons/bodies or where the subsidiary's executive Directors' decision making has become fully subordinate to the holding company with the consequence that the subsidiary's executive Directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling non-resident enterprise (NRE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, recharacterise the equity transfer according to its economic

> substance and impose the tax on the actual controlling non-resident enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense)."

85. Mr. Srivastava then contended that it would be wholly incorrect for the Court to hold that a TRC is conclusive and restrains income tax authorities from undertaking any further inquiries where fraud is suspected. He sought to draw sustenance for the aforenoted contention from the observations appearing in the following paragraphs forming part of the decision in *Vodafone*:-

> "**313.** DTAA and Circular No. 789 dated 13- 4-2000, in our view, would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance. The Tax Department, in such a situation, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. In other words, TRC does not prevent enquiry into a tax fraud; for example, where an OCB is used by an Indian resident for round- tripping or any other illegal activities, nothing prevents the Revenue from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of OCB in the entire transaction.
>
> **xxxx xxxx xxxx**
>
> **321.** Round-tripping can take many formats like under-invoicing and over-invoicing of exports and imports. Round-tripping involves getting the money out of India, say to Mauritius, and then come to India like FDI or FII. Article 4 of the Indo-Mauritius

DTAA defines a "resident" to mean any person, who under the laws of the contracting State is liable to taxation therein by reason of his domicile, residence, place of business or any other similar criteria. An Indian company, with the idea of tax evasion can also incorporate a company offshore, say in a tax haven, and then create a WOS in Mauritius and after obtaining a TRC may invest in India. Large amounts, therefore, can be routed back to India using TRC as a defence, but once it is established that *such an investment is black money or capital that is hidden, it is nothing but circular movement of capital known as round-tripping; then TRC can be ignored, since the transaction is fraudulent and against national interest*.

322. *The facts stated above are food for thought to the legislature and adequate legislative measures have to be taken to plug the loopholes; all the same, a genuine corporate structure set up for purely commercial purpose and indulging in genuine investment is to be recognised*. However, if the fraud is detected by the court of law, it can pierce the corporate structure since fraud unravels everything, even a statutory provision, if it is a stumbling block, because the legislature never intents to guard fraud. *Certainly, in our view, TRC certificate though can be accepted as a conclusive evidence for accepting status of residents as well as beneficial ownership for applying the tax treaty, it can be ignored if the treaty is abused for the fraudulent purpose of evasion of tax*."

86. Learned counsel also relied upon paragraphs 74 to 79 of the report in *Vodafone* and which are reproduced hereinbelow:-

"**74.** However, where the subsidiary's executive Directors' competences are transferred to other persons/bodies or where the subsidiary's executive Directors' decision making has become fully subordinate to the holding company with the consequence that the subsidiary's executive Directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling non-resident enterprise (NRE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, recharacterise the equity transfer according to its economic substance and impose the tax on the actual controlling non-resident enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance

over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).

75. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in *Salomon v. Salomon and Co. Ltd.,*. that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of *holding structures*.

76. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as a Cayman Islands or Mauritius-based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e. without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such holding structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance.

77. In this case, we are concerned with the concept of General Anti-Avoidance Rule (GAAR). In this case, we are not concerned with treaty shopping but with the anti- avoidance rules. The concept of GAAR is not new to India since India already has a judicial anti-avoidance rule, like some other jurisdictions. Lack of clarity and absence of appropriate provisions in the statute and/or in the treaty regarding the circumstances in which judicial anti-avoidance rules would apply has generated litigation in India.

78. Holding structures are recognised in corporate as well as tax laws. Special purpose vehicles (SPVs) and holding companies have a place in legal structures in India, be it in company law, the Takeover Code under SEBI or even under the income tax law.

79. When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the “substance over form” principle or “piercing the corporate veil” test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant.

> To give an example, if a structure is used for circular trading or round tripping or bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold."

87. Insofar as conclusivity of a TRC is concerned, Mr. Srivastava also sought to draw sustenance from the following observations as rendered by the Bombay High Court in **Aditya Birla Nuvo Ltd. vs. Deputy Director of Income-tax**[42]:

> "**47.** Once it is prima facie established that the investments in the shares of the JVC were made by AT&T, USA and the allotment of shares in the name of AT&T, Mauritius was as a permitted transferee of AT&T, USA then the fact that AT&T, Mauritius held a tax residence certificate issued by the Republic of Mauritius and that the certificate was valid on the date of sale of ICL shares would become wholly irrelevant. Since the shares of the JVC were subscribed and owned by AT&T, USA as a joint venture partner and AT&T, USA had agreed to sell the shares of ICL along with AT&T, Mauritius to Indian Rayon by a sale and purchase agreement dated September 28, 2005, the amount of sale consideration received by AT&T, USA through AT&T, Mauritius would be taxable in the hands of the AT&T, USA (now represented by NCWS). The argument that the amount received by NCWS was not the sale proceeds but represented the dividend income and return of loan advanced by NCWS to AT&T, Mauritius cannot prima facie be accepted, because, under the JVA the liability to pay for the equity shares was on AT&T USA and if AT&T USA discharges that liability by a device of advancing loan to AT&T, Mauritius and paying through AT&T, Mauritius, then it is open to the Assessing Officer to discard the device and take into consideration the real transaction between the parties.
>
> **xxxx xxxx xxxx**
>
> **96.** We have carefully considered the above arguments advanced on behalf of TIL. In the present case, TIL in exercise of its right of first refusal contained in the shareholders' agreement had agreed to purchase 37,17,80,740 equity shares of ICL from NCWS for US$ 150 million. However, instead of purchasing the said shares of

[42] 2011 SCC OnLine Bom 899

> ICL, by a sale and purchase agreement entered into with NCWS and MMMH, TIL agreed to purchase the entire shares of AT&T, Mauritius for US$ 150 million. Once we find merit in the contention of the Revenue that prima facie the ICL shares held by AT&T, Mauritius belonged to NCWS and the value of the ICL shares remaining with AT&T, Mauritius (after selling shares to Indian Rayon) was US$ 150 million, then the question to be considered is, whether TIL paid US$ 150 million for the shares of ICL or for the shares of AT&T, Mauritius which had no assets other than ICL shares. These questions would have to be gone into in the assessment proceedings.
>
> **97.** TIL cannot be said to be unaware of the fact that the shares of ICL held by AT&T, Mauritius did not belong to AT&T, Mauritius because TIL was party to the shareholders agreement, wherein all rights in respect of the shares of JVC to be issued after the shareholders' agreement was to vest in AT&T, USA and not with AT&T, Mauritius. In the share purchase agreement, it is recorded that the sale of shares of AT&T, Mauritius in favour of TIL would take place only after the sale of shares of ICL in favour of Indian Rayon takes place so that on the date of transfer of shares of AT&T, Mauritius, only 50 per cent. of the ICL shares remain in the name of AT&T, Mauritius. Therefore, the prima facie opinion of the Revenue that the transaction between TIL and NCWS/MMMH for sale and purchase of shares of AT&T, Mauritius was a colourable transaction and in fact the transaction was for sale and purchase of ICL shares by NCWS to TIL cannot be said to be devoid of any merit."

88. Mr. Srivastava then proceeded to explain the significance of various amendments which came to be introduced in the Act by virtue of Finance Act, 2012. According to learned counsel, the statutory amendments which came to be introduced by virtue of Finance Act, 2012 were a direct fallout of the aforenoted decisions. It was pointed out that by virtue of those amendments, indirect transfers came to be brought within the tax dragnet with the introduction of Explanation 5 to Section 9. It was submitted that an amendment of greater import was the addition of sub-section (2-A) in Section 90 and which came into effect from 01 April 2013. According to Mr. Srivastava, it was in order to give effect to the legislative mandate of Section 90 (2-A) that

Chapter X-A also came to be introduced by Finance Act, 2013. Mr. Srivastava took us in great detail through the various anti-avoidance rule principles which form part of Chapter X-A and the Act expounding upon impermissible tax avoidance measures. It was Mr. Srivastava's submission that the intent of the legislature providing an overriding effect to provisions enshrined in Chapter X-A is evident from Section 96 placing a reverse burden of proof upon the assessee insofar as Impermissible avoidance arrangements are concerned. Section 96 reads as under:-

> "**Impermissible avoidance arrangement**
> 96. (1) An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it-
> (a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;
> (b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;
> (c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or
> (d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.
> (2) An arrangement shall be presumed, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding fact that the main purpose of the whole arrangement is not to obtain a benefit."

Mr. Srivastava also took us through the provisions made with respect to arrangements which may be said to lack commercial substance and the consequences of an impermissible tax arrangement, which are dealt with in Sections 97 and 98 respectively.

89. More importantly, Mr. Srivastava contended that Rule 10U which came to be introduced with effect from 01 April 2016 in the

Income Tax Rules 1962[43], clearly provides added support to the contention of the respondents that the provisions of Chapter X-A would apply, notwithstanding the grandfathering clause which was relied upon by the petitioners. The submission in this respect proceeded along the following lines.

90. Mr. Srivastava contended that Rule 10U(2) in unequivocal terms declares that the provisions of Chapter X-A would apply to any arrangement irrespective of the date on which it may have been entered into and in relation to any tax benefit obtained from that arrangement on or after 01 April 2017. Since elaborate submissions were addressed in the context of the aforesaid Rule, the same is reproduced hereinbelow:-

> "**10U. Chapter X-A not to apply in certain cases**
> (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;
> (b) a Foreign Institutional Investor-
> (i) who is an assessee under the Act;
> (ii) who has not taken benefit of an agreement referred to in section 90 or section 90A as the case may be; and
> (iii) who has invested in listed securities, or unlisted securities, with the prior permission of the competent authority, in accordance with the Securities and Exchange Board of India (Foreign Institutional Investor) Regulations, 1995 and such other regulations as may be applicable, in relation to such investments;
> (c) a person, being a non-resident, in relation to investment made by him by way of offshore derivative instruments or otherwise, directly or indirectly, in a Foreign Institutional Investor;
> (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,

[43] Rules

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.

(3) For the purposes of this rule-

(i) "Foreign Institutional Investor" shall have the same meaning as assigned to it in the Explanation to section 115AD;

(ii) "off shore derivative instrument" shall have the same meaning as assigned to it in the Securities and Exchange Board of India (Foreign Institutional Investor) Regulations, 1995 issued under Securities and Exchange Board of India Act, 1992

(iii) "Securities and Exchange Board of India" shall have the same meaning as assigned to it in clause (a) of sub-section (1) of section 2 of the Securities and Exchange Board of India Act, 1992

(iv) "tax benefit" as defined in clause (10) of section 102 and computed in accordance with Chapter X-A shall be with reference to-

(a) sub clauses (a) to (e), the amount of tax; and

(b) sub-clause (f) of the said clause, the tax that would have been chargeable had the increase in loss referred to therein been the total income"

91. Mr. Srivastava submitted that although clause (d) of Rule 10U(1) would appear to suggest that all income accruing or arising to any person from a transfer of investments made before 01 April 2017, would not be subject to the inquiry as contemplated under Chapter X-A, sub-rule (2) constitutes a 'without prejudice' clause and which would override clause (d). In view of the above, it was the submission of Mr. Srivastava that even though an arrangement may have been entered into prior to 01 April 2017, any benefit obtained from that arrangement on or after 01 April 2017 would be subject to the provisions contained in Chapter X-A. To buttress the arguments addressed on this score, Mr. Srivastava took us through Sections 97 and 98 and which read as under:-

"**Arrangement to lack commercial substance**

97. (1) An arrangement shall be deemed to lack commercial substance, if-

(a) the substance or effect of the arrangement as a whole, is

inconsistent with, or differs significantly from, the form of its individual steps or a part; or

(b) it involves or includes-

(i) round trip financing;

(ii) an accommodating party;

(iii) elements that have effect of offsetting or cancelling each other; or

(iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction; or

(c) it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit (but for the provisions of this Chapter) for a party; or

(d) it does not have a significant effect upon the business risks or net cash flows of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained (but for the provisions of this Chapter).

(2) For the purposes of sub-section (1), round trip financing includes any arrangement in which, through a series of transactions-

(a) funds are transferred among the parties to the arrangement; and

(b) such transactions do not have any substantial commercial purpose other than obtaining the tax benefit (but for the F provisions of this Chapter).

without having any regard to-

(A) whether or not the funds involved in the round trip financing can be traced to any funds transferred to, or received by, any party in connection with the arrangement;

(B) the time, or sequence, in which the funds involved in the round trip financing are transferred or received; or

(C) the means by, or manner in, or mode through, which funds involved in the round trip financing are transferred or received.

(3) For the purposes of this Chapter, a party to an arrangement shall be an accommodating party, if the main purpose of the direct or indirect participation of that party in the arrangement, in whole or in part, is to obtain, directly or indirectly, a tax benefit (but for the provisions of this Chapter) for the assessee whether or not the party is a connected person in relation to any party to the arrangement.

(4) For the removal of doubts, it is hereby clarified that the following may be relevant but shall not be sufficient for determining whether an arrangement lacks commercial

substance or not, namely:-

(i) the period or time for which the arrangement (including operations therein) exists;

(ii) the fact of payment of taxes, directly or indirectly, under the arrangement;

(iii) the fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement.

Consequences of impermissible avoidance arrangement

98. (1) If an arrangement is declared to be an impermissible avoidance arrangement, then, the consequences, in relation to tax, of the arrangement, including denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate, in the circumstances of the case, including by way of but not limited to the following, namely:-

(a) disregarding, combining or recharacterising any step in, or a part or whole of, the impermissible avoidance arrangement;

(b) treating the impermissible avoidance arrangement as if it had not been entered into or carried out;

(c) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;

(d) deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount;

(e) reallocating amongst the parties to the arrangement-

(i) any accrual, or receipt, of a capital nature or revenue nature; or

(ii) any expenditure, deduction, relief or rebate;

(f) treating-

(i) the place of residence of any party to the arrangement; or

(ii) the situs of an asset or of a transaction,

at a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or

(g) considering or looking through any arrangement by disregarding any corporate structure.

(2) For the purposes of sub-section (1), -

(i) any equity may be treated as debt or vice versa;

(ii) any accrual, or receipt, of a capital nature may be treated as of revenue nature or vice versa; or

(iii) any expenditure, deduction, relief or rebate may be recharacterised."

92. According to Mr. Srivastava, tested on the anvil of Section

97(1)(iv) and which speaks of a transaction conducted through persons and which is designed to disguise the value, location, source, ownership or control of funds, would clearly get attracted to the transaction in question. The transaction according to Mr. Srivastava would also fail to satisfy the tests of commercial substance and bona fide purposes which are envisaged under Section 96. According to learned counsel, all of the above would clearly merit the respondents being accorded the right to undertake a detailed assessment of the subject transaction and accordingly commended for our acceptance the view as taken by the AAR.

F. THE PRELIMINARY OBJECTIONS

93. Before we proceed to delve into the merits of the principal issues which arise for our consideration, it would be appropriate at the outset to deal with the preliminary objections which were addressed by Mr. Srivastava. To recall, Mr. Srivastava had contended that courts while exercising their power of judicial review would desist from interfering with a prima facie opinion rendered by the AAR while considering an application for an advance ruling. Mr. Srivastava had argued that in the absence of the said opinion being established to suffer from a manifest illegality or perversity, there would exist no justification for this Court to interfere with the orders impugned. It was also argued that the opinion rendered by the AAR stands confined to the issue of whether, prima facie, the transaction constitutes a tax avoidance stratagem. It was essentially contended that since the issue of chargeability had not been decided, there would be no justification for this Court to interfere with the order of the AAR.

94. We at the outset deem it appropriate to observe that the aspect

of whether the orders impugned suffer from a manifest or patent error or illegality would merit consideration in the subsequent parts of this decision and once we have had an occasion to deal with the fundamental questions in greater depth and detail.

95. Yet another preliminary objection which was raised to the maintainability of the writ petitions was in light of what Mr. Srivastava chose to describe as the AAR having merely rendered a prima facie opinion. According to learned counsel, similar would be the position which would emerge in the context of the orders framed by the respondents with reference to Section 197. It was in the aforesaid backdrop that Mr. Srivastava had contended that since all aspects relating to the transaction in question would be open to be examined and evaluated in the course of a regular assessment, no justification exists for this Court to invoke its powers of judicial review and interdict that process. We find ourselves unable to sustain the aforenoted contention bearing in mind the following facts.

96. While it is true that ordinarily an order framed with reference to Section 197 does not constitute a final determination on the issue of taxability, we find ourselves unable to ignore or gloss over the position which emerges upon a consideration of the stand as expressed and taken by the respondents before the AAR and connected to the Section 197 proceedings which had preceded the filing of the applications before that authority. The CIT (International Transaction) in its report which was submitted to the AAR and referable to Section 245(R)(2) had understood the scope and outcome of the Section 197 proceedings as under:

"**5.** Whereas the first proviso of the section 245 R(2) is concerned,

it is a fact that as on date there are no proceeding pending against the assessee in this charge. But it would be proper to bring the fact on record that the issue of charging capital gains tax on the sale proceeds of shares held by the Applicant in Flipkart Private Limited, Singapore to Fit Holdings S.A.R.L, Luxembourg has been examined by the department in detail during the FY 2018-19. In this regard, it is pertinent to note that the Applicant had applied on 02/08/2018 for a certificate of nil withholding(Copy as Enclosed to this report) in connection with regard to the sale of its shares held in Flipkart Pvt Ltd, Singapore to Fit Holdings S.A.R.L., Luxembourg. Based on the facts of the case, queries vide DClT's questionnaires dated 9.8.2018, 13.8.2018, 16.8.2018 and 17.8.2018 were issued to the applicant (Copies enclosed). After due consideration of the applicant's submissions dated 13.8.2018 and 17.8.2018, certificate u/s 197 of the I T Act, 1961 was issued on 17/08/2018 from this office prescribing a withholding rate of 6.05% ***provisionally on the total sale consideration. It means that the long term capital gains arising to the applicant on the sale of these were held to be taxable at 10% u/s 112(1)(C) of the Income Tax Act, 1961 and the benefits available under the India-Mauritius DTAA were denied to the applicant***. Therefore, On the basis of this certificate, Fit Holdings, S.A.R.L. withheld a sum of USD 12,50,96,638.52 (Rs.866,91,97,049/- approx.) which represents the Long Term Capital Gains on the above sale of shares by the Applicant. The reasons for issuing the certificate at above mentioned rate have been clearly mentioned by the then AO vide his order sheet. The copy of the order sheet maintained is enclosed herewith report. In this regard, it is humbly submitted that the department has already decided the taxability of the capital gains in the hands of the applicant by analysing the facts of the case and piercing the corporate veil to identify the beneficial owners of the" shares which have been sold by the applicant. There is no change in the facts of the case and the stand of the department has not changed. Now the Applicant has filed an application before the Hon'ble Authority for Advance Rulings (Principal Bench), New Delhi requesting for advance ruling on the same transaction. As per Applicant, it is not liable for capital gains tax on the sale of shares as above. As the department has already decided the chargeability of capital gains on the sale of shares and the stand of the remains the same on the basis of the facts, therefore, on this ground itself, the Hon'ble AAR is requested to reject the application of the applicant. Further, the applicant has filed its Return of Income for the AY 2019-20, with a refund claim of Rs. 866.91 Crores and therefore, the case may be selected under Computer Assisted Scrutiny Selection(CASS) and the department shall determine the chargeability of capital gains once again. Therefore, the Hon'ble AAR is requested to reject the application of the applicant on this ground as well."

97. The CIT (International Transaction) after referring to the detailed examination which was undertaken by the Department with reference to the application for grant of certification under Section 197 as moved by the petitioners had observed that they had already decided the taxability of capital gains and identified the beneficial owner of the shares upon piercing the corporate veil. It proceeded further to observe that since the Department had already decided the chargeability of capital gains question and its stance remains the same, the AAR would be justified in rejecting the application on that ground alone.

98. In the same report the CIT (International Transaction) while dealing with the perceived holding structure of the petitioner had observed as follows:

> "7.3. As per the notes to financial statements of the year ending 31.12.2011, The Applicant is owned by Tiger Global Five Parent Holdings, Tiger Global Six Parent Holdings, and Tiger Global Principals (the "Shareholders"), Mauritius private companies. Tiger Global Five Parent Holdings owns 79.3%, Tiger Global Six Parent Holdings owns 16.7% and Tiger Global Principals owns 4.0% of the Company. Tiger Global Five Parent Holdings is wholly owned by Tiger Global Private Investment Partners V, L.P., a Cayman Island exempted limited partnership. Tiger Global Six Parent Holdings is wholly owned by Tiger Global Private Investment Partners VI, L.P., a Cayman Island exempted limited partnership. Tiger Global Management, L.L.C. is the management company of Tiger Global Private Investment Partners V, L.P. and Tiger Global Private Investment Partners VI, L.P. Tiger Global Principals is wholly owned by Tiger Global Side Fund, LLC, a Delaware Limited Liability Company. All members of Tiger Global Side Fund, LLC are affiliated with Tiger Global Management, LLC."

99. On the aspect of the alleged beneficial ownership of shares, the CIT (International Transaction) opined as follows:

> "**10.3 <u>BENEFICIAL OWNER OF THE SHARES</u>:**

The applicant, in its application for Category 1 Global Business License has not mentioned any beneficial owner of the Shares of the holding company. However, **it is pertinent to note that in the case of Tiger Global International III holdings, which has applied for the lower/NIL deduction certificate before the Dy. CIT-IT-4(1), has submitted in the one of the document, that Mr. Charles P Coleman as the Beneficial Owner of the Tiger Global Six Parent Holdings, which is the promoter company in the case of the applicant. Therefore, from the documents submitted by the applicant, it is appears that Mr. Charles P Coleman is the beneficiary owner of the shares and it can be said that the real control does not lie with the directors based out of Mauritius but the directors based out of mauritius appear to be just name lenders**."

100. That report additionally embodied the following observations:

"**10.5 COMPANY WITH NO INCOME**

On perusal of the financial statements of the applicant, it is observed that the applicant does not have any income from the date of inception and the sources of fund for the investment in Flipkart Private Limited has been from the entities based out of Mauritius, which are controlled by entities based out of Cayman Islands and ultimately controlled by Tiger Global Management, LLC, USA.

10.8 On analysis of the financial statements of the applicant, it is found that the initial source of investment and subsequent sources of investment in Flipkart P Ltd have been capital contributions from the shareholders. The applicant has no income of its own and the sources of fund for investment and expenses are capital contributions from the entities based out of Mauritius, which are held by entities based out of Cayman Islands and ultimately controlled by the entity, Tiger Global Management LLC, USA. **The source of investment and instructions for a specified amounts given by a person, ie. Mr. Charles P Coleman, who is not in the board of directors and the top executives of the Tiger Global management LLC, i.e. Justin Horan present in the minutes of the meeting clearly shows that the applicant is only a conduit for the investment of US Based Entity, Tiger Global Management LLC, through a web of other conduit companies based out of Mauritius and Cayman Islands.**

101. The CIT (International Transaction) ultimately came to the following conclusions:

"10.9 The above facts prima facie indicates that the applicant is not

acting "INDEPENDENTLY" but as a conduit for the real beneficial owners based out the USA. **Further, the facts of the case are squarely covered by the observations made by the Hon'ble AAR in its ruling in the case of AB Mauritius in AAR No, 1128 of 2011 dated 8.11.2017**. Therefore, considering the above facts and the ruling of the AAR and also the judgement of the Hon'ble HC of Bombay in the case of Aditya Birla Nuvo Limited Vs DDIT(2012) 342 ITR 0308, the treaty benefits of the india- Mauritius DTAA are not available to the applicant, the ultimate beneficiary of the shares of Indian Company is Tiger Global Management LLC, a company incorporated in the United States of America. Hence the applicant can not be provided any benefit under the Treaty of India- Mauritius DAA due to the fact that prima facie the said transaction appears to be designed for avoidance of tax

11. CONCLUSION:

In conclusion, with respect to specific points on which comments were called for regarding the admissibility of the application under 245R(2), it is submitted as under:

Proviso of section 245 R(2)	**Issue to be examined**	**Whether proviso applicable**	**Comments on admissibility**
(i)	Whether the question raised in the application is already pending before any income-tax authority or Appellate Tribunal?	No	The issue of chargeability of capital gains has already decided by the department when the applicant filed an application for issuance of lower certificate u/s 197 of the Income Tax Act, 1961. Therefore, as there is no change in facts of the case, the application may be rejected on this ground itself.
(ii)	Whether the question raised in the application involves determination of fair market value of any property	Yes	Inadmissible

(iii)		yes	Inadmissible

102. As is evident from the aforesaid extract, the CIT (International Transaction) reiterated its view that since the issue of chargeability of capital gains had already been decided by the Department, in the absence of any change in facts, the AAR should reject the applications made by the writ petitioners. Coming then to the impugned order itself the aforesaid stand of the respondents in the said report stands duly reflected in paragraphs 5, 6 and 13 and which are extracted hereunder:

> "**5.** The Revenue has raised objections on the admissibility of the application in all the three casesin respect of all the three conditions as stipulated in provisos to Section 245R(2) of the Income-tax Act, 1961 ("**the Act**"). The first condition of the said proviso is regarding pendency of proceeding before any Income-tax Authority or the Appellate Tribunal. In the report dated 03.01.2020, the Commissioner of Income-tax(IT)-4, Mumbai has admitted that as on date of application no proceeding was pending against any of the three applicants. However, it has been pointed that the issue of chargeability of capital gains on the sale proceeds of shares held by the applicants in Flipkart Private Limited, Singapore to Fit Holdings, S.A.R.L. Luxembourg was examined by the Department in detail in the course of proceeding under Section 197 of the Act. The applicants had filed an application on 02.08.2018 for certificate of 'nil' withholding in connection with the sale transaction and after due consideration of their submission a certificate under section 197 of the Act was issued on 17.08.2018 prescribing certain withholding rate provisionally on the total sale consideration. The Revenue has accordingly contended that long term capital gains arising to the applicants on the sale of shares was held as taxable and the benefit available under the India-Mauritius Double Taxation Avoidance Agreement (DTAA) was denied to the applicants.
>
> **6.** According to the Revenue, the taxability of the capital gains in the hands of the applicants was already decided by analyzing the facts of the case and piercing the corporate veil to identify the beneficial owner of the shares sold. Accordingly, a request was made to reject the application since the issue raised in the present application already stood decided. It was further pointed out that the applicants had filed their return of income for Assessment Year 2019-20 and the case may be selected under Computer Assisted Scrutiny Selection (CASS) and the department shall determine the chargeability of capital gains once again. The Department has also

placed strong reliance on the order dated 22.01.2020 of Mumbai Bench of this Authority in the case of Areva NP SAS, France wherein it was held that conclusion of proceedings under Section 197 of the Act was a reasonable ground for rejecting the application. According to Revenue the applicants had a choice to either go for revision before the Commissioner of Income-tax or file a writ application before the High Court and that the AAR was not an appellate forum, as held in the case of Areva and, therefore, was precluded from filing the present application.

xxxx **xxxx** **xxxx**

13. The Department has contended that it had already decided the chargeability of capital gains on the sale of shares in the proceedings under section 197 of the Act and that the present applications should be rejected. The Hon'ble Gujarat High Court has held in the case of *OPJ Trading Pvt. Ltd.* (supra) that the deduction of tax at source and depositing it with the Government revenue by the payee does not decide the final tax liability of the recipient of income which would be subject matter of assessment of return. An identical view was taken by Hon'ble Madras High Court in the case of *AnasaldoEnergia SPA Vs. ITO* and by the Kerala High Court in the case of *InfoparksVs. DCIT* wherein it was held that the assessee's tax liability cannot be decided in the proceeding under section 197 of the Act but can only be subject matter of assessment proceeding."

103. The AAR while proceeding to render its findings has firstly in paragraph 34 taken the view that the inquiry would have to take a broad overview of the entire transaction as opposed to restricting its consideration to the sale of shares alone as suggested by the writ petitioners. It thereafter and in paragraph 35 significantly observes that from the evidence forming part of its record it was apparent that the writ petitioners had been set up only "*for making investment in order to derive benefit under the DTAA between Mauritius and India*" and the same being "*an inescapable conclusion*".

104. Proceeding further although in paragraph 36 the AAR holds that merely because the funds for the investment may have come from

promoters in the USA, the same would not lead one to a conclusion that the arrangement was one of tax avoidance, it ultimately proceeded to categorically hold that the head and brain of the petitioners was not situate in Mauritius. It has proceeded to thereafter in paragraph 38 render findings of a conclusive character based on the positioning of Mr. Coleman as a counter signatory. This aspect is again reiterated in paragraph 39 of the impugned order. The AAR thereafter proceeded to significantly hold that from the evidence brought on the record by the Department it would be evident that not only were the funds of the writ petitioners controlled by Mr. Coleman and that they had only a limited degree of control, the decision for investment and sale was liable to be attributed to Mr. Coleman who exercised control over all decision making powers of the Board. In paragraph 42, the AAR observes that TRC would not constitute conclusive evidence and that in cases where corporate structures come to be interposed as part of a colourable exercise it would be open to the Department to disregard such devices so as to discern the true nature of the transaction.

105. It proceeds then to hold that the real intention of the writ petitioners was to take advantage and benefit of the DTAA. While seeking the distinguish the decision in *Serco BPO*, the AAR in paragraph 45 held that from the facts and findings arrived at by it, it had come to be established that not only was the transaction designed for avoidance of tax, the petitioners had clearly tried to reap benefits in clear violation of the intent underlying the convention as well as the intent of the Contracting States. Similar findings appear in paragraph 47 with the AAR holding that in the absence of any direct investment in India one would come to the irresistible conclusion that

"*arrangement was a pre-ordained transaction which was created for tax avoidance purpose*". The perceived objective of the writ petitioners suffered further adverse comment in paragraph 48. It was on the aforesaid basis that the applications ultimately came to be dismissed under Section 245(R)(2).

106. However and as is manifest from the aforesaid discussion and the tone and tenor of the findings and observations that were rendered by the AAR, the view as expressed neither appears to be tentative nor one formed on a preliminary examination. Both the reports of the CIT (International Transaction) as well as of the AAR clearly appear to be imbued with trappings of finality and conclusive determination. There is thus an apparent and evident element of resolute decisiveness which pervades the impugned orders. Subordinate authorities administering the provisions of the Act would find it difficult to ignore the conclusions that have come to be recorded by both the CIT (International Taxation) as well as the AAR. There is nothing tentative or prima facie in the AAR holding that the transaction was not only designed for avoidance of tax, benefits if extended would be violative of the objective underlying the DTAA. The AAR has further held that the transfer of shares of Flipkart Singapore would not be covered under the Convention. Regard must also be had to the fact that the AAR while framing the impugned orders has categorically held that the petitioners *".....have no case on merits and fall on the ground of treaty eligibility as well."* Those and other observations appearing in both the report of the CIT as well as in the impugned order can clearly not be countenanced as being either the expression of a preliminary view or a decision which may be said to be provisional in character.

The petitioners would in any case stand gravely prejudiced if those decisions continued to exist and were to be read as having already decided all aspects of the impugned transaction. We consequently find ourselves unable to sustain the submission of the respondents addressed on this score.

G. ORGANISATIONAL STRUCTURE OF THE PETITIONERS

107. Before proceeding further, it would be appropriate to outline the contentions which were addressed with respect to the underlying corporate and holding structure of the petitioner, TG III and TG IV. As is evident from a reading of the counter affidavit filed in these proceedings as well as the submissions which appear to have been addressed before the AAR, the respondents have proceeded on the premise that TGM LLC was the controlling entity and the holding company. It is this aspect which was also sought to be highlighted by Mr. Srivastava who sought to explain the holding structure by referring us to the schematic charts which have been extracted hereinabove. It is those chart which have also been taken note of by the AAR and which additionally held that the same were not disputed.

108. However, we note that right from inception, the petitioners had taken an unwavering position insofar as the shareholding position of the petitioner, TG III and TG IV was concerned. This becomes apparent from a reading of the following recitals which appear in the application which was submitted before the AAR. In the application moved and concerning the petitioner, it was averred as under: -

> "1.4. The Applicant is a tax resident of Mauritius under the laws of Mauritius and under the provisions of the Agreement between India and Mauritius for the Avoidance of Double Taxation and the

Prevention of Fiscal Evasion with Foreign Countries ("**Mauritius Treaty**"). The Applicant holds a valid Tax Residency Certificate ("**TRC**") issued by the Mauritius Revenue Authority ("**MRA**") certifying it to be a tax resident in Mauritius for the period between 17 June 2018 and 16 June 2019 for income tax purposes. A copy of the TRC dated 22 June 2018, along with a duly completed Form No. 10F is attached herewith as **Exhibit 5**. The Applicant has also becn issued a TRC for all periods commencing from the incorporation of the Applicant.

1.5. The Applicant has engaged Tiger Global Management, LLC ("**TGM**"), a company incorporated in the United States to provide services in relation to the Applicant's investment activities. All services provided by TGM to the Applicant including but not limited to investment sourcing, portfolio stewardship and observership services, are subject to review and final approval by the Board of Directors of the Applicant. TGM does not have the right to contract on behalf of or bind the Applicant or take any decision on behalf of the Applicant without the approval of thc Applicant's Board of Directors. "

109. Similar recitals appear in the applications made to the AAR by TG III and TG IV relevant parts whereof are reproduced hereinbelow:

TG III:

"1.4. The Applicant is a tax resident of Mauritius under the laws of Mauritius and under the provisions of the Agreement between India and Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Foreign Countries ("**Mauritius Treaty**"). The Applicant holds a valid Tax Residency Certificate ("**TRC**") issued by the Mauritius Revenue Authority ("**MRA**") certifying it to be a tax resident in Mauritius for the period between 18 June 2018 and 17 June 2019 for income tax purposes. A copy of the TRC dated 20 June 2018, along with a duly completed Form No. 10F is attached herewith as **Exhibit 6**. The Applicant has also becn issued a TRC for all periods commencing from the incorporation of the Applicant.

1.5. The Applicant has engaged Tiger Global Management, LLC ("**TGM**"), a company incorporated in the United States to provide services in relation to the Applicant's investment activities. All services provided by TGM to the Applicant including but not limited to investment sourcing, portfolio stewardship and observership services, are subject to review and final approval by the Board of Directors of the Applicant. TGM does not have the right to contract on behalf of or bind the Applicant or take any decision on behalf of the Applicant without the approval of the

Applicant's Board of Directors."

xxxx xxxx xxxx

TG IV:

"1.4. The Applicant is a tax resident of Mauritius under the laws of Mauritius and under the provisions of the Agreement bet\\Ten India and Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Foreign Countries ("**Mauritius Treaty**"). The Applicant holds a valid Tax Residency Certificate ("**TRC**") issued by the Mauritius Revenue Authority ("**MRA**") certifying it to be a tax resident in Mauritius for the period between 15 October 2017 and 14October 2018 for income tax purposes. A copy of the TRC dated 20 October 2017, along with a duly completed Form No. 10F is attached herewith as **Exhibit 6**. The Applicant has also becn issued a TRC for all periods commencing from the incorporation of the Applicant.

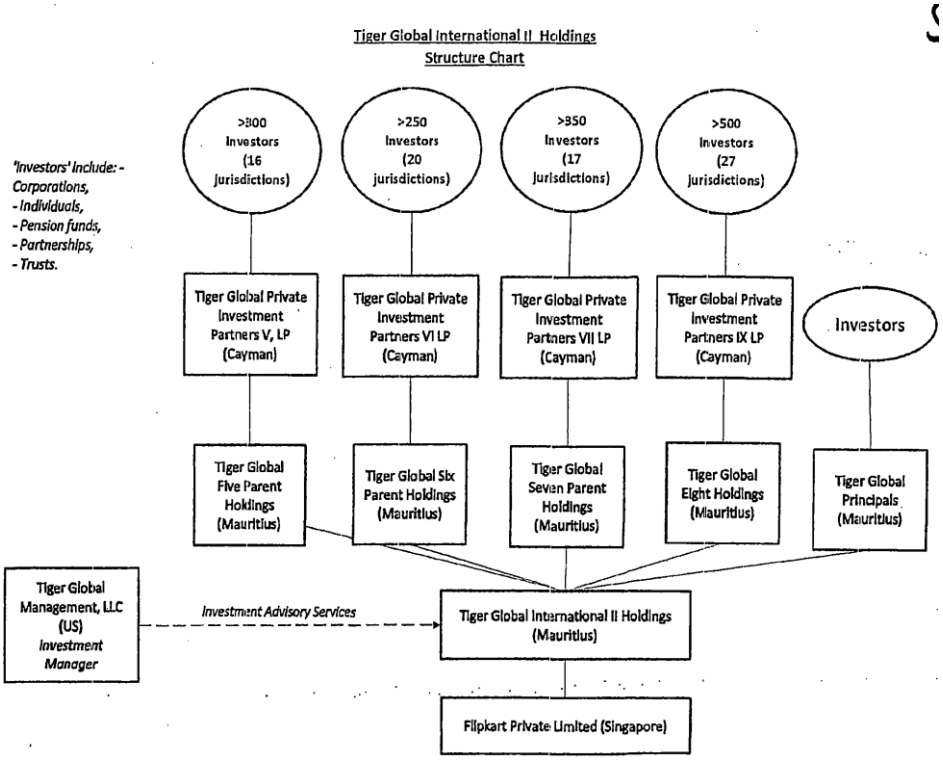
1.5. The Applicant has engaged Tiger Global Management, LLC ("**TGM**"), a company incorporated in the United States to provide services in relation to the Applicant's investment activities. All services provided by TGM to the Applicant including but not limited to investment sourcing, portfolio stewardship and observership services, are subject to review and final approval by the Board of Directors of the Applicant. TGM does not have the right to contract on behalf of or bind the Applicant or take any decision on behalf of the Applicant without the approval of thc Applicant's Board of Directors."

110. The petitioners thus appear to have taken the consistent position that TGM LLC was engaged as the investment manager and whose services were sought to be availed for various purposes including investment sourcing, portfolio stewardship and observership services, subject to review and final approval by the BoD of the respective Mauritian entities. It was further categorically averred that TGM LLC had neither been conferred the right to contract on their behalf nor was it entitled to take any decision without the approval of the BoD of the writ petitioners.

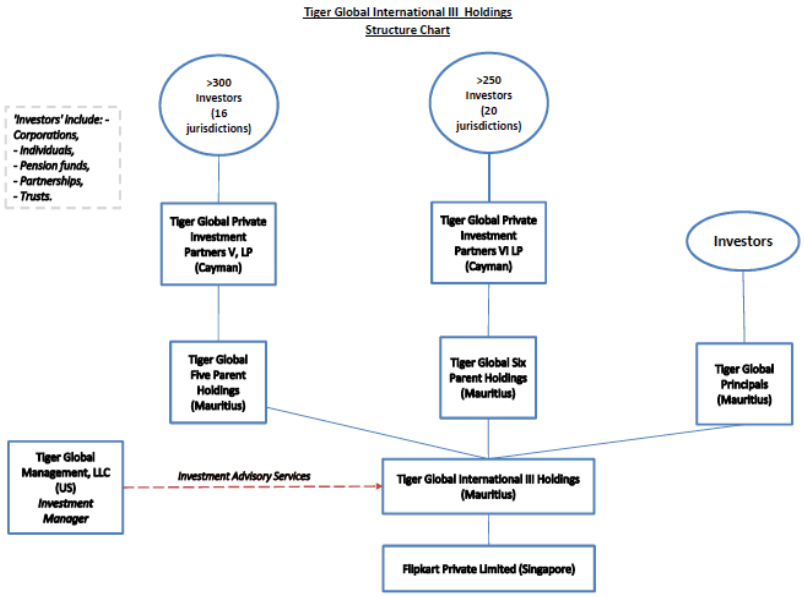
111. Along with the rejoinder affidavit the writ petitioners have placed on our record a structural chart which is reproduced

hereinbelow:

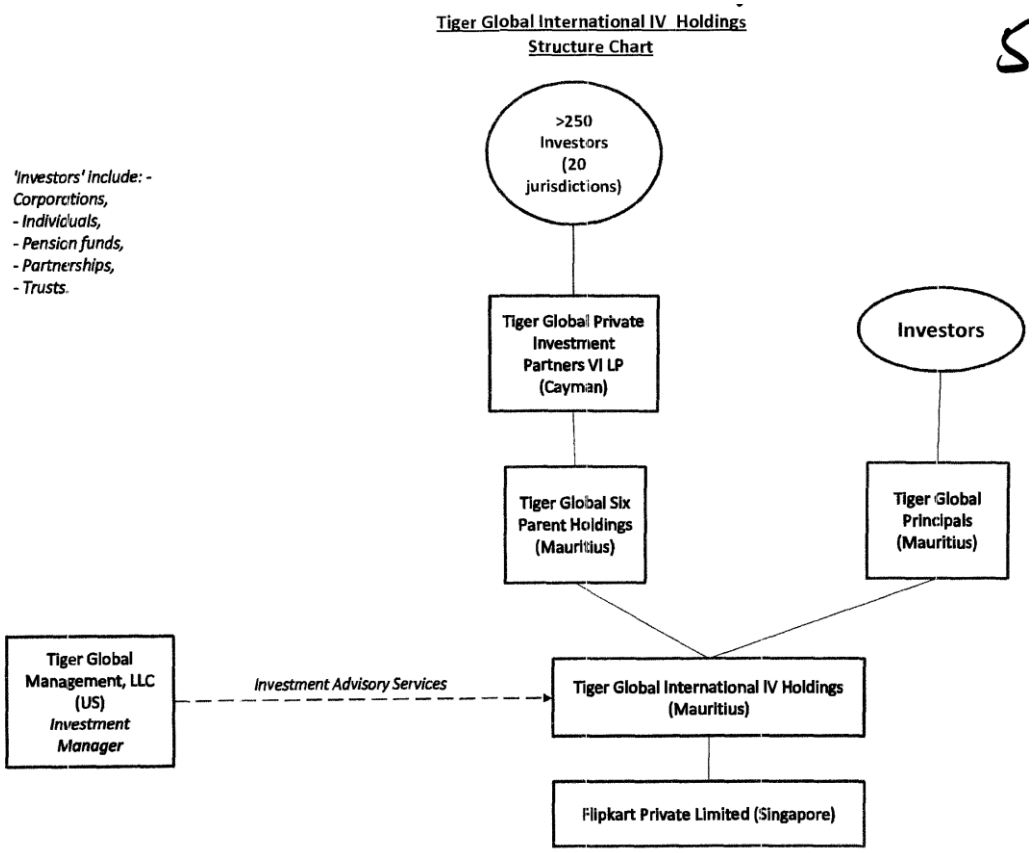
Petitioner:



TG III:



TG IV:



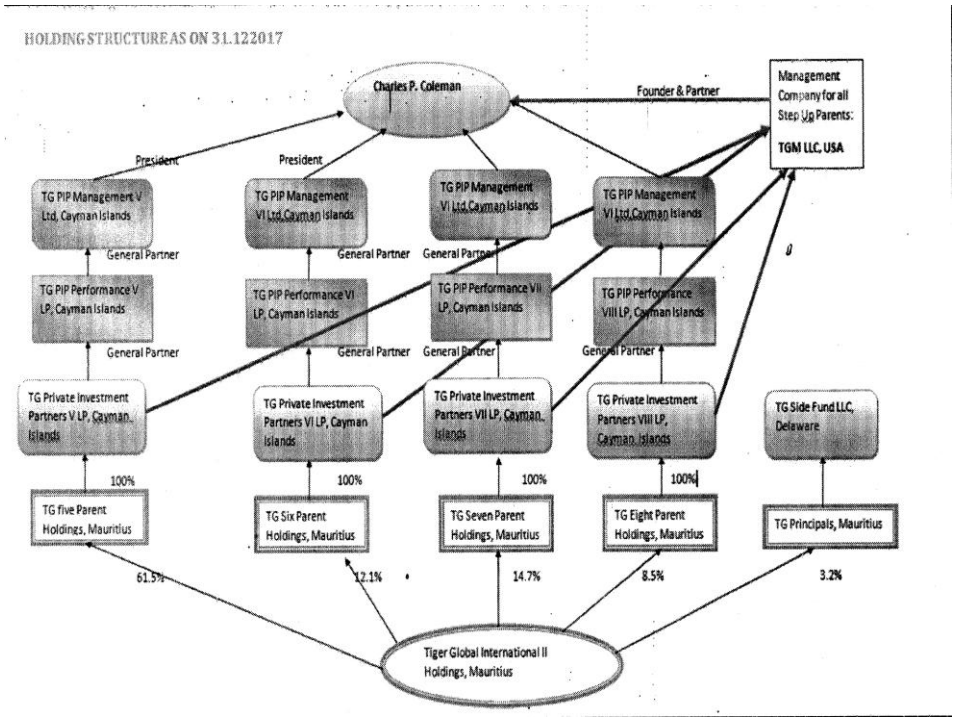
112. The positioning of the petitioner, TG III and TG IV carry similar declarations with respect to the rule of TGM LLC and relevant parts whereof have been extracted hereinabove. As is manifest from those declarations, there too TGM LLC was described as the management company. We also bear in consideration the unwavering position which has been taken by the petitioners with it being categorically asserted that TGM LLC was neither an equity partner nor did the funds for the investment originate from that entity.

113. It was in the aforesaid backdrop that Mr. Kaka in his rejoinder submissions had contended that all assertions, namely of TGM LLC being the ultimate parent, were erroneous and factually incorrect.

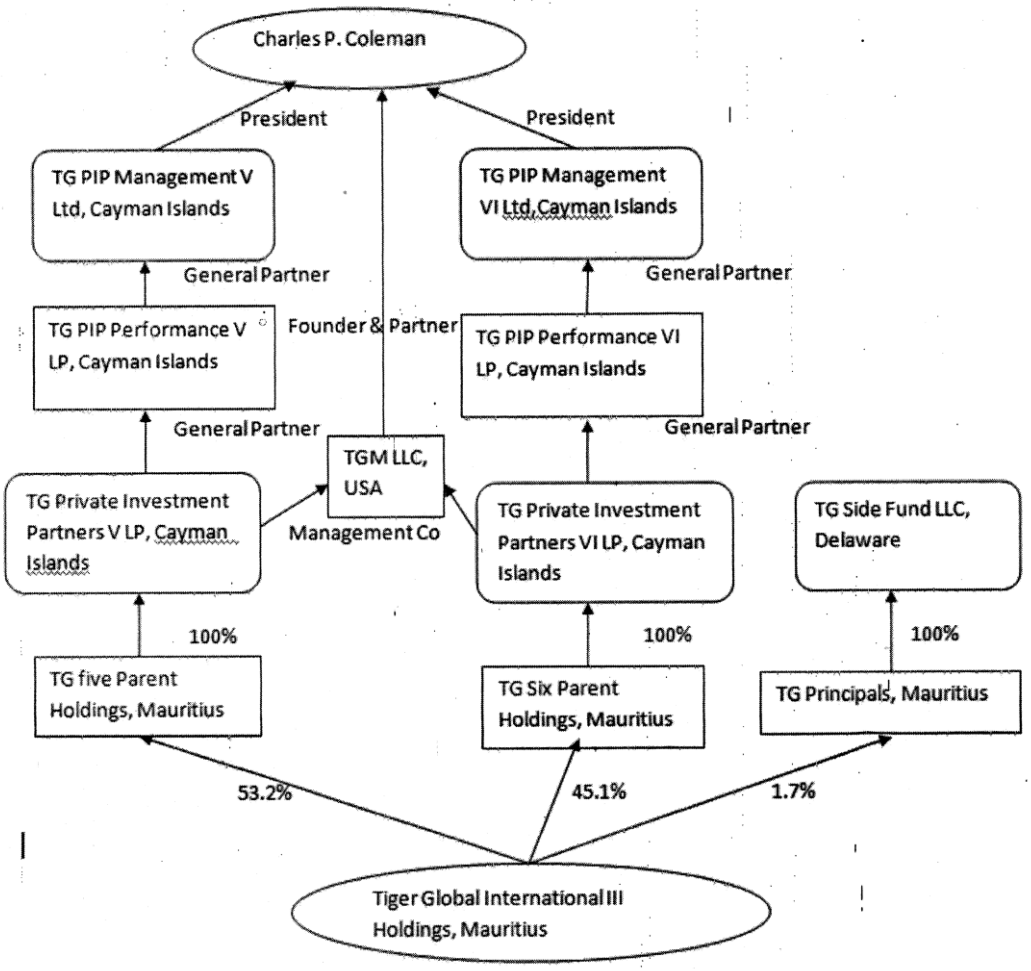
114. We also take note of the counter affidavit which has been filed in these proceedings and where too in the schematic holding structure

reproduced in paragraph 7.5 to 7.7, the position of TGM LLC is understood to be that of a management company. The schematic holding structures as set forth in the counter affidavit are reproduced hereinbelow:

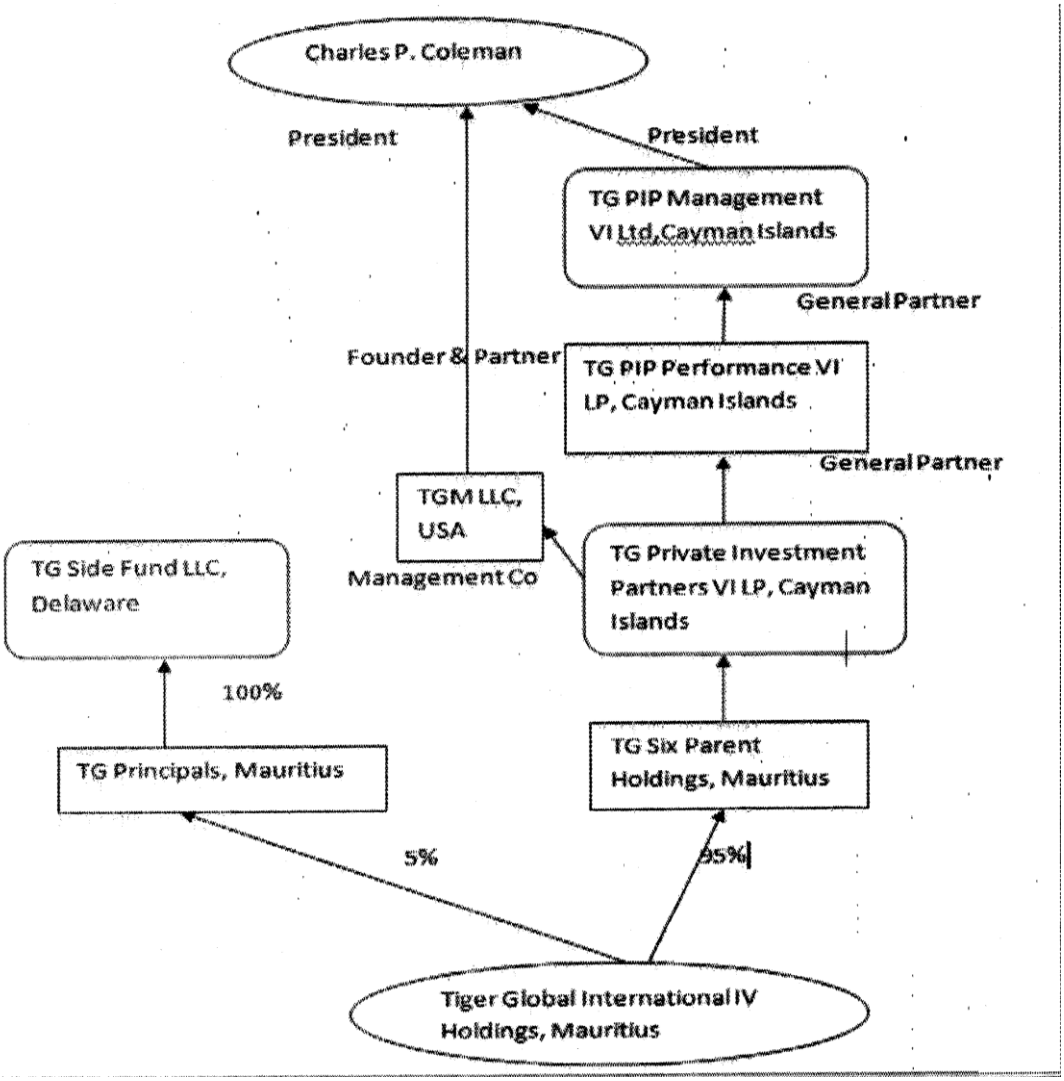
Petitioner:



TG III:



TG IV:



115. We note in this regard that although the petitioners had consistently taken the stand of TGM LLC being merely the investment manager, with no equity participation and having not made any investments, the AAR for inexplicable reasons appears to have proceeded on the basis that the writ petitioners had not disputed the primary function and role performed by and assigned to TGM LLC. The entire case as set up against the petitioner thus appears to suffer from a wholly erroneous and factually unsustainable premise of TGM LLC being the holding and the parent company. Neither the AAR nor the respondents before us have been able to dislodge or cast a doubt

on the role and position of TGM LLC as advocated and asserted by the writ petitioners. Despite its position having been duly disclosed in the original application itself and the petitioners having denied the role ascribed to TGM LLC by the respondents, the AAR has erroneously proceeded on the premise that it was the parent and holding company. While proceeding on the basis of a perceived admission, the AAR also failed to verify the facts which were evident from a perusal of the Financial Statements which formed part of its record and which had duly disclosed the identity of the principal shareholders of the writ petitioners. This fundamental mistake has clearly tainted the impugned orders beyond repair. The orders impugned thus suffer from a manifest and patent error quite apart from being fundamentally flawed.

H. THE MAURITIUS ROUTE

116. We at the outset deem it pertinent to note that investments emanating from Mauritius is clearly not a recent phenomenon. The first tax treaty between India and Mauritius was signed at Port Louis on 24 August 1982 and came into effect from 01 April 1983 and 01 July 1983 in the two countries respectively. The last Protocol for amending the provisions of that treaty came to be signed on 10 May 2016. From the data available on the portal of the **Department For Promotion Of Industry And Internal Trade**[44] and which captures **Foreign Direct Investment**[45] into the country between the period April 2000 to March 2024, the following position emerges insofar as

[44] DPIIT
[45] FDI

cumulative FDI inflow is concerned[46] :-

QUARTERLY FACT SHEET FACT SHEET ON FOREIGN DIRECT INVESTMENT (FDI)INFLOW FROM APRIL, 2000 to MARCH, 2024			
			(Updated up to March, 2024)
I. CUMULATIVE FDI FLOWS INTO INDIA (2000-2024):			
A. TOTAL FDI INFLOW (from April, 2000 to March, 2024):			
1	**CUMULATIVE AMOUNT OF FDI INFLOW (Equity inflow + 'Re-invested earnings' + 'Other capital')**		USD 9,90,972 Million
2	**CUMULATIVE AMOUNT OF FDI EQUITY INFLOW (excluding, amount remitted through RBI's NRI Schemes)**	INR 43,47,001 Crore	USD 6,78,864 Million
B. FDI INFLOW DURING FOURTH QUARTER OF FINANCIAL YEAR 2023-24 (JANUARY TO MARCH 2024):			
1	**TOTAL FDI INFLOW INTO INDIA (Equity inflow + 'Re-invested earnings' + 'Other capital') (as per RBI's Monthly bulletins)**		USD 19,046 Million
2	**FDI EQUITY INFLOW**	INR 1,02,869 Crore	USD 12,386 Million
C. FDI EQUITY INFLOW (MONTH-WISE) DURING THE FINANCIAL YEAR 2023-24:			
Financial Year 2023-24		***Amount of FDI Equity inflow***	
(April – March)		***(In INR Crore)***	***(In USD mn)***
1	April, 2023	41,877	5,106
2	May, 2023	22,055	2,678
3	June, 2023	25,999	3,162
4	July, 2023	20,917	2,546
5	August, 2023	24,071	2,908
6	September, 2023	33,957	4,089
7	October, 2023	52,755	6,338
8	November, 2023	23,628	2,837
9	December, 2023	19,771	2,374

[46] https://dpiit.gov.in/sites/default/files/FDI_Factsheet_30May2024.pdf

10	January, 2024	49,829	5,995
11	February, 2024	21,977	2,649
12	March, 2024	31,063	3,742
2023-24 (from April, 2023 to March, 2024) #		**3,67,899**	**44,423**
2022-23 (from April, 2022 to March, 2023) #		**3,67,435**	**46,034**
%age growth over last year		**(+) 0.13%**	**(-) 3.49%**

Note: *i) Country & Sector specific analysis is available from the year 2000 onwards, as Remittance-wisedetails are provided by RBI from April, 2000 onwards only.*
ii) ii. FEDAI (Foreign Exchange Dealers Association of India) conversion rate from rupees to US dollar applied,on the basis of monthly average rate provided by RBI (DEAP), Mumbai.
 # Figures are provisional, subject to reconciliation with RBI, Mumbai.

117. The official web portal also captures data pertaining to the total FDI inflow from various countries. As would be evident from the following chart which appears on that website, the inflow from Mauritius stands at 25% and the said nation constitutes the first amongst the top ten from where FDI flows into the country. The said chart is being reproduced hereinbelow:-

D. SHARE OF TOP INVESTING COUNTRIES FDI EQUITY INFLOW (Financial year):

Rank	***Country Name***	**Amt. in Rupees Crores/ Amt. in USD Million**	***2021-22 (April-March)***	***2022-23 (April-March)***	***2023-24 (April-March)***	***Cumulative Equity Inflow * (April, 2000-March, 2024)***	***%age out of total FDI Equity inflow (in terms ofUSD)***
1	**Mauritius**	Rupees Crores	69,945	48,895	66,147	10,22,589	
		USD Million	9,392	6,134	7,970	1,71,847	25%
2	**Singapore**	Rupees Crores	1,18,235	1,37,374	97,475	10,91,873	
		USD Million	15,878	17,203	11,774	1,59,943	24%
3	**U.S.A.**	Rupees Crores	78,527	48,666	41,403	4,47,317	
		USD Million	10,549	6,044	4,998	65,194	10%
		Rupees Crores	34,442	19,855	40,733	3,24,182	

4	**Netherland**	USD Million	4,620	2,498	4,924	48,683	7%
5	**Japan**	Rupees Crores	11,187	14,328	26,243	2,62,304	
		USD Million	1,494	1,798	3,177	41,918	6%
6	**United Kingdom**	Rupees Crores	12,283	13,994	10,061	2,03,296	
		USD Million	1,657	1,738	1,216	35,091	5%
7	**UAE**	Rupees Crores	7,699	26,315	24,262	1,31,220	
		USD Million	1,032	3,353	2,924	18,502	3%
8	**Cayman Islands**	Rupees Crores	28,383	6,069	2,835	1,07,914	
		USD Million	3,818	772	342	15,266	2%
9	**Germany**	Rupees Crores	5,421	4,417	4,181	87,874	
		USD Million	728	547	505	14,643	2%
10	**Cyprus**	Rupees Crores	1,735	10,184	6,705	79,456	
		USD Million	233	1,277	806	13,450	2%
TOTAL FDI EQUITY INFLOW FROM ALL COUNTRIES		Rupees Crores	**4,37,188**	**3,67,435**	**3,67,899**	**43,47,001**	
		USD Million	**58,773**	**46,034**	**44,423**	**6,78,864**	-

** Includes inflow under NRI Schemes of RBI.*

Note: i. Cumulative country-wise FDI equity inflow (from April, 2000 to March, 2024) are at – Annex-'A'.

ii. FEDAI (Foreign Exchange Dealers Association of India) conversion rate from rupees to US dollar applied, onthe basis of monthly average rate provided by RBI (DEAP), Mumbai.

%age worked out in USD terms & FDI inflow received through Government Route + Automatic Route +Acquisition of existing shares only.

Figures are provisional.

118. Mauritius, as would be evident from the data and material publicly available, appears to have been identified as one of the more favoured jurisdictions for FIIs' desirous of investing in India. In fact and as was noted by the Supreme Court in *Azadi Bachao Andolan*, out of the total investment from FIIs in 2012 pegged at INR 45,00,000 million, INR 7,00,000 million came from Mauritius. This appears to have coincided with the liberalization measures which were adopted by India commencing from 1991. The Mauritius route appears to owe

its genesis to the proximity of the island nation to India as well as a wide bouquet of bilateral and multilateral trade agreements which that nation had entered into with various countries. Mauritius became a source for investments aimed not just at the Asian Tiger economies but also a gateway to investments flowing to the African continent itself. This since Mauritius stood at the proverbial crossroads of Africa and Asia. Entities appear to have established offices in that country bearing in mind liberalized exchange controls, a favourable investment climate coupled with political and social stability. While seeking to adapt to the changing world order, India which had signed its first tax treaty with Egypt way back in 1969, is presently a party to as many as 94 DTAAs. Investments emanating from Mauritius formed the subject matter of various circulars which came to be issued by the CBDT from time to time with the first being Circular No. 682 dated 30 March 1994. Circular No. 682 constitutes the first significant clarification which the Board chose to render in the context of Article 13 of the DTAA and the taxation of capital gains. Paragraph 3 of Circular No. 682 in unequivocal terms declared that gains derived by a resident of Mauritius by sale or transfer of shares would only be taxable in that country. Not stopping there, Circular No. 682 proceeded further to proclaim that even if a resident of Mauritius were to derive income from the alienation of shares of Indian companies, it would become liable to a capital gains tax only in Mauritius and as per the taxation laws prevalent in that Nation. It was thus held out that such an entity would not have to face the spectre of a capital gains tax liability arising or accruing in India.

119. This was followed by Circular No. 789 dated 13 April 2000 and

which clarified the position taken by the respondents with respect to TRCs' issued by authorities in Mauritius and such a certificate constituting sufficient evidence for the purposes of ascertaining status of residence as well as application of principles of beneficial ownership. Circular No. 789 further clarified that the test of residence formulated and flowing from a TRC would also apply in respect of income from capital gains on sale of shares. Circular No. 789 proceeded to reiterate the stand which appears in Circular No. 682 to hold that a resident of Mauritius would not be subjected to a capital gains tax which may arise in India consequent to a sale of shares as per Article 13(4) the DTAA. Of equal significance were some of the proposed amendments to the Act and which we propose to notice in the subsequent parts of this decision.

I. DECISIONS RENDERED BY THE SUPREME COURT

120. Proceeding chronologically, we then take note of the seminal decision handed down by the Supreme Court in *Azadi Bachao Andolan*. The said decision emanated from a challenge laid before this Court to Circular No. 789. It appears to have been contended before our Court that the Circular was ultra vires Sections 90 and 119 of the Act and clouded the discretion and powers of inquiry and investigation which could otherwise be wielded by assessing authorities under the Act. The High Court had proceeded to quash Circular No. 789 holding that the said directive essentially compelled authorities under the Act to accept a TRC as conclusive evidence with respect to status of residence and beneficial ownership. The Court thus came to the conclusion that Circular No. 789 was ultra vires the powers otherwise vested in the CBDT. It further proceeded to hold

that an Income Tax Officer is entitled in law to pierce the corporate veil in order to ascertain whether a company is actually a resident of Mauritius. According to the High Court, the directive of the CBDT clearly amounted to impinging upon the quasi-judicial power otherwise inhering in an Income Tax Officer.

121. While considering the challenge which came to be laid to the decision handed down by this Court, the Supreme Court in *Azadi Bachao Andolan* at the outset made the following pertinent observations with respect to tax conventions and the treaty making power inhering in nations:-

> "**17.** Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment, and so on. A country might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called Double Taxation Avoidance Treaties, Conventions or Agreements.
>
> **18.** The power of entering into a treaty is an inherent part of the sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is, qua the State, competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the

> Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

122. *Azadi Bachao Andolan* then proceeded to explain the scope of the power conferred upon the Union by virtue of Section 90 and of taxing conventions prevailing in the event of a conflict by virtue of Sections 4 and 5 of the Act themselves being made subject to the other provisions of the statute. This becomes evident from a reading of paragraphs 20 and 22 of the report which are reproduced hereinbelow:-

> "**20.** The purpose of Section 90 becomes clear by reference to its legislative history. Section 49-A of the Income Tax Act, 1922 enabled the Central Government to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income on which, both income tax (including supertax) under the Act and income tax in that country, under the Income Tax Act and the corresponding law in force in that country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the Official Gazette. When the Income Tax Act, 1961 was introduced, Section 90 contained therein initially was a reproduction of Section 49-A of the 1922 Act. The Finance Act, 1972 (Act 16 of 1972) modified Section 90 and brought it into force with effect from 1-4-1972. The object and scope of the substitution was explained by a circular of the Central Board of Direct Taxes (No. 108 dated 20-3-1973) as to empower the Central Government to enter into agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing Section 90 was renumbered as sub-section (1) and sub-section (2) was inserted by the Finance Act, 1991 with retrospective effect from 1-4-1972. CBDT Circular No. 621 dated 19-12-1991 explains its purpose as follows:
>
> > "43. *Taxation of foreign companies and other non-resident taxpayers*.- Tax treaties generally contain a provision to

> the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.
> 43 .1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-a-vis other taxpayers, Section 90 of the Income Tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial."

xxxx xxxx xxxx

> **22.** The Andhra Pradesh High Court in *CIT v. Visakhapatnam Port Trust* held that provisions of Sections 4 and 5 of the Income Tax Act are expressly made "subject to the provisions of the Act" which means that they are subject to the provisions of Section 90. By necessary implication, they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. Therefore, the total income specified in Sections 4 and 5 chargeable to income tax is also subject to the provisions of the agreement to the contrary, if any."

123. The aforesaid aspects were reemphasized in paragraph 28 which reads thus:-

> "**28.** A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to

> issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC"

124. Proceeding further to the main question of whether Circular No. 789 was ultra vires the powers of the Board, the Supreme Court held as follows:-

> "**53.** As early as on 30-3-1994, CBDT had issued Circular No. 682 in which it had been emphasised that any resident of Mauritius deriving income from alienation of shares of an Indian company would be liable to capital gains tax only in Mauritius as per Mauritian tax law and would not have any capital gains tax liability in India. This circular was a clear enunciation of the provisions contained in DTAC, which would have an overriding effect over the provisions of Sections 4 and 5 of the Income Tax Act, 1961 by virtue of Section 90 (1) of the Act. If, in the teeth of this clarification, the assessing officers chose to ignore the guidelines and spent their time, talent and energy on inconsequential matters, we think that CBDT was justified in issuing "appropriate" directions vide Circular No. 789, under its powers under Section 119, to set things on course by eliminating avoidable wastage of time, talent and energy of the assessing officers discharging the onerous public duty of collection of revenue. Thus, Circular No. 789 does not in any way crib, cabin or confine the powers of the assessing officer with regard to any particular assessment. It merely formulates broad guidelines to be applied in the matter of assessment of the assessees covered by the provisions of DTAC.
> **54.** We do not think the circular in any way takes away or curtails the jurisdiction of the assessing officer to assess the income of the assessee before him. In our view, therefore, it is erroneous to say that the impugned Circular No. 789 dated 13-4-2000 is ultra vires the provisions of Section 119 of the Act. In our judgment, the powers conferred upon CBDT by sub-sections (1) and (2) of Section 119 are wide enough to accommodate such a circular."

125. As is manifest from the above, the Supreme Court took note of the consistent stand of the Union and which flowed right from the time when Circular No. 682 had come to be issued of Mauritius residents being absolved and exempt from a capital gains tax liability in India. It pertinently observed that the circular was a clear

enunciation of the legal position which would flow from the DTAA and which would prevail by virtue of Sections 4 and 5 of the Act. The decision in *Azadi Bachao Andolan* also carries the following pertinent observations with respect to fiscal residence. This becomes evident from a reading of the following observations appearing in paragraphs 62 to 64 of the report:

> "**62.** The concept of "fiscal residence" of a company assumes importance in the application and interpretation of the Double Taxation Avoidance Treaties.
> **63.** In *Cahiers De Droit Fiscal International* it is said that under the OECD and UNO Model Conventions, "fiscal residence" is a place where a person, amongst others a corporation, is subjected to unlimited fiscal liability and subjected to taxation for the worldwide profit of the resident company. At paragraph 2.2 it is pointed out:
>
> > "The UNO Model Convention takes these two different concepts into account. It has not embodied the second sentence of Article 4, paragraph (1) of the OECD Model Convention, which provides that the term 'resident' does not include any person who is liable to tax in that State in respect only of income from sources in that State. In fact, if one adhered to a strict interpretation of this text, there would be no resident in the meaning of the Convention in those States that apply the principle of territoriality."
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> Again in paragraph 3 .5 it is said:
>
> > "The existence of a company from a company law standpoint is usually determined under the law of the State of incorporation or of the country where the real seat is located. On the other hand, the tax status of a corporation is determined under the law of each of the countries where it carries on business, be it as resident or non-resident."
>
> **64.** In paragraph 4.1 it is observed that the principle of universality of taxation i.e. the principle of worldwide taxation, has been adopted by a majority of States. One has to consider the worldwide income of a company to determine its taxable profit. In this system it is crucial to define the fiscal residence of a company very accurately. The State of residence is the one entitled to levy tax on the corporation's worldwide profit. The company is subject to unlimited fiscal liability in that State. In the case of a company, however, several factors enter the picture and render the decision difficult. First, the company is necessarily incorporated and usually registered under the tax law of a State that grants it corporate status. A corporation has administrative activities, directors and managers who reside, meet and take decisions in one or several

places. It has activities and carries on business. Finally, it has shareholders who control it. Hence, it is opined:

> "When all these elements coexist in the same country, no complications arise. As soon as they are dissociated and 'scattered' in different States, each country may want to subject the company to taxation on the basis of an element to which it gives preference; incorporation procedure, management functions, running of the business, shareholders' controlling power. Depending on the criterion adopted, fiscal residence will abide in one or the other country.
>
> All the European countries concerned, except France, levy tax on the worldwide profit at the place of residence of the company considered. South Korea, India and Japan in Asia, Australia and New Zealand in Oceania follow this principle."

126. Of equal significance are the principles which came to be propounded with respect to treaty shopping and the allegation of Mauritius being used as a base for establishment of shell or conduit companies. Dealing with the aforesaid aspect, the Supreme Court held:-

> "**111.** The respondents vehemently urge that the offshore companies have been incorporated under the laws of Mauritius only as shell companies, which carry on no business there, and are incorporated only with the motive of taking undue advantage of DTAC between India and Mauritius. They also urged that "treaty shopping" is both unethical and illegal and amounts to a fraud on the Treaty and that this Court must be astute to interdict all attempts at treaty shopping.
>
> **112.** "Treaty shopping" is a graphic expression used to describe the act of a resident of a third country taking advantage of a fiscal treaty between two contracting States. According to Lord McNair,
>
> > "provided that any necessary implementation by municipal law has been carried out, there is nothing to prevent the nationals of 'third States', in the absence of any expressed or implied provision to the contrary, from claiming the right or becoming subject to the obligation created by a treaty".
>
> **113.** Reliance is also placed on the following observations of Lord McNair:
>
> > "that any necessary implementation by municipal law has been carried out, there is nothing to prevent the nationals

> of 'third States', in the absence of any express or implied provision to the contrary, from claiming the rights, or becoming subject to the obligations, created by a treaty; for instance, if an Anglo-American Convention provided that professors on the staff of the universities of each country were exempt from taxation in respect of fees earned for lecturing in the other country, and any necessary changes in the tax laws were made, that privilege could be claimed by, or on behalf of, professors of those universities who were the nationals of 'third States' ".

114. It is urged by the learned counsel for the appellants, and rightly in our view, that if it was intended that a national of a third State should be precluded from the benefits of DTAC, then a suitable term of limitation to that effect should have been incorporated therein. As a contrast, our attention was drawn to Article 24 of the Indo-US Treaty on Avoidance of Double Taxation which specifically provides the limitations subject to which the benefits under the Treaty can be availed of. One of the limitations is that more than 50% of the beneficial interest, or in the case of a company, more than 50% of the number of shares of each class of the company, be owned directly or indirectly by one or more individual residents of one of the contracting States. Article 24 of the lndo-US DTAC is in marked contrast with the Indo-Mauritius DTAC. The appellants rightly contend that in the absence of a limitation clause, such as the one contained in Article 24 of the lndo-US Treaty there are no disabling or disentitling conditions under the Indo-Mauritius Treaty prohibiting the resident of a third nation from deriving benefits thereunder. They also urge that motives with which the residents have been incorporated in Mauritius are wholly irrelevant and cannot in any way affect the legality of the transaction. They urge that there is nothing like equity in a fiscal statute. Either the statute applies *proprio vigore* or it does not. There is no question of applying a fiscal statute by intendment, if the expressed words do not apply. In our view, this contention of the appellants has merit and deserves acceptance. We shall have occasion to examine the argument based on motive a little later.

115. The decision of the Chancery Division in *F.G. (Films) Ltd., In re* was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to prevent "fraud". This decision only emphasises the doctrine of piercing the veil of incorporation. There is no doubt that, where necessary, the courts are empowered to lift the veil of incorporation while applying the domestic law. In the situation where the terms of DTAC have been made applicable by reason of Section 90 of the Income Tax Act, 1961, even if they derogate from the

provisions of the Income Tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the court. As we have already emphasised, the whole purpose of DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income Tax Act. In our view, therefore, the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us.

116. The respondents banked on certain observations made in *Oppenheim's International Law*. All that is stated therein is a reiteration of the general rule in municipal law that contractual obligations bind the parties to their contracts and not a third party to the contract. In international law also, it has been pointed out that the Vienna Convention on the Laws of Treaties, 1969 reaffirms the general rule that a treaty does not create either obligations or rights for a third-party State without its consent, based on the general principle *pacta tertiis nee nocent nec prosunt*. It is true that an international treaty between States *A* and *B* is neither intended to confer benefits nor impose obligations on the residents of State *C*, but, here we are not concerned with this question at all. The question posed for our consideration is: if the residents of State C qualify for a benefit under the treaty, can they be denied the benefit on some theoretical ground that "treaty shopping" is unethical and illegal? We find no support for this proposition in the passage cited from *Oppenheim*.

117. The respondents then relied on the observations of Philip Baker regarding a seminar at IFI, Barcelona in 1991, wherein a paper was presented on "Limitation of treaty benefits for companies" (treaty shopping). He points out that the Committee on Fiscal Affairs of OECD in its report styled as "Conduit Companies Report, 1987" recognised that a conduit company would generally be able to claim treaty benefits.

118. There is elaborate discussion in Baker's treatise on the anti-abuse provisions in the OECD Model and the approach of different countries to the issue of "treaty shopping". True, that several countries like the USA, Germany, Netherlands, Switzerland and United Kingdom have taken suitable steps, either by way of incorporation of appropriate provisions in the international conventions as to double taxation avoidance, or by domestic legislation, to ensure that the benefits of a treaty/convention are not available to residents of a third State. Doubtless, the treatise by Philip Baker is an excellent guide as to how a State should modulate its laws or incorporate suitable terms in tax conventions to which it is a party so that the possibility of a resident of a third State deriving benefits thereunder is totally eliminated. That may be an academic approach to the problem to say how the law should be. The maxim "*judicis est jus dice re, non dare*" pithily expounds the duty of the Court. It is to decide what the law is, and apply it;

not to make it."

127. It becomes pertinent to note that *Azadi Bachao Andolan* had come to be pronounced at a time when the DTAA did not incorporate a LOB provision. While noticing this aspect, the Supreme Court observed that unlike other tax treaties which embodied Articles which regulated or constituted limitations with respect to treaty benefits being availed, the India-Mauritius DTAA contained no disabling conditions. It proceeded to hold that where the terms of a taxing convention were applicable, notwithstanding courts being otherwise empowered to peer through the veil of incorporation, the said principle would be inapplicable. The Court thus proceeded to negate the submission of the incorporation of entities in Mauritius being liable to be doubted or frowned upon. This becomes evident from the following observations which came to be entered:-

> "**133.** Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants etc.
>
> **134.** Developing countries need foreign investments, and the treaty-shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South-East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the "Mauritius conduit".

> Although Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India-Mauritius Tax Treaty.
>
> **135.** Overall, countries need to take, and do take, a holistic view. Developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and nontax benefits from the treaty, or the treaty shopping leads to other tax abuses.
>
> **136.** There are many principles in fiscal economy which, though at the first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping in our view, is another. Despite the sound and fury of the respondents over the so-called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when the lndo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."

128. While concluding, the Supreme Court pertinently observed as under:-

> "**166.** We are unable to agree with the submission that an act which is otherwise valid in law can be treated as *non est* merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents.
>
> **167.** In the result, we are of the view that the Delhi High Court erred on all counts in quashing the impugned circular. The judgment under appeal is set aside and it is held and declared that Circular No. 789 dated 13-4-2000 is valid and efficacious."

129. While one would have thought that the authoritative pronouncement of the Supreme Court in *Azadi Bachao Andolan* and which had come to be pronounced on 07 October 2003 would have

rendered a quietus, the aspect of capital gains which may flow from the sale of shares routed in India again arose for consideration of the Supreme Court in *Vodafone*. It becomes pertinent to note that the aforesaid decision had come to be rendered prior to the introduction of Explanation 5 in Section 9(1). *Vodafone* carries the following elucidating passages with respect to holding structures and the allied issues which arise in the field of international taxation. While dealing with the aforesaid aspects, Kapadia CJI, and whose opinion was joined by Swatanter Kumar J., explained those concepts in the following terms:-

> "**72.** The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned *separate entity principle* i.e. treat a company as a separate person. The Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on stand-alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants that are subject to (personal or corporate) income tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Nowadays, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers.
>
> **73.** It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive Directors. Such a

restriction, which is the inevitable consequence of any group structure, is generally accepted, both in corporate and tax laws.

74. However, where the subsidiary's executive Directors' competences are transferred to other persons/bodies or where the subsidiary's executive Directors' decision making has become fully subordinate to the holding company with the consequence that the subsidiary's executive Directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling non resident enterprise (NRE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, recharacterise the equity transfer according to its economic substance and impose the tax on the actual controlling non-resident enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).

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79. When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold.

80. In this connection, we may reiterate the "*look at*" principle enunciated in *Ramsay* in which it was held that the Revenue or the

> Court must *look at* a document or a transaction in a context to which it properly belongs to It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "*look at*" test to ascertain its true legal nature [see *Craven v. White (Stephen)* which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date]."

130. As is manifest from the principles enunciated by the Supreme Court, the position of holding or parent companies exercising due oversight was duly acknowledged. This becomes evident from the Supreme Court noting that a group or parent company would invariably be involved in providing principled guidance to other entities forming part of that conglomerate and the same being in exercise of the right of the principal or the major shareholder itself. It was pertinently noted that merely because a parent company were to issue such a directive or formulate a policy of guidance, the same would not compel one to hold that the subsidiary was liable to be deemed to be a resident of a State in which the parent company resided.

131. Kapadia C.J. proceeded further to hold that one would be justified in ignoring the principles of separate entity only if it were found that the subsidiary stood completely denuded of independent decision making powers and were a mere puppet which was wholly controlled by the parent. It was pertinently observed that it is only in cases where it be found that where the Directors of the subsidiary stood deprived of independent decision making power and had become fully subordinate or subservient to the parent company that such a presumption may be drawn. It then proceeded to formulate

various principles which would justify the Revenue doubting the corporate existence and independence of a subsidiary. *Vodafone* explains that the Revenue would be empowered to disregard the form of an arrangement in situations where it be found that a non-resident enterprise were acting through "*abuse of organization form/legal form and without reasonable business purpose*". It was in that limited window that the Supreme Court recognized the authority of the Revenue to disregard the form and recharacterize the transaction according to the principle of economic substance. It also acknowledged the right of the Revenue to undertake that exercise of recharacterization where it were to find that the subsidiary company had been interposed essentially as a "*colourable device*".

132. It thus held that it would be in the aforesaid situations that the Revenue would be entitled to ignore the corporate veil and test the transaction based on the precept of substance over form. The power of the Revenue to pierce the corporate veil was explained as one available to be invoked where it be found on facts that the transaction were a sham or a tax avoidance mechanism. These presumptions, Kapadia C.J. explained, would be attracted where the entire arrangement were found to be based on fraud, the corporate structure being used for circular trading or round tripping or for illegal purposes such as bribery. In such situations, Kapadia C.J. held that the test of fiscal nullity would apply and enable the Revenue to discard the form of the subsidiary.

133. However, in *Vodafone*, the Supreme Court also penned the following significant note of caution:-

"**81.** Applying the above tests, we are of the view that every strategic

> foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.
>
> **82**. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device."

134. As was noted by us in the preceding parts of this decision, the judgment in *Vodafone* had come to be pronounced prior to Explanation 5 coming to be incorporated in Section 9(1) of the Act. Section 9 as it stood at that point in time did not incorporate principles pertaining to taxation of indirect transfers. The Supreme Court was thus called upon to examine whether a transfer of shares which were asserted to derive value from assets situated in India would fall within the dragnet of Section 9(1)(i). While negativing the contention of the Revenue in this respect, the Supreme Court pertinently observed as follows:-

> "**91.** For the above reasons, Section 9(1)(i) cannot by a process of interpretation be extended to cover *indirect transfers* of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)(i). We cannot rewrite Section 9(1)(i). The legislature has not used the words *indirect transfer* in Section 9(1)(i). If the word *indirect* is read into Section 9(1)(i), it would render the express statutory requirement of the fourth sub-clause in Section 9(1)(i) nugatory. This is because Section 9(1)(i) applies to transfers of a capital asset *situate in India*. This is one of the elements in the fourth sub-clause of Section 9(1)(i) and if indirect transfer of a capital asset is read into Section 9(1)(i) then the words *capital asset situate in India* would be rendered nugatory. Similarly, the words "underlying asset" do not find place in Section 9(1)(i). Further, "transfer" should be of an asset in respect of which it is possible to compute a capital gain in accordance with the

provisions of the Act. Moreover, even Section 163(1)(c) is wide enough to cover the income whether received directly or indirectly. Thus, the words "directly or indirectly" in Section 9(1)(i) go with the "income" and not with "the transfer of a capital asset (property).

92. Lastly, it may be mentioned that the Direct Taxes Code (DTC) Bill, 2010 proposes to tax income from transfer of shares of a foreign company by a non-resident, where at any time during 12 months preceding the transfer, the fair market value of the assets in India, owned directly or indirectly, by the company, represents at least 50% of the fair market value of all assets owned by the company. Thus, the DTC Bill, 2010 proposes taxation of offshore share transactions. This proposal indicates in a way that *indirect transfers* are not covered by the existing Section 9(1)(i) of the Act. In fact, the DTC Bill, 2009 expressly stated that income accruing even from *indirect* transfer of a capital asset situate in India would be deemed to accrue in India. These proposals, therefore, show that in the existing Section 9(1)(i) the word *indirect* cannot be read on the basis of purposive construction.

93. The question of providing "*look through*" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, *limitation of benefits* has to be expressly provided for in the treaty. Such clauses cannot be read into the section by interpretation. For the foregoing reasons, we hold that Section 9(l)(i) is not a "look through" provision."

135. Proceeding then to reiterate the limited extent to which the Revenue may be entitled to doubt the source of investment, the Supreme Court rendered the following significant observations:-

"**97.** One more aspect needs to be reiterated. There is a conceptual difference between a *preordained transaction* which is created for tax avoidance purposes, on the one hand, and a transaction which evidences *investment to participate* in India. In order to find out whether a given transaction evidences a preordained transaction in the sense indicated above or *investment to participate*, one has to take into account the factors enumerated hereinabove, namely, duration of time during which the holding structure existed, the period of business operations in India, generation of taxable revenue in India during the period of business operations in India, the timing of the exit, the continuity of business on such exit, etc.

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101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has

nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded.

102. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies.

103. The Directors of the subsidiary under their articles are the managers of the companies. If new Directors are appointed even at the request of the parent company and even if such Directors were removable by the parent company, such Directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholders' influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) Directors. They cannot be reduced to be puppets. The decisive criterion is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive Directors."

136. K.S.P. Radhakrishnan J., while penning a concurrent opinion, firstly observed that the burden of establishing that the incorporation of an entity was aimed solely to subserve a fraudulent or dishonest purpose lies entirely on the Revenue. This becomes evident from paragraphs 241 and 242 of the report:-

> "**241.** Corporate structures created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the group is undergoing financial or other overall restructuring; or when operations, such as consolidation, are carried out, to clean defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of tax neutral and investor-friendly countries to establish an SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring.
>
> **242.** Corporate structure may also have an exit route, especially when investment is overseas. For purely commercial reasons, a foreign group may wind up its activities overseas for better returns, due to disputes between partners, unfavourable fiscal policies, uncertain political situations, strengthen fiscal loans and its application, threat to its investment, insecurity, weak and time-consuming judicial system, etc., all can be contributing factors that may drive its exit or restructuring. Clearly, there is a fundamental difference in transnational investment made overseas and domestic investment. Domestic investments are made in the borne country and meant to stay as it were, but when the transnational investment is made overseas away from the natural residence of the investing company, provisions are usually made for exit route to facilitate an exit as and when necessary for good business and commercial reasons, which is generally foreign to judicial review."

137. It was also pertinently observed that it was always open for multinational corporations and who intended to expand their activities or presence in various markets across the globe to choose tax neutral and investor friendly jurisdictions. The learned Judge thus acknowledged the establishment of such entities for bona fide purposes. Proceeding further to deal with transnational companies and FDI in particular, Radhakrishnan J. held as follows:-

> "**247.** Overseas companies are companies incorporated outside India and neither the Companies Act nor the Income Tax Act enacted in

India has any control over those companies established overseas and they are governed by the laws in the countries where they are established. From country to country laws governing incorporation, management, control, taxation, etc. may change. Many developed and wealthy nations may park their capital in such offshore companies to carry on business operations in other countries in the world. *Many countries give facilities for establishing companies in their jurisdiction with minimum control and maximum freedom. Competition is also there among various countries for setting up such offshore companies in their jurisdiction*. Demand for offshore facilities has considerably increased, in recent times, owing to high growth rates of cross-border investments and to the increased number of rich investors who are prepared to use high technology and communication infrastructures to go offshore. *Removal of barriers to cross-border trade, the liberalisation of financial markets and new communication technologies have had positive effects on the developing countries including India*.

248. Investment under the Foreign Direct Investment Scheme (FDI Scheme), investment by foreign institutional investors (FIIs) under the Portfolio Investment Scheme, investment by NRIs/OBCs under the Portfolio Investment Scheme and sale of shares by NRIs/OBCs on non-repatriation basis; purchase and sale of securities other than shares and convertible debentures of an Indian company by a non-resident are common. Press notes are announced by the Ministry of Commerce and Industry and the Ministry issued Press Note 2 of 2009 and Press Note 3 of 2009, which deal with calculation of foreign investment in downstream entities and requirement of ownership or control in sectoral cap companies. Many of the offshore companies use the facilities of offshore financial centres situate in Mauritius, the Cayman Islands, etc. *Many of these offshore holdings and arrangements are undertaken for sound commercial and legitimate tax planning reasons, without any intent to conceal income or assets from the home country tax jurisdiction and India has always encouraged such arrangements, unless it is fraudulent or fictitious*.

249. Moving offshore or using an OFC does not necessarily lead to the conclusion that they involve in the activities of tax evasion or other criminal activities. Multinational companies are attracted to offshore financial centres mainly due to the reason of providing attractive facilities for investment. Many corporate conglomerates employ a large number of holding companies and often high-risk assets are parked in separate companies so as to avoid legal and technical risks to the main group. *Instances are also there when individuals form offshore vehicles to engage in risky investments, through the use of derivatives trading, etc. Many of such companies do, of course, involve in manipulation of the market, money laundering and also indulge in corrupt activities like round tripping,*

parking black money or offering, accepting, etc., directly or indirectly bribe or any other undue advantage or prospect thereof.

250. OECD (Organisation for Economic Cooperation and Development) in the year 1998 issued a report called "Harmful Tax Competition: An Emerging Global Issue". The report advocated doing away with tax havens and offshore financial centres, like the Cayman Islands, on the basis that their low-tax regimes provide them with an unfair advantage in the global marketplace and are thus harmful to the economies of more developed countries. OECD threatened to place the Cayman Islands and other tax havens on a "black list" and impose sanctions against them. OECD's blacklist was avoided by the Cayman Islands in May 2000 by committing itself to a string of reforms to improve transparency, remove discriminatory practices and began to exchange information with OECD.

251. *Often, complaints have been raised stating that these centres are utilised for manipulating markets, to launder money, to evade tax, to finance terrorism, indulge in corruption, etc*. All the same, it is stated that OFCs have an important role in the international economy, offering advantages for multinational companies and individuals for investments and also for legitimate financial planning and risk management. *It is often said that insufficient legislation in the countries where they operate gives opportunities for money laundering, tax evasion, etc. and, hence, it is imperative that that the Indian Parliament would address all these issues with utmost urgency*."

138. As is evident from the aforesaid observations, Radhakrishnan J. acknowledged the paradigm shift in global commerce of companies being desirous of overcoming trade barriers and bureaucratic obstacles while choosing investor friendly shores. It was significantly observed that many of such entities which may be seated in jurisdictions such as Mauritius or the Cayman Islands may in fact be premised on sound commercial and legitimate tax planning purposes without any intent to conceal income or assets. The learned Judge then held that merely because an offshore jurisdiction was chosen to establish a subsidiary or a holding entity, the same would not necessarily lead one to adversely presume that such an activity was motivated by tax evasion or a criminal purpose. The opinion penned by Radhakrishnan J. also

has the following illuminating passages relating to the interplay between holding and subsidiary companies. The relevant parts of his Lordship's opinion in this respect are extracted hereinbelow:-

> "**254.** The Companies Act in India and all over the world have statutorily *recognised subsidiary company as a separate legal entity*. Section 2(47) of a the Companies Act, 1956 defines "subsidiary company" or "subsidiary", a subsidiary company within the meaning of Section 4 of the Act. For the purpose of the Companies Act, a company shall be subject to the provisions of sub-section (3) of Section 4, be deemed to be subsidiary of another, subject to certain conditions, which includes holding of share capital in excess of 50% controlling the composition of the Board of Directors and gaining status of a subsidiary with respect to the third company by the holding company's subsidisation of the third company.
>
> **255.** A holding company is one which owns sufficient shares in the subsidiary company to determine who shall be its Directors and how its affairs shall be conducted. The position in India and elsewhere is that the holding company controls a number of subsidiaries and respective businesses of companies within the group and manage and integrate as a whole as though they are merely departments of one large undertaking owned by the holding company. *But, the business of a subsidiary is not the business of the holding company* (see *Gramophone and Typewriter Ltd. v. Stanley*, All ER Rep at p. 837).
>
> **256.** Subsidiary companies are, therefore, the integral part of corporate structure. Activities of the companies over the years have grown enormously of its incorporation and outside and their structures have become more complex. *Multinational companies having large volume of business nationally or internationally will have to depend upon their subsidiary companies in the national and international level for better returns for the investors and for the growth of the company*. When a holding company owns all of the voting stock of another company, the company is said to be a WOS of the parent company. Holding companies and their subsidiaries can create pyramids, whereby a subsidiary owns a controlling interest in another company, thus becoming its parent company.
>
> **257.** The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In *Bacha F. Guzdar v. CIT*, this Court held that shareholders' only right is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting. Refer also to *Carew and Co. Ltd. v. Union of India* and *Carrasco Investments Ltd. v. Directorate of*

Enforcement.

258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. *Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed decentralised management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries*.

259. The US Supreme Court in *United States v. Bestfoods* explained that it is a general principle of corporate law and legal systems that a parent corporation is not liable for the acts of its subsidiary, *but the Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, if the corporal form is misused to accomplish certain wrongful purposes, when the parent company is directly a participant in the wrong complained of.* Mere ownership, parental control, management, etc. of a subsidiary is not sufficient to pierce the status of their relationship and, to hold parent company liable. In *Adams v. Cape Industries Plc.*, the Court of Appeal emphasised that it is appropriate to pierce the corporate veil where special circumstances exist indicating that it is mere facade concealing true facts.

260. *Courts, however, will not allow the separate corporate entities to be used as a means to carry out fraud or to evade tax. Parent company of a WOS, is not responsible, legally for the unlawful activities of the subsidiary save in exceptional circumstances, such as a company is a sham or the agent of the shareholder, the parent company is regarded as a shareholder*. Multinational companies, by setting up complex vertical pyramid-like structures, would be able to distance themselves and separate the parent from operating companies, thereby protecting the multinational companies from legal liabilities."

139. The opinion then proceeds to enunciate the various contingencies in which the doctrine of lifting of the corporate veil may be applied. We deem it apposite to extract paragraphs 277 and 280 of the report hereunder:-

"**277.** Lifting the corporate veil doctrine is readily applied in the cases coming within the company law, law of contract, law of taxation. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction.

xxxx **xxxx** **xxxx**

280. Lifting the corporate veil doctrine can, therefore, be applied in tax matters even in the absence of any statutory authorisation to that effect. The principle is also being applied in cases of holding company-subsidiary relationship, where in spite of being separate legal personalities, if the facts reveal that they indulge in dubious methods for tax evasion."

140. Of equal significance is the following discussion on LOBs' and the presumptions which may flow from a TRC:-

"***Limitation of benefit clause (LOB)***

309. The Indo-Mauritius Treaty does not contain any limitation of benefit (LOB) clause, similar to the Indo-US Treaty, wherein Article 24 stipulates that benefits will be available if 50% of the shares of a company are owned directly or indirectly by one or more individual residents of a controlling State. The LOB clause also finds a place in India-Singapore DTA. The Indo-Mauritius Treaty does not restrict the benefit to companies whose shareholders are non-citizens/residents of Mauritius, or where the beneficial interest is owned by non-citizens/residents of Mauritius, in the event where there is no justification in prohibiting the residents of a third nation from incorporating companies in Mauritius and deriving benefit under the treaty. *No presumption can be drawn that the Union of India or the Tax Department is unaware that the quantum of both FDI and FII do not originate from Mauritius but from other global investors situate outside Mauritius*. Mauritius, it is well known is incapable of bringing FDI worth millions of dollars into India. If the Union of India and the Tax Department insist that the investment would directly come from Mauritius and Mauritius alone then the Indo-Mauritius Treaty would be dead letter.

310. Mr Aspi Chinoy, learned Senior Counsel's contention that in the absence of an LOB clause in the Indo-Mauritius Treaty, the scope of the Treaty would be positive from Mauritius Special Purpose Vehicles (SPVs) created specifically to route investments into India, meets with our approval. We acknowledge that on a subsequent sale/transfer/disinvestment of shares by the Mauritian

company, after a reasonable time, the sale proceeds would be received by the Mauritius company as the registered holder/owner of such shares, such benefits could be sent back to the foreign principal/100% shareholder of Mauritius company either by way of a declaration of special dividend by the Mauritius company and/or by way of repayment of loans received by the Mauritius company from the foreign principal/shareholder for a the purpose of making the investment. Mr. Chinoy is right in his contention that apart from DTAA, which provides for tax exemption in the case of capital gains received by a Mauritius company/shareholder at the time of disinvestment/exit and the fact that Mauritius does not levy tax on dividends declared and paid by a Mauritius company/subsidiary to its foreign shareholders/principal, there is no other reason for this quantum of funds to be invested from/through Mauritius.

311. *We are, therefore, of the view that in the absence of an LOB clause and the presence of Circular No. 789 of 2000 and the TRC certificate, on the residence and beneficial interest/ownership, the Tax Department cannot at the time of sale/disinvestment/exit from such FDI, deny benefits to such Mauritius companies of the Treaty by stating that FDI was only routed through a Mauritius company*, by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the foreign principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the foreign principal/100% shareholder of Mauritius company had played a dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the foreign principal/its 100% shareholder either by way of special dividend or by way of repayment of loans received; or the real owner/beneficial owner of the shares was the foreign principal company. Setting up of a WOS Mauritius subsidiary/SPV by principals/genuine substantial long-term FDI in India from/through Mauritius, pursuant to the DTAA and Circular No. 789 can never be considered to be set up for tax evasion.

TRC whether conclusive

312. LOB and *look through* provisions cannot be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the Tax Department cannot pierce the veil and *look at* the substance of the transaction.

313. DTAA and Circular No. 789 dated 13-4-2000, in our view, would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius

company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance. *The Tax Department, in such a situation, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty is entitled to look at* the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. *In other words, TRC does not prevent enquiry into a tax fraud; for example, where an OCB is used by an Indian resident for round- tripping or any other illegal activities, nothing prevents the Revenue from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of OCB in the entire transaction.*

314. *No court will recognise a sham transaction or a colourable device or adoption of a dubious method to evade tax, but to say that the Indo-Mauritian Treaty will recognise FDI and FII only if it originates from Mauritius, not the investors from third countries, incorporating company in Mauritius, is pitching it too high, especially when statistics reveal that for the last decade FDI in India was US $178 billion and, of this, 42% i.e. US $74.56 billion was through the Mauritian route*. Presently, it is known, FII in India is Rs 4,50,000 crores, out of which Rs 70,000 crores is from Mauritius. The facts, therefore, clearly show that almost the entire FDI and FII made in India from Mauritius under DTAA does not originate from that country, but has been made by Mauritius companies/SPV, which are owned by companies/individuals of third countries providing funds for making FDI by such companies/individuals not from Mauritius, but from third countries.

315. Mauritius, and India, it is known, have also signed a memorandum of understanding (MoU) laying down the rules for information exchange between the two countries which provides for the two signatory authorities to assist each other in the detection of fraudulent market practices, including insider dealing and market manipulation in the areas of securities transactions and derivative dealings. The object and purpose of the MoU is to track down transactions tainted by fraud and financial crime, not to target the bona fide legitimate transactions. Mauritius has also enacted stringent "Know Your Clients" (KYC) regulations and anti-money laundering laws which seek to avoid abusive use of treaty.

316. Viewed in the above perspective, we also find no reason to import the "*abuse of rights doctrine*" (abus de droit) to India. The

above doctrine was seen applied by the Swiss court in *A Holdings ApS*, unlike courts following common law. That was a case where a Danish company was interposed to hold all the shares in a Swiss company and there was a clear finding of fact that it was interposed for the sole purpose of benefiting from the Swiss-Denmark DTA which had the effect of reducing a normal 35% withholding tax on dividend out of Switzerland down to 0%. The court in that case held that the only reason for the existence of the Danish company was to benefit from the zero withholding tax under the tax treaty. On facts also, the above case will not apply to the case in hand."

141. Insofar as tax havens, treaty shopping and shell companies are concerned, Radhakrishnan J. pertinently observed as follows:-

"***Tax havens, treaty shopping and shell companies***

318. "Tax haven" is not seen defined or mentioned in the tax laws of this country. The corporate world gives different meanings to that expression, so also the Tax Department. The term "tax haven" is sometimes described as a State with nil or moderate level of taxation and/or liberal tax incentives for undertaking specific activities such as exporting. The expression "tax haven" is also sometimes used as a "secrecy jurisdiction". The term "shell companies" finds no definition in the tax laws and the term is used in its pejorative sense, namely, as a company which exists only on paper, but in reality, they are investment companies. Meaning of the expression "treaty shopping" was elaborately dealt with in *Azadi Bachao Andolan* and hence is not repeated.

319. The Tax Justice Network Project (UK), however, in its briefing paper published in September 2005, stated as follows:

> "The role played by tax havens in encouraging and profiteering from tax avoidance, tax evasion and capital flight from developed and developing countries is a scandal of gigantic proportions."

The Project recorded that one per cent of the world's population holds more than 57% of total global net worth and that approximately US $255 billion annually was involved in using offshore havens to escape taxation, an amount which would more than plug the financing gap to achieve the Millennium Development Goal of reducing the world poverty by 50% by 2015. Necessity of proper legislation for charging those types of transactions have already been emphasised by us.

Round-tripping

320. India is considered to be the most attractive investment

destinations and, it is known, has received $37.763 billion in FDI and $29.048 billion in FII investment in the year to 31-3-2010. FDI inflows it is reported were of $22.958 billion between April 2010 and January 2011 and FII investment were $31.031 billion. Reports are afloat that million of rupees go out of the country only to be returned as FDI or FII.

321. Round-tripping can take many formats like under-invoicing and over-invoicing of exports and imports. Round-tripping involves getting the money out of India, say to Mauritius, and then come to India like FDI or FII. Article 4 of the Indo-Mauritius DTAA defines a "resident" to mean any person, who under the laws of the contracting State is liable to taxation therein by reason of his domicile, residence, place of business or any other similar criteria. An Indian company, with the idea of tax evasion can also incorporate a company offshore, say in a tax haven, and then create a WOS in Mauritius and after obtaining a TRC may invest in India. Large amounts, therefore, can be routed back to India using TRC as a defence, but once it is established that *such an investment is black money or capital that is hidden, it is nothing but circular movement of capital known as round-tripping; then TRC can be ignored, since the transaction is fraudulent and against national interest*.

322. *The facts stated above are food for thought to the legislature and adequate legislative measures have to be taken to plug the loopholes; all the same, a genuine corporate structure set up for purely commercial purpose and indulging in genuine investment is to be recognised*. However, if the fraud is detected by the court of law, it can pierce the corporate structure since fraud unravels everything, even a statutory provision, if it is a stumbling block, because the legislature never intents to guard fraud. *Certainly, in our view, TRC certificate though can be accepted as a conclusive evidence for accepting status of residents as well as beneficial ownership for applying the tax treaty, it can be ignored if the treaty is abused for the fraudulent purpose of evasion of tax*."

142. Post the decision rendered in *Vodafone*, Parliament stepped in and while promulgating Finance Act 2012 introduced Explanation 5 to Section 9(1)(i). Close on the heels of that legislative amendment being introduced, certain proposed amendments to Section 90 were mooted in terms of the Finance Bill, 2013. As was noted in the earlier parts of this decision, one of the controversial amendments were those

proposed in terms of the introduction of sub-section (5) in Section 90 and which sought to introduce a rule that while a TRC would be necessary, it would not constitute sufficient basis for claiming reliefs under the DTAA. This appears to have led to a huge furore being raised, the measure being opposed and capital markets in India being adversely impacted.

143. Soon thereafter, the Finance Ministry issued a clarification on 01 March 2013 stating that proposed sub-section (5) of Section 90 was never intended to be a measure enabling income tax authorities to question the validity of a TRC. It thus reiterated the position of the Union Government that a TRC would be accepted as evidence and that Income Tax authorities would not go behind the TRC or question the residence status claimed on that basis. Circular No. 789 and the provisions incorporated therein were reiterated. It is pertinent to note that proposed sub-section (5) was ultimately shelved and never came to form part of Section 90.

J. THE HIGH COURT DECISIONS

144. Subsequent to the decision of *Vodafone*, the Andhra Pradesh High Court came to render its judgement in *Sanofi*. The writ petitions before the Andhra Pradesh High Court pertained to a tax dispute between the petitioners and the Revenue with respect to the acquisition of share capital by a French entity, **M/s Sanofi Pasteur Holding SA France**[47] of a French based **Joint Venture Company**, **M/s ShanH SAS France**[48] from its constituents **M/s Merieux**

[47] Sanofi Pasteur
[48] ShanH

Alliance France[49] and **M/s Groupe Industriel Marcel Dassault**[50]. ShanH, as of the date of acquisition by Sanofi Pasteur, was stated to have held 80% of the shares in **Shanta Biotechnics Ltd.**[51], an entity based in Hyderabad.

145. The Revenue had determined the petitioner therein to be an assessee in default in respect of payments made by it to MA and GIMD regarding the aforenoted acquisition. The AAR had in its impugned order observed that the transaction was designed for avoidance of tax in India and that the transfer of shares of the JVC effectively amounted to the transfer of assets of an India based company since the sequence of events pertaining to the said transfer involved a transfer of the underlying assets and control of the Indian company, SBL. Accordingly, it was determined that the transaction of sale of shares was in fact taxable in India in terms of Article 14(5) of the DTAA between India and France. The AAR had additionally declined to rule on the questions posed since it was determined that sub-clause (iii) to Section 245R(2) was applicable.

146. The Court in *Sanofi* observed that the JVC was a resident of France and was a distinct entity having commercial substance which was incorporated to serve as an investment vehicle and accordingly had commercial substance and a legitimate business purpose of also facilitating FDI in India. It accordingly observed as follows:-

> "**82.** ……...This court is of the considered view that ShanH as a French resident corporate entity (initially a subsidiary of MA, thereafter a joint venture of MA/GIMD and eventually a joint venture comprising MA/GIMD/Georges Hibon) is a distinct entity of commercial substance, distinct from MA and/ or GIMD

[49] MA
[50] GIMD
[51] SBL

> and/or Georges Hibon, incorporated to serve as an investment vehicle, this being the commercial substance and business purpose, i.e., of foreign direct investment in India, by way of participation in SBL……."

147. The Court had additionally relied upon the decisions rendered by the Supreme Court in *Azadi Bachao Andolan* and *Vodafone* to hold that the JVC was not a sham corporate entity brought into existence solely for the purposes of avoiding capital gains liability under the provisions of the Act and hence there being no reason to pierce the corporate veil. This since the Revenue had failed to establish that the said entity was one lacking in any commercial substance and was interposed as a mere tax avoidance device.

148. The Court had additionally rendered the following pertinent observations with respect to the interplay between the DTAA and the retrospective amendments to the provisions of the Act:-

> "**105.** Other clear indicators (apart from the speech of the Finance Minister, adverted to supra) to negate the Revenue's contention that retrospective amendments to the Act would override the provisions of the DTAA (or other tax treaties) may be noticed:
>
> •The Finance Act, 2012, apart from introducing several retrospective amendments to tax indirect transfers, has also introduced provisions (sections 95 to 102) in relation to the GAAR, vide Chapter X-A of the Act. The purpose of these provisions is to invoke the provisions of the Act in instances of abuse of the treaty provisions. The GAAR provisions specifically seek to override the tax treaties (proposed to be operationalised with effect from April 1, 2014).
>
> • Section 90 of the Act has been amended, inserting sub-section (2A) (with effect from April 1, 2013), to enable application of Chapter X-A even if the same be not beneficial to the assessee (enacting an override effect over the provisions of section 90(2)). Section 98 in Chapter X-A is inserted with the specific intention to override tax treaties, where an arrangement is declared to be an impermissible avoidance agreement, as defined in section 96 ;

• In contradistinction, the retrospective amendments, sought to be relied upon by the Revenue in the present case (Explanation 2 to section 2(47)) ; and Explanations 4 and 5 to section 9) are not fortified by a non obstante clause expressed to override tax treaties.

• There is a presumption against a repeal by implication and the reason underlying this principle is premised on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and, therefore, when it does not provide a repealing the provision it signals an intention not to repeal the existing legislation-Municipal Council, Palai v. T. J. Joseph, AIR 1963 SC 1561 ; Tansukh Rai v. Nilratan Prasad Shaw, AIR 1966 SC 1780, Northern India Caterers (P.) Ltd. v. State of Puniab. AIR 1967 SC 1581 : Municioal Corooration of Delhi v. Shiv Shanker, AIR 1971 SC 815 ; Ratan Lal Adukia v. Union of India, AIR 1990 SC 104 ; R.S. Raghunath v. State of Karnataka, AIR 1992 SC 81 ; Union of India v. S.Venkateshan, AIR 2002 SC 1890 ; State of M. P. v. Kedia Leather and Liquor Ltd., AIR 2003 SC 3236 ;

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109. In the case on hand, therefore, the meaning and the trajectory of the retrospective amendments to the Act (by the Finance Act, 2012), must be identified by ascertaining the legal meaning of the amendments, considered in the light of provisions of the Act ; the mischief, the amendments are intended to address and other applicable legal norms ; which in the context include provisions of the DTAA, an instrument effectuated under constitutional text and authority and duly notified under provisions of the Act and the amendment ought be confined to its legitimate locus and orbit.

110. As earlier observed, the provisions of the Act and of the DTAA are overlapping and competing legal magisteria and the proper interpretive role requires, on a harmonious construction and in accordance with the relative weight and priority, giving effect to both competing provisions, as per the inter se weightage mandated by the overarching legal norms, set out in section 90(2) of the Act."

149. The Court while examining Article 14 of the India-France DTAA in the context of *Sanofi* had observed that sub-clause (5) which pertained to alienation of shares, does not contemplate a "see through" approach to enquire into the control of the taxpaying entity. It was accordingly observed as under:-

"**117.** On an interactive analyses of paragraphs (4) and (5), in our

considered view, the scope and reach of article 14(5) is:
(a) the transaction must involve gains from alienation of shares (not being shares of the capital stock of a company, the property of which principally comprises, directly or indirectly of immovable property-article 14(4)), representing participation of at least 10 per cent. in the company ; and

(b) on indicators in (a) being satisfied, the gains derived from alienation of shares of such company may be taxed in the Contracting State whereat the company is resident.

118. On no rational interpretive principle is it legitimate to consider provisions of article 14(5) as permitting a "see through". The provision, on a true, fair and non-manipulative interpretation, does not accommodate reckoning of the inherence of control by an intermediary/interpositioned joint venture company (ShanH), of the affairs, management and assets of its subsidiary (SBL), as alienation of shares by or of the control over the affairs, management and assets of the subsidiary (SBL), by one or all of the distinct participants of the interpositioned joint venture, i.e., by MA/GIMD, who are distinct and French resident corporate entities themselves.

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140. Qua article 14(5), where shares of a company which is a resident of France are transferred, representing a participation (shareholding see Vodafone) of more than 10 per cent. in such entity, the resultant capital gain is taxable only in France. Even where the underlying value of such shares is located in the jurisdiction of the other contracting State (India), this fact is irrelevant under the DTAA provisions ; except where the alienation is of shares of a company the property of which consists principally (whether directly or indirectly) of immovable property and in the later circumstance the entitlement to tax stands allocated under article 14(4) to the contracting State within whose jurisdiction such property is situate. To reiterate, the fact that the value of the shares alienated comprise underlying assets located in the other contracting State is irrelevant in the context of article 14(5).

141. The creative interpretation by the Revenue of provisions of article 14(5) on the substrate of its "underlying assets" theory (premised on its "MA/ GIMD are the legal and beneficial owners of SBL shares" assumption) ; and in the context of SBL assets comprising immovable property pertaining to its industrial and commercial operations as well ; would render the provisions of article 14(4) otiose.

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144. The petitioners have contended (a contention that commends our acceptance) that the UN Model Convention provides that countries negotiating a treaty have an option in article 14(5) to permit the clause to operate only in instances where a substantial portion of the company's assets are situate in that Contracting State, mere residence of a company would not suffice and its underlying assets should also be situate in that State. The relevant commentary on the UN Model Convention, at paragraph 11 mentions that such a clause must be incorporated as part of a treaty. The relevant part of the commentary reads:

> "Some countries might consider that the Contracting State in which a company is resident should be allowed to tax the alienation of its shares, only if a substantial portion of the company's assets are situated in that State, and in bilateral negotiations might urge such a limitation. Other countries might prefer that paragraph to be omitted completely."

145. The DTAA does not incorporate such a clause and accommodating a "see through" in article 14(5) would transgress the negotiated terms of the DTAA since the capital gains tax arising from the transaction, which stands allocated to France in terms of the DTAA would be susceptible to doubletaxation, both in India and France, by an artificial and strained construction of the provisions of article 14(5).”

150. The Court had also rendered the following pivotal observations pertaining to the primacy of DTAAs’, treaty shopping and the principles underlying the formulation and interpretation of treaties:-

“**119.** The DTAA is a treaty. As noticed in our prefatory observations, treaty provisions are expressions of sovereign policy, of more than one sovereign State, negotiated and entered into at a political/diplomatic level and have several explicit and/or subliminal and unarticulated considerations as their bases. A tax treaty must be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between Contracting States as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. As Azadi Bachao Andolan has noticed, treaty negotiations are essentially a bargaining process, with each side seeking concessions from the other. The final agreement would often represent several compromises and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides. Many developed countries tolerate or encourage even treaty shopping, even if it were unintended, improper or unjustified, for

other and non-tax reasons, unless it leads to significant loss of tax revenue ; and allow the use of treaty network to attract foreign enterprises and offshore activities. Some States favour treaty shopping for outbound investment to reduce foreign taxes of their tax residents but dislike their own loss of tax revenue on inbound investment or trade of non-residents. All these are sovereign policy choices.

120. Developing countries need foreign investments and treaty shopping opportunities could be an additional factor to attract them. There are many principles in a fiscal economy which, though may facially appear inequitable, are tolerated in a developing economy in the interest of long-term development.

121. The principles relevant to treaty interpretation are not the same as those pertaining to interpretation of municipal legislation. Francis Bennion observes (quoted with approval in Azadi Bachao Andolan) : the drafting of treaties is notoriously sloppy usually for very good reason. To get agreement, politic uncertainty is called for.

xxxx xxxx xxxx

148. Whose purpose is the question ? It is axiomatic that while the tax legislation may principally be for revenue augmentation that need not, in all circumstances, be the singular legislative purpose. Sovereign power to tax may be and often is (in contemporaneous Governmental objectives, across nations) pursued for effectuating a cornucopia of State objectives ; including nurture of societal equilibrium, minimizing economic or other disparities and health or ecological concerns (to mention a few). Normatively, promotion of international trade and commerce, in goods and services is thus a legitimate Governmental purpose that may be pursued through tax legislation.

149. The Act (section 90) authorizes, effectuation of a tax treaty (to which India is a signatory) and for the prevalence of the duly notified treaty provisions over the provisions of the Act, as well.

150. Strained construction of the treaty provisions, where not authorized by the settled principles of statutory construction, either by the tax administrator or by the judicial branch at the invitation of the Revenue of one of the Contracting States to a treaty would also transgress the inherent and vital constitutional scheme, of separation of powers. Treaty-making power is integral to the exercise of sovereign legislative or executive will according to the relevant constitutional scheme, in all jurisdictions. Once the power is exercised by the authorized agency (the Legislature or the executive, as the case may be) and a treaty entered into, the

> provisions of such treaty must receive a good faith interpretation by every authorized interpreter, whether an executive agency, a quasi-judicial authority or the judicial branch. The supremacy of the tax treaty provisions duly operationalised within a contracting State (which may (theoretically) be disempowered only by explicit and appropriately authorized legislative exertions), cannot be eclipsed by employment of an interpretive stratagem, on misconceived and ambiguous assumption of revenue interests of one of the Contracting States. Where the operative treaty's provisions are unambiguous and their legal meaning clearly discernible and lend to an uncontestable comprehension on good faith interpretation, no further interpretive exertion is authorized ; for that would tantamount to usurpation (by an unauthorized body-the interpreting agency/tribunal), intrusion and unlawful encroachment into the domain of treaty-making under article 253 (in the Indian context), an arena off-limits to the judicial branch and when the organic charter accommodates no participatory role, for either the judicial branch or the executors of the Act."

151. It was on the aforesaid basis that the Court declined to entertain the contention of the Revenue commending the Court to purposively construe Article 14(5) and derive the interpretation of the terms emanating therefrom as per the provisions of the Act, observing that treaties must be interpreted in accordance with the "*ordinary meaning*" given to it in terms of the treaty and in light of the objects and purpose of the latter. The Court went on to observe that the proposition of the Revenue to adopt a "see through approach" towards Article 14(5) rested on an assumption that the JVC is an entity of no commercial substance and is not the beneficial owner of shares. The aforenoted premise of the Revenue was, however, categorically rejected by the Court. Accordingly, the Court observed that the income accruing from the transaction does not arise and is not taxable in India but is liable to taxation in France. Pursuant to the above, it was held that the ruling of the AAR that capital gains arising out of the transaction is liable to tax in India, was wholly unsustainable.

152. The Punjab and Haryana High Court, in *Serco BPO* dealt with a challenge to an AAR ruling where the petitioner sought a declaration that the transaction was not designed for the avoidance of tax. That High Court proceeded to decide the matter on merits on account of the inordinate delays in deciding the application of the petitioner before the AAR. The primary dispute before the AAR pertained to whether the capital gains arising in the hands of the Mauritian entity on account of sale of shares of the Indian entity would be exempt from taxation under the Act and in light of Article 13(4) of the India-Mauritius DTAA. The Court placed reliance on the provisions of the India-Mauritius DTAA as well as CBDT Circular No. 682 and 789 to hold that any resident of Mauritius deriving income from alienation of shares of Indian companies would be liable to capital gains tax solely as per Mauritian tax laws and that a TRC would constitute sufficient proof of residence as well as beneficial ownership.

153. The High Court came to render the following pertinent observations with respect to the sanctity of a TRC:-

> "**29.** As per article 1 the Convention applies to persons who are residents of one or both of the Contracting States. Blackstone Mauritius and Barclays are both residents of Mauritius. The residency certificates referred to above establish the same. Clause 2 of the Central Board of Direct Taxes Circular No. 789 expressly clarifies that certificates of residence issued by the Mauritius authorities constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the DTAC. The certificate of residence issued by the Mauritian authorities in favour of Blackstone Mauritius and Barclays was accepted by the authorities. Its genuineness and validity was fairly not questioned either before the first respondent or before us. The certificates of residence issued by the Mauritius Authorities, therefore, establish that Blackstone Mauritius and Barclays are residents of Mauritius within the meaning of article-1.
>
> **30.** In view of the circular, it is incumbent upon the authorities in India to accept the certificates of residence issued by the Mauritian authorities. Circular No. 789 is a statutory circular issued under

> section 119 of the Act. It is obviously based upon the trust reposed by the Indian authorities in the Mauritian authorities. Once it is accepted that the certificate has been issued by the Mauritian authorities, the validity thereof cannot be questioned by the Indian authorities. This is a convention/treaty entered into between two sovereign States. A refusal to accept the validity of a certificate issued by the Contracting States would be contrary to the convention and constitute an erosion of the faith and trust reposed by the Contracting States in each other. It is for the Government of India to decide whether or not such a certificate ought to be accepted. Once it is established that it has been issued by the contracting State i.e. Mauritius, a failure to accept the residence certificate issued by the Mauritian authorities would be an indication of break down in the faith reposed by the Government of India in the Government of Mauritius and the Mauritian authorities reiterated in and evidenced by statutory circulars issued under section 119 of the Act."

154. The Court in *Serco BPO* also took note of the proposed amendments to Section 90 and the proposed sub-section (5) which never came to fruition as a result of the ensuing backlash, which has been noticed in some detail in the preceding parts of this decision. The Court accordingly observed that in light of the entire sequence of events pertaining to the proposed amendment vide Finance Bill, 2013 as well as the decision of *Azadi Bachao Andolan*, the TRC issued to the Mauritian entities must be accepted as valid and the entities considered as legitimate residents of Mauritius. In view of the above, it was observed that the capital gains arising from the sale of shares could only have been liable to tax in Mauritius as per Article 13.

155. The Court after taking note of the analysis rendered in *Azadi Bachao Andolan* with respect to treaty shopping had made the following succinct observations in the aforesaid context:-

> "**49.** The Supreme Court also dealt with the interpretation of treaties with respect to 'treaty shopping' in considerable detail. It is sufficient to note only a few observations. It was observed that many developed countries tolerate or encourage treaty shopping,

> even if it is unintended, improper or unjustified, for other non-tax reasons unless it leads to a significant loss of tax revenues. Several countries allow use of their treaty network to attract foreign enterprises and offshore activities. In developed countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. The countries take a holistic view keeping in mind the fiscal necessity and political compulsions. The Supreme Court observed that it could not judge the legality of treating shopping merely because one section of thought considers it improper. We would only add that entering into a treaty and terms and conditions thereof are the sovereign functions involving important aspects of policy. Such decisions must be left to the policy makers who are best equipped and have been entrusted with the responsibility of negotiating the treaty to the greatest advantage and good of the country."

Accordingly the High Court in *Serco BPO* proceeded to quash the impugned order and declare that no capital gains tax was payable by the Mauritian entity in regard to the sale of shares to the petitioner therein.

K. TAX AVOIDANCE AND TREATY ABUSE

156. Elaborate submissions were addressed by respective sides on tax avoidance and treaty abuse and insofar as the respondents are concerned, it was alleged that the petitioner, TG III and TG IV are merely conduit companies of TGM LLC and thus disentitled from claiming benefits under the DTAA. Apart from the above, Mr. Srivastava, learned special counsel had also adverted to the GAAR provisions which now stand statutorily embodied in Chapter X-A. However, and before we evaluate the submissions which were addressed basis the provisions contained in the aforenoted Chapter, this would be an appropriate juncture to examine and understand the concept of tax avoidance and treaty abuse which were emphasized by the respondents and was an aspect which also appears to have weighed upon the AAR.

157. Tax Conventions owe their importance in today's time in light of the expansion of cross-border trade and investment. While they are principally aimed at seeking to eliminate or reduce source-based taxation, these conventions also aim to strike a balance by endeavoring to strike down improper use of treaty provisions. An improper use of treaty provisions has been explained to be concerned with an attempt to derive benefits from a convention contrary to its spirit, object and purpose. The aforesaid explanation and the concept of improper use was first taken note of by the Committee of Experts of International Cooperation in Tax Matters constituted by the **United Nations**[52] and which paper was presented to its Economic and Social Council.

158. Treaty abuse is generally understood to mean the use of tax treaties by persons who were not intended to benefit or derive advantages from the treaty contrary to the intended and avowed objectives of the Contracting States. However, insofar as treaty shopping is concerned, and as would be evident from the discussion which ensues, it has become a well-known and acknowledged aspect of international taxation. Aspects pertaining to treaty shopping were also expounded upon in *Vodafone*, as would be evident from the passages of that decision extracted above. However, and what necessarily must be borne in mind is that the mere establishment of an intermediary or subsidiary in the absence of negative factors cannot and should not be readily presumed to be lacking in bona fides or being an attempt to create an artifice lacking substance. It is in the aforesaid context that principles of substance over form and economic

[52] UN

substance have come to be evolved.

159. The **Organisation for Economic Co-operation and Development[53]/Group of Twenty[54] Base Erosion and Profit Shifting[55]** Project has authored a work titled "*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*". It becomes pertinent to note that the BEPS Action Plan which was drawn up to counter treaty abuse and regulate treaty shopping as part of the 15 action points which were formulated, had also adopted Action 6 which dealt with the subject of prevention of treaty abuse. Action 6 was worded as follows:

> ***"Action 6 - Prevent treaty abuse***
> *Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. The work will be co-ordinated with the work on hybrids."*

160. The paper identified the three principal areas pertaining to Action 6 as requiring: (a) the development of model treaty provisions to prevent the grant of treaty benefits in inappropriate circumstances; (b) clarification of tax treaties elaborating that they were not intended to generate double non-taxation; and (c) to identify tax policy considerations in general to be considered by countries before finalizing taxing conventions. It was in the course of the aforesaid study that a recommendation came to be formulated for treaties to incorporate specific anti-abuse rules and which in turn resulted in the

[53] OECD
[54] G-20
[55] BEPS

formulation of LOB principles and the **Principal Purpose Test**[56].

161. The OECD in its Sixth-Year review report on treaty shopping and the progress made with respect to Action 6, takes note of the significant increase in the number of compliant agreements and records that over 1,120 out of the 1,270 compliant agreements had been brought in accord through the **Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting**[57].

162. The **United Nations Model Double Taxation Convention Between Developed and Developing Countries 2021**[58] also takes note of the aforesaid initiatives commenced by the OECD/G-20 BEPS Project while dealing with Article 29 of the UN Model Convention 2021 and which is concerned with entitlement of benefits in general. The aforesaid Commentary has adopted the following parts of the OECD Commentary on Article 29, and which is extracted hereinbelow:

> "**5.** The Committee considers that the following part of the Commentary on Article 29 of the 2017 OECD Model Tax Convention, which describes the detailed version of that Article, is applicable to paragraphs 1 to 7 of Article 29 of this Model:
>
> 4. This Article contains provisions that prevent various forms of treaty shopping through which persons who are not residents of a Contracting State might establish an entity that would be a resident of that State in order to reduce or eliminate taxation in the other Contracting State through the benefits of the tax treaty concluded between these two States. Allowing persons who are not directly entitled to treaty benefits (such as the reduction or elimination of withholding taxes on dividends, interest or royalties) to obtain these benefits indirectly through treaty shopping would frustrate the bilateral and reciprocal nature of tax treaties. If, for

[56] PPT
[57] BEPS MLI
[58] UN Model Convention 2021

instance, a State knows that its residents can indirectly access the benefits of treaties concluded by another State, it may have little interest in granting reciprocal benefits to residents of that other State through the conclusion of a tax treaty. Also, in such a case, the benefits that would be indirectly obtained may not be appropriate given the nature of the tax system of the former State; if, for instance, that State does not levy an income tax on a certain type of income, it would be inappropriate for its residents to benefit from the provisions of a tax treaty concluded between two other States that grant a reduction or elimination of source taxation for that type of income and that were designed on the assumption that the two Contracting States would tax such income.

5. The provisions of paragraphs 1 to 7 seek to deny treaty benefits in the case of structures that typically result in the indirect granting of treaty benefits to persons that are not directly entitled to these benefits whilst recognising that in some cases, persons who are not residents of a Contracting State may establish an entity in that State for legitimate business reasons. Although these provisions apply regardless of whether or not a particular structure was adopted for treaty-shopping purposes, the Article allows the competent authority of a Contracting State to grant treaty benefits where the other provisions of the Article would otherwise deny these benefits but the competent authority determines that the structure did not have as one of its principal purposes the obtaining of benefits under the Convention.

6. The Article restricts the general scope of the other provisions of the Convention, including those of Article 1 according to which the Convention applies to persons who are residents of a Contracting State. Paragraph 1 of the Article provides that a resident of a Contracting State shall not be entitled to the benefits of the Convention unless it constitutes a "qualified person" under paragraph 2 or unless benefits are granted under the provisions of paragraphs 3, 4, 5 or 6. Paragraph 2 determines who constitutes a "qualified person" by reference to the nature or attributes of various categories of persons; any person to which that paragraph applies is entitled to all the benefits of the Convention. Under paragraph 3, a person is entitled to the benefits of the Convention with respect to an item of income even if it does not constitute a "qualified person" under paragraph 2 as long as that item of income emanates from, or is incidental to, the active conduct of a business in that person's State of residence (subject to certain exceptions). Paragraph 4 is a "derivative benefits" provision that allows certain entities owned by residents of third States to obtain treaty benefits

> provided that these residents would have been entitled to equivalent benefits if they had invested directly. Paragraph 5 is a "headquarters company" provision under which a company that is not eligible for benefits under paragraph 2 may nevertheless qualify for benefits with respect to particular items of income. Paragraph 6 includes the provisions that allow the competent authority of a Contracting State to grant treaty benefits where the other provisions of the Article would otherwise deny these benefits. Paragraph 7 includes a number of definitions that apply for the purposes of the Article."

163. As is manifest from the above, the principal focus of authorities across the globe appears to be concentrated on ensuring that persons who were not entitled to derive benefits from taxing treaties not being able to obtain the same indirectly through treaty shopping and thus violate the reciprocal character of those treaties itself. It is in the aforesaid context that both the OECD as well as the UN Model Convention 2021 bids member States to adopt the concepts of qualified person and also deal with various other situations in which treaty benefits may be denied.

164. While explaining model paragraph 3 of Article 29, the Commentary on the UN Model Convention 2021 again adopts the comments formulated by the OECD and advocates the testing of transactions based on the precept of active conduct of business. This would be evident from the following relevant passages which appear in the UN Commentary:-

> "**18.** The Committee considers that the following part of the Commentary on Article 29 of the 2017 OECD Model Tax Convention, which explains paragraph 3, is applicable to the equivalent provision of this Model (the modifications that appear in italics between square brackets, which are not part of the Commentary on the OECD Model Tax Convention, have been inserted in order to provide additional explanations and to reflect

the differences between the provisions of the OECD Model Tax Convention and those of this Model):

> 68. Paragraph 3 of both the simplified and detailed versions sets forth an alternative test under which a resident of a Contracting State may receive treaty benefits with respect to certain items of income that are connected to an active business conducted in its State of residence. This paragraph recognises that where an entity resident of a Contracting State actively carries on business activities in that State, including activities conducted by connected persons, and derives income from the other Contracting State that emanates from, or is incidental to, such business activities, granting treaty benefits with respect to such income does not give rise to treaty-shopping concerns regardless of the nature and ownership of the entity. The paragraph will provide treaty benefits in a large number of situations where benefits would otherwise be denied under paragraph 1 because the entity is not a "qualified person" under paragraph 2."

165. In order to examine the view which judicial institutions have taken with respect to treaty abuse we find an excellent exposition on the fundamental principles which should apply in the decision of the **Court of Justice of the European Communities**[59] in **Cadbury Schweppes Plc and another v Inland Revenue Commissioners**[60]. Though rendered in the context of the right of establishment comprised in Articles 43 and 48 of the European Convention, there are some pertinent observations which appear in that decision and which would be of relevance to the questions which stand posited before us.

166. The aforenoted decision had come to be rendered in the context of the Income and Corporation Taxes Act, 1988, prevalent in the **United Kingdom**[61] and in terms of which a parent company established in the UK was taxed on the profits of certain subsidiaries

[59] CJEC
[60] [(2006) 3 WLR 890]
[61] UK

noted as **Controlled Foreign Companies**[62] and in which case the profits attributable to the CFCs' were attributed to the parent and taxed in its hands. The fundamental question which came to be posed before the Panel was whether the aforesaid legislative measure was compatible with the freedom of establishment and free movement of capital as guaranteed under the European Convention. It appears to have been asserted that the establishment of CFCs was in abuse of the freedom of establishment right as guaranteed. The Advocate General in his opinion pertinently observed as under:

> "**40.** I do not believe that the fact that a parent company establishes a subsidiary in another member state for the avowed purpose of enjoying the more favourable tax regime in that state constitutes, in itself, an abuse of freedom of establishment, which would thereby deprive that company of the opportunity of relying on the rights conferred by articles 43 and 48 EC. I base that analysis on the scope of those provisions, as defined by case law.
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> **xxxx xxxx xxxx**
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> **42.** Next, it seems important in this case to state that "establishment" allows a Community national to participate, on a stable and continuous basis, in the economic life of a member state other than his state of origin and to profit therefrom: see, to that effect, *Reyners*, para 21, and *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94) [1995] ECR I-4165, para 25. Freedom of establishment thus concerns the genuine and actual pursuit of an economic activity in the host member state: *R v Secretary of State for Transport, Ex p Factortame Ltd (No 3)* (Case C-221/89) [1992] QB 680, para 20, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-246/89) [1991] ECR I-4585, para 21. As stated by Advocate General Darmon in para 3 of his opinion in *R v Her Majesty's Treasury, Ex p Daily Mail and General Trust plc* (Case 81/87) [1989] QB 446: "Establishment 'means integration into a national economy'." It is therefore the exercise of an economic activity in the host member state which is the raison d'être of freedom of establishment.
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> **xxxx xxxx xxxx**

[62] CFC

49. For the purposes of the present case, it can be inferred from that case law that as long as there is genuine and actual pursuit of an activity by the controlled subsidiary in the member state in which it was established, the reasons for which the parent company decided to establish the subsidiary in that host state cannot call into question the rights which that company derives from the Treaty. (Conversely, when the objectives of freedom of establishment have not been fulfilled, the company cannot rely on the provisions of article 43 EC: see *R v Her Majesty's Treasury, Ex p Daily Mail and General Trust plc* (Case 81/87) [1989] QB 446. In that case, the company Daily Mail, formed in accordance with the law of the United Kingdom, wished to transfer its central management and control outside that member state without losing its legal personality or ceasing to be a company incorporated in the United Kingdom, as provided for by the law of that member state. It disputed, however, that it had to submit to the condition provided for by that legislation requiring consent to be obtained from the Treasury. Daily Mail wished to transfer its central management to the Netherlands in order to be in a position, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy a part of its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law. The Court of Justice held that Community law as it then stood did not preclude legislation such as that at issue because it conferred no right on companies incorporated under national law to transfer their central management and control to another member state while remaining companies of the member state under the legislation of which they were incorporated.)

xxxx xxxx xxxx

53. To the same effect, it is also settled case law that the mere fact that a resident company establishes a secondary establishment in another member state cannot give rise to a general presumption of tax evasion or avoidance or justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty: see, to that effect, *Commission of the European Communities v Kingdom of Belgium* (Case C-478/98) [2ooo] ECR I-7587, para 45; see also *X v Riksskatteverket* (Case C-436/oo) [2oo2] ECR I-1o829, para 62. As the court has held on several occasions, the establishment of a company in another member state does not, of itself, entail tax avoidance, since the company in question will in any event be subject to the legislation of that state: *Imperial Chemical Industries*, para 26; *Metallgesellschaft Ltd v Inland Revenue Comrs* (Joined Cases C-397 and 41o/98) [2oo1] Ch 62o, para 57, and *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt*

(Case C-324/oo) [2oo2] ECR I-11779, para 37."

167. The CJEC thus appears to have struck a similar chord when it held that mere establishment of a subsidiary in another member State cannot ipso facto amount to an abuse of freedom of establishment. The Advocate General in his opinion pertinently observes that the right to establish an enterprise is principally concerned with the motive to genuinely and actively pursue an economic activity in a member State. It was thus held that the reasons which may have weighed upon the parent company to establish or domicile a subsidiary cannot be called into question since the right to establish would flow from the treaty itself. It was further observed that the mere establishment of a subsidiary would not give rise to a general presumption of tax evasion or avoidance.

168. The Advocate General in his opinion thereafter proceeded to observe as follows:

> "**88.** The use of that formula, whose language reproduces that of the A doctrine of ''abuse of rights" (see, in particular, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* (Case C-110/99) [2000] ECR I-11569, para 56), may be understood as intended to prevent the counteraction of tax avoidance from being used as a pretext for protectionism. Application of Community law may be refused only when the company in question relies on it abusively because it has set up an artificial arrangement in order to avoid tax.
>
> **89.** The court has thus held that a restrictive national measure cannot be justified by the counteraction of tax avoidance when that legislation applies to a situation which is defined too generally. Accordingly, the court takes the view that in order for that justification to apply, the national legislation at issue must not apply ''generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom" (*Imperial Chemical Industries* [1999] 1 WLR 108, para 26) or concern ''generally, any situation in which, for whatever reason, the transfer at undervalue is to a company established under the legislation of another member state [in which the transferor has a holding] or a branch set up in the Kingdom of

Sweden by such a company" (X (Case C-436/00) [2002] ECR I-10829, para 61).

xxxx xxxx xxxx

91. On the other hand, the national courts may, case by case and on the basis of objective evidence, take account of abuse or fraudulent conduct on the part of the persons concerned in order to deny them the benefit of the provisions of Community law on which they seek to rely: *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (Case C-212/97) [2000] Ch 446, para 25, and X (Case C-436/00), para 42.
92. It follows that, in order to be capable of being justified by counteraction of tax avoidance, national legislation must not merely refer to a given situation in general terms but must enable the national court to refuse, case by case, the benefit of Community law to certain taxpayers or certain companies which have made use of an artificial arrangement for the purpose of avoiding tax."

169. The aspect of establishment and the same being indelibly coupled to an actual pursuit of economic activity was again reiterated in paragraphs 106 and 107 which are reproduced hereinbelow:

"**106.** We have seen that ''establishment", within the meaning of articles 43 et seq EC, involves the actual pursuit of an economic activity in the host state. If the subsidiary is actually carrying on such an activity in that state and, in that connection, it provides genuine and actual services to the parent company, I do not think that that situation may be regarded, in itself, as tax evasion or avoidance, even if payment for those services leads to a reduction in the taxable profits of the parent company in the state of origin.
107. Having regard to the objective of freedom of establishment, as long as the subsidiary carries on a genuine economic activity in the host state, there is no difference between the provision of services to third parties and the provision of those services to companies belonging to the same group as the subsidiary."

170. The Advocate General ultimately came to the following conclusions:

"**151.** In the light of all of the foregoing considerations, I am of the opinion that the answer to the question referred for a preliminary ruling is that articles 43 and 48 EC do not preclude national tax legislation which provides for inclusion in the tax base of a resident parent company of profits of a CFC established in another member state where those profits are subject in that state to a much lower level of taxation than that in effect in the state of residence of the

parent company, if that legislation applies only to wholly artificial arrangements intended to circumvent national law. Such legislation must therefore enable the taxpayer to be exempted by providing proof that the controlled subsidiary is genuinely established in the state of establishment and that the transactions which have resulted in a reduction in the taxation of the parent company reflect services which were actually carried out in that state and were not devoid of economic purpose with regard to that company's activities."

171. In the judgment of the Court itself we find the following relevant observations:

"**34.** Before examining the legislation on CFCs in the light of articles 43 and 48 EC, it is important to answer the national court's initial question seeking to ascertain whether the fact that a company established in a member state establishes and capitalises companies in another member state solely because of the more favourable tax regime applicable in that member state constitutes an abuse of freedom of establishment.

35. It is true that nationals of a member state cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law: *Knoors v Secretary of State for Economic Affairs* (Case 115/78) [1979] ECR 399, para 25; *Criminal proceedings against Bouchoucha* (Case C-61/89) [199o] ECR I-3551, para 14; and *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (Case C-212/97) [2ooo] Ch 446,para 24.

36. However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a member state other than his state of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty: see, to that effect, *Heirs of H Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* (Case C-364/o1) [2oo3] ECR I-15o13,para 71.

37. As to freedom of establishment, the court has already held that the fact that the company was established in a member state for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom: see, to that effect, *Centros*, para 27, and *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* (Case C-167/o1) [2oo3] ECR I-10155, para 96."

172. The right of the parent company to establish a secondary establishment while accorded due importance was made subject to it

being established that the aforesaid activity was premised on sound and justifiable economic considerations as would be evident from the following passages:

> "**50.** It is also apparent from case law that the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another member state cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty: see, to that effect, *Imperial Chemical Industries plc v Colmer* (Case C-264/96) [1999] 1 WLR 108, para 26; *Commission of the European Communities v Kingdom of Belgium* (Case C-478/98) [2ooo] ECR I-7587, para 45; *X v Riksskatteverket* (Case C-436/oo) [2oo2] ECR I-1o829, para 62, and *Commission of the European Communities v French Republic* (Case C-334/o2) [2oo4] ECR I-2229, para 27.
>
> **51.** On the other hand, a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the member state concerned: see to that effect *Imperial Chemical Industries*, para 26; *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* (Case C-324/oo) [2oo2] ECR I-11779, para 37; *De Lasteyvie du Saillant* [2oo4] ECR I-24o9, para 50, and *Marks & Spencer* [2oo6] Ch 184, para 57.
>
> **52.** It is necessary, in assessing the conduct of the taxable person, to take particular account of the objective pursued by the freedom of establishment: see, to that effect, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (Case C-212/97) [2ooo] Ch 446, para 25,and *X v Riksskatteverket*, para 42.
>
> **53.** That objective is to allow a national of a member state to set up a secondary establishment in another member state to carry on his activities there and thus assist economic and social interpenetration within the Community in the sphere of activities as self-employed persons: see *Reyners v Belgian State* (Case 2/74) [1974] ECR 631, para 21. To that end, freedom of establishment is intended to allow a Community national to participate, on a stable and continuing basis, in the economic life of a member state other than his state of origin and to profit therefrom: *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94) [1995] ECR I-4165, para 25."

173. Even the CJES frowned upon the creation of artificial arrangements and which did not reflect economic reality as would be manifest from the following observations forming part of that

judgment:

> "**54.** Having regard to that objective of integration in the host member state, the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that state for an indefinite period: see *R v Secretary of State for Transport, Ex p Factortame Ltd (No 3)* (Case C-221/89) [1992] QB 68o, para 2o, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-246/89) [1991] ECR I-4585, para 21. Consequently, it presupposes actual establishment of the company concerned in the host member state and the pursuit of genuine economic activity there.
>
> **55.** It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory."

174. The CJES in *Cadbury* ultimately held as under:

> "**75.** In the light of the preceding considerations, the answer to the question referred must be that articles 43 and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a member state of profits made by a CFC in another member state, where those profits are subject in that state to a lower level of taxation than that applicable in the first state, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that, despite the existence of tax motives, that CFC is actually established in the host member state and carries on genuine economic activities there."

175. Closer to the present cause, is a more recent judgment rendered by the Upper Tribunal (Tax And Chancery Chamber) in **Burlington Loan Management DAC v Revenue and Customs Commissioners**[63]**.** The respondent before the Court was a resident in Ireland and subject to the UK-Republic of Ireland Double Taxation

[63] [(2024) UKUT 152 (TCC)]

Convention. It was stated to have taken an assignment of a debt claim from SAAD Investments Company Ltd., a resident in the Cayman Islands. As a consequence of the aforesaid assignment, it became entitled to receive various payments connected to the administration of Lehman Brothers International, a company resident in the UK. The question which appears to have arisen before the Tribunal was whether the aforesaid assignment would fall foul of Article 12(5) of the Double Taxation Convention and which was asserted to constitute an anti-abuse measure.

176. The Tribunal took note of the position that if the assignment be valid, it would be taxable only in Ireland unless the anti-abuse measure applied. Article 12(5) of the Convention read as under:-

> "(1) Interest derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.
> (2) The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and other debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises but shall not include any income which is treated as a distribution under Article 11
> …
> (5) The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment."

177. While explaining the meaning liable to be ascribed to Article 12(5), the Tribunal firstly propounded the basic principles which would govern treaty interpretation. This becomes evident from a reading of paragraph 43 which is reproduced hereinbelow:-

> **"[43]** The approach to the interpretation of the UK-Ireland treaty was common ground between the parties. The FTT noted at [83]

that the principles enumerated in cases such as *Smallwood v The Commissioners for Her Majesty's Revenue and Customs* [2010] STC 2045 per Patten LJ at [26] to [29], *The Commissioners for Her Majesty's Revenue and Customs v Anson* [2015] STC 1777 per Lord Reed at [54] to [56] and [110] and [111] and *Fowler v The Commissioners for Her Majesty's Revenue and Customs* [2020] STC 1476 at [16] to [19] made it clear that:

> (1) double tax treaties had to be interpreted in accordance with arts 31 and 32 of the Vienna Convention on the Law of Treaties; and
>
> (2) consequently, a double tax treaty had to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (see art 31(1))."

178. While seeking to identify the scope and ambit of Article 12(5) that Tribunal also took note of the Commentary on the OECD Model Convention as would be evident from the following passages of that decision:

> **"[47]** A provision similar to art 12(5) of the UK-Ireland treaty is not included in the OECD model convention. But the commentary on the OECD model convention (the 2015 version – which was the one in force at the material time) does contain material that, in our view, should be taken into account in determining the object and purpose of art 12(5) of the UK-Ireland treaty.
>
> **[48]** In the commentary on art 1 of the OECD model convention, paras 7 to 26 contain material under the heading 'Improper use of the Convention'. The commentary notes that:
>
> > 7.1 Taxpayers may be tempted to abuse the tax laws of a State by exploiting the differences between various countries' laws. Such attempts may be countered by provisions or jurisprudential rules that are part of the domestic law of the State concerned. Such a State is then unlikely to agree to provisions of bilateral double taxation conventions that would have the effect of allowing abusive transactions that would otherwise be prevented by the provisions and rules of this kind contained in its domestic law. Also, it will not wish to apply its bilateral conventions in a way that would have that effect.
> >
> > 8. It is also important to note that the extension of double taxation conventions increases the risk of abuse by facilitating the use of artificial legal constructions aimed at securing the benefits of both the tax advantages available under certain

domestic laws and the reliefs from tax provided for in double taxation conventions.

9. This would be the case, for example, if a person (whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly. […]

9.1 This raises two fundamental questions that are discussed in the following paragraphs:

— whether the benefits of tax conventions must be granted when transactions that constitute an abuse of the provisions of these conventions are entered into (see Paragraphs 9.2 and following below);

[…]

[*Rest of* Para. *9.1 and* Para. *9.2 not reproduced because they relate to how domestic law might prevent treaty abuse*]

9.3 Other States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law. These States, however, then consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention on the Law of Treaties).

9.4 Under both approaches, therefore, it is agreed that States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.

9.5 It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. (our emphasis)

[49] The commentary then goes on to observe that where specific avoidance techniques have been identified or are especially problematic, it will often be useful to include provision directly addressing the concern. At para 11, the commentary refers to a particularly prevalent form of 'improper' use of the OECD model convention discussed in the Conduit Report. It notes that there has

been a 'growing tendency towards the use of conduit companies to obtain treaty benefits not intended by the Contracting States' and how 'this has led to an increasing number of member countries to implement treaty provisions (both general and specific) to counter abuse'. The commentary then discusses a wide number of examples of possible solutions open to member countries to deal with particular cases. Among the examples set out at para 21.4 under the heading 'Anti-abuse rules dealing with source taxation of specific types of income' is a form of provision that is, in all material respects, the same as art 12(5) of the UK-Ireland treaty.

xxxx xxxx xxxx

[51] As noted in para 6 of the Conduit Report, the conduit company 'takes advantage' of the treaty provisions but the economic benefit goes to a person (resident in State X) not entitled to use the treaty. The problem is created exclusively by the treaty itself: the domestic tax laws of the source country (in which the advantage arises) are adequate as the State generally taxes all non-residents (including the conduit company). Paragraph 7 of the Conduit Report explains why this is unsatisfactory:

(1) treaty benefits are economically extended to persons resident in a third State in a way unintended by the contracting States;

(2) income may be wholly exempted from taxation or subject to inadequate taxation; and

(3) the State of residence of the ultimate beneficiary has little incentive to enter into a treaty with the source State as it can indirectly receive the treaty benefits without the need to provide reciprocal benefits."

179. As is evident from the aforesaid, the Tribunal ultimately came to conclude that while an allegation of tax abuse should not be readily or easily assumed, the same would get attracted only where it be found that the transaction or arrangement was entered into in order to secure a favourable tax position and if that were to be countenanced the same would be contrary to the object and purpose of the convention itself.

180. The Tribunal also acknowledged the ever-growing phenomenon of conduit companies which may come to be established for the purposes of deriving advantages under a taxing convention but the

economic benefit being claimed by a person resident of another State and who would have in normal circumstances not been entitled to the benefit of the treaty. The Tribunal thus proceeded to formulate the decisive tests as being that of an abusive arrangement. This becomes apparent from a reading of paragraph 65 which is extracted hereinbelow:

> **"[65]** In our view, the correct starting point is the proposition that, unless there is an abusive arrangement falling within art 12(5), BLM, a resident of Ireland and beneficial owner of the SAAD Claim, is to be taxed only in Ireland on the Post-Administration Interest. The question, therefore, is whether there is something abusive, in the particular circumstances of this case, for Ireland alone to tax interest beneficially owned by a company resident in its territory."

181. The Tribunal then proceeded to observe:

> **"[67]** We accept that a tribunal of fact considering art 12(5) may well consider it relevant to determine the extent of a person's knowledge of the treaty, including whether a party has taken steps to disguise their knowledge or avoid obtaining specific knowledge of its provisions. But those matters would simply form part of the factual enquiry to determine whether a person concerned in the creation or assignment of a debt claim has a main purpose of improperly taking advantage of the art 12(1) of the UK-Ireland treaty. We respectfully consider that the FTT went too far in saying, at [150], that a necessary condition for art 12(5) to apply was that SICL knew that the purchaser of the SAAD Claim would be relying on art 12(1) specifically. We consider that to be an unjustified gloss on the actual words chosen by the contracting States in concluding the treaty.
>
> **[68]** However, we cannot accept HMRC's submission either. Their submission seeks always to apply art 12(5) of the UK-Ireland treaty in a case where the person assigning the interest on a debt claim (in this case, SICL) knew that the purchaser would not suffer UK WHT and consequently sought to obtain an economic advantage for itself by sharing in the saving of UK WHT in circumstances where the purchaser had an exemption from UK WHT. The only thing that mattered was that the exemption was actually attributable to the UK-Ireland treaty even if the seller did not know the basis of the purchaser's exemption.
>
> **[69]** In our view, it is a question for the FTT to determine the subjective purposes of both the seller and the purchaser and, in so

> doing, to consider all the circumstances of the case. But the question before the FTT is, as we have explained above, directed at determining whether there has, by means of the particular transaction concerned, been an abuse of the UK-Ireland treaty."

182. In *Burlington*, ultimately and bearing in mind the restricted jurisdiction which an appellate court would be entitled to wield, refused to interfere with the decision taken by the **First Tier Tribunal**[64].

L. FAVOURABLE TAX JURISDICTIONS

183. Having broadly sketched out the backdrop in which the questions which stand posed would merit consideration, we, at the outset, deem it pertinent to cull out some of the key takeaways that emerge.

184. As is manifest from a consideration of the historical genesis of the DTAA in question as well as the volume of FDI originating from the island nation, it would be wholly incorrect to view such investments as an anathema. To borrow the words that the Supreme Court used in *Vodafone*, there is nothing inherently pejorative or odious attached to investments that may be routed through that nation. At least the law does not raise a presumption of illegality or disreputability to foreign investments that may be made through entities domiciled in Mauritius. We bear in mind that the first tax convention was signed between our country and Mauritius as far back as 1982 and the last Protocol signed and made effective from 2016. We also bear in consideration the most recent Protocol that has come to be signed by the two sides on 07 March 2024 and which however is yet to be enforced and energized. The official statistics reveal that

[64] FTT

25% of the total FDI inflow into our country originates from Mauritius and which takes the pole position amongst the top ten nations which contribute to the FDI inflow into the country.

185. As was noticed by us hereinabove, Mauritius perhaps became the preferred destination for various investors who were desirous of routing investments towards the South East Asian economies and with India post the liberalization measures adopted in 1991 becoming one of the more favored and preferred destinations. Of equal significance appears to have been of Mauritius having positioned itself as being investment friendly, freed of bureaucratic red-tapeism and having adopted various ease of business measures much before that phrase became ubiquitous with nations vying amongst themselves to earn that title. Mauritius also appears to have entered into various bilateral and multilateral trade agreements and thus constructing a framework of advantageous tax treaties enabling investors to tap the potential of various emerging economies by setting up pooling investment entities in that nation. Out of the bulk of the FDI headed towards India in 2012, as was noted in *Azadi Bachao Andolan*, almost fifty per cent of the same originated from Mauritius. The data and the facts noticed above lead us to the irresistible conclusion that it would be wholly incorrect to presume investments originating from that nation as being inherently dubious or disreputable. Thus, the mere fiscal residence of an entity in Mauritius would not give rise to a presumption of infamy or constrain courts to approach such investments through what are metaphorically referred to as tinted lenses.

186. We also bear in mind *Azadi Bachao Andolan* itself having acknowledged how nations seek to compete with others in seeking to

attract capital investment by holding out the benefits that could be obtained from their treaty networks. The Supreme Court in unequivocal terms held that there was nothing inherently abhorrent in treaty shopping given the economic compulsions of nations who are desirous of attracting foreign investment. The decision in *Azadi Bachao Andolan* assumes significance in light of its acknowledgement and recognition of the changing world order, the breaking down of commercial frontiers and the imperatives underlying developing nations to attract capital and technological inflows. It chose to describe treaty shopping as a *"necessary evil in a developing economy"*. The decision thus clearly appears to hold and suggest that while treaty shopping may be permissible, nations have chosen to adopt a system of checks and balances to ensure that there is no significant revenue loss or treaty abuse. It however further observed that these concerns must principally be left for the consideration of the executive and which may weigh the economic and political ramifications of such measures.

187. When doubts with respect to legality of such entities domiciled in tax friendly jurisdictions or what are commonly referred to as tax havens came to be raised in *Vodafone*, Radhakrishnan J. in a concurring opinion noted that the establishment of such entities in particular jurisdictions appeared to have seen an immense rise on account of the sheer rise in the number of multinational corporations and corporate behemoths seeking to invest in markets across the globe and businesses continually striving to find new investment opportunities. This phenomenon according to the learned Judge was fueled by barriers to cross border trade disintegrating, the

liberalization of financial markets and the march of developing nations seeking to alleviate the standard and quality of life of their citizenry. Not only do these sentiments find resonance in paragraphs 247 to 249 of the report, the learned Judge pertinently observes that the mere establishment of an offshore company would not justify an assumption that they are *"involved in the activities of tax evasion or other criminal activities"*. It was held that the establishment of such entities or the creation of a holding structure straddling jurisdictions may in fact be motivated by *"sound commercial and legitimate tax planning reasons….."*. The opinion also took note of the OECD report titled *"Harmful Tax Competition: An Emerging Global Issue"* and which had taken note of the important role discharged by offshore entities and whose fiscal residence may be driven by the economic need to penetrate different markets around the world or as part of legitimate financial planning.

188. Both *Azadi Bachao* as well as *Vodafone* then proceeded to identify the contingencies where courts or tax authorities would be justified in questioning the character of the investment or the originating entity. While repelling the argument of entities in Mauritius being mere shells and of treaty shopping being unethical, the Supreme Court in *Azadi Bachao Andolan* held that if the Contracting States intended to deprive a particular category of entities from the benefits of the Convention, it would have been reasonably expected that a limitation of benefit provision were incorporated. The Supreme Court took note of the DTAA as it stood then in contrast to other Conventions and which provided for appropriate disqualifications. Their Lordships spoke of the significance of

"disabling and disentitling conditions" being found in the DTAA itself. What clearly appears to flow from a reading of paragraphs 114 to 117 of the report is of the Court in *Azadi Bachao Andolan* being of the firm opinion that once a person qualifies for benefits under the Convention it would be wholly incorrect to deny it those benefits based on arguments founded on the perceived unethicality of treaty shopping. The *Azadi Bachao Andolan* Court also bids us to bear in mind the need for disablement or disqualification being found in the Convention itself and thus it being an aspect best left for the consideration of the Contracting Nations as opposed to courts being called upon to invoke the principle of piercing the corporate veil. This was again emphasized when the Supreme Court held that once the DTAA were recognised as intended to override the provisions of the Act, it would be impermissible for national courts to lift the veil of incorporation.

189. In *Vodafone*, Kapadia CJ. propounded the tests of *"abuse of organization form/legal form" and "without reasonable business purpose"* as constituting some of the circumstances relevant for disentitlement. *Vodafone* proceeds to observe that where the transaction be a colourable device for distribution of profits or where the interposed entity be found to be a device or conduit, the Revenue may be entitled to apply the principles of substance over form and disregard the propounded character of the transaction. It proceeded further to acknowledge situations where the transaction be found on facts to be a complete sham, used as a camouflage for illegal activities as being some of the circumstances where a person may be denied the benefits of a treaty. The Supreme Court further cautioned the Revenue

from adopting a dissecting approach or seeking to doubt the validity of a transaction based on the assumption that it was designed as a tax deferment device. The decision underlines the imperative of the "look at" doctrine being applied based on an evaluation of the transaction as a whole. Radhakrishnan J. while expounding on the extent of applicability of the lifting of the corporate veil principle pertinently observed that corporate structures would be liable to be ignored where it is misused for the accomplishment of a wrongful purpose or where it be found to be a mere façade. His Lordship observed that the aforenoted doctrine would be attracted where the transaction itself be found to be fraudulent, a sham, a circuitous device aimed at tax evasion. However, and notwithstanding these caveats, Radhakrishnan J. held that in the absence of a LOB clause coupled with the presence of Circular No. 789 of 2000 and the TRC, a Mauritian entity could not be denied benefits merely on the ground that the investment originated from that jurisdiction. His Lordship proceeded to hold that the mere establishment of a wholly owned subsidiary in Mauritius by principals having a genuine or substantially long-term investments in India *"can never be considered"* to have been *"set up for tax evasion"*. Proceeding to speak of TRC, his Lordship held that the same would not prevent the Revenue from enquiring into "*tax fraud*", illegal or sham transactions, colourable devices or adoption of dubious methods to evade taxes. However, and significantly his Lordship stoutly rejected the contention that a Mauritian investment would be considered legitimate only if it "originates" from that nation and not investments from "*third countries*".

190. The precedents handed down by our Supreme Court thus in unhesitating terms appear to have acknowledged and accepted the changed world order necessitating the cross-border movement of capital and investments and those in turn resulting in the creation of trans-national corporations, the incorporation of entities in different jurisdictions and thus facilitating investments in diverse parts of our interconnected world. These entities thus sought out domiciles which had an established treaty network, were cognizant of the new realities concerned with ease of business and were enabled to overcome barriers of time and place. Capital thus sought out new avenues and found itself funding opportunities then unknown and unthought of. The forever shrinking world order saw the birth of new investment highways created by nations aligning their common economic goals aimed at fulfilling the need of their people to find upliftment and prosperity. This march cannot possibly be stalled, legally or otherwise, by skepticism or distrust except on the basis of well-established parameters.

191. While much water has flown post *Azadi Bachao Andolan* and the BEPS initiatives adopted by nations across the globe, the tests to doubt the legitimacy of investments have remained more or less the same. All that has occurred is of nations becoming more aware and cognizant of devices and conduits which seek to exploit the positive measures adopted by nations to derive benefits from cross border trade and investments illegitimately and contrary to the avowed objectives of those conventions and the underlying interpretative precept of good faith. These are aspects which have also been underscored by two High Courts in *Serco BPO* and *Sanofi*.

192. This would constitute an appropriate juncture to take note of the executive response by India of the ethical concerns which were raised with respect to investments emanating from Mauritius. The first seeds of doubt pertaining to capital gains arising out of alienation of shares was considered in Circular No. 682 of 1994. The Union Government clarified that any gains derived by a Mauritian resident from alienation of shares would be taxable only in that country. Many years before the introduction of sub-section (4) in Section 90 and Rule 21AB in the Income Tax Rules 1962, the Union Government clarified vide Circular No. 789 of 2000 that a TRC would constitute sufficient evidence for accepting status of residence and beneficial ownership. Of seminal import were the amendments which were sought to be pushed through by virtue of Finance Bill 2013 and which sought to insert a provision in Section 90 intending to proclaim that while a TRC would be necessary to avail of treaty benefits, it would not constitute a sufficient basis for claiming benefits. As noticed hereinbefore, the said amendment was ultimately withdrawn as a consequence of a huge furore and the resounding negative clamour and opposition which came to be voiced in connection therewith.

193. More importantly we find that the position of the Union Government does not appear to have been opposed to what the Supreme Court ultimately held in *Azadi Bachao Andolan* and *Vodafone*. The Union as well as the Revenue appear to have accepted the legal position as enunciated in those two decisions and which had acknowledged the invocation of the substance over form principles to the confined and extremely narrow contingencies where the Revenue

may be recognised as being justified in questioning the motives of an investment transaction.

M. TAX RESIDENCY CERTIFICATES

194. The position which emerges from the aforesaid discussion is that the Revenue would be justified in doubting the bona fides of a transaction if it be found to be an outright sham, designed to subserve an illegal motive or intended to achieve an illegal objective. Treaty shopping is not liable to be frowned upon unless it be established on facts as being motivated by an intent to evade tax and contrary to the underlying and stated objectives of the Contracting States. So also would be the case where parties adopt colourable devices and interpose entities to perpetrate tax fraud, abuse normative legal or organizational norms and entities are found to have been established without any economic or commercial considerations. It is only in cases where it be duly established or where no other conclusion can be possibly harboured but of the entity being found to be a conduit or a device lacking in commercial expediency and designed to perpetuate fraud that the Revenue would be justified in doubting the character of the transaction. Ultimately, the determinative would be a finding on facts that the entity is a mere artifice lacking any commercial substance.

195. Proceeding then to the issues which were raised with respect to the TRC, we deem it apposite to note that both *Azadi Bachao Andolan* as well as *Vodafone* had come to be rendered prior to a statutory regime with respect to residency having been put in place. The observations appearing in those two decisions would thus have to be appreciated bearing the mind that provisions for obtaining a TRC were

yet to be codified. However, we also cannot lose sight of the stand taken by the Revenue itself and which came to be expressed in the various circulars that came to be issued from time to time. Circular No. 789 of 2000 clearly held out that a TRC issued by Mauritian authorities would constitute sufficient evidence for determining fiscal residence and beneficial ownership. This circular further clarified that such a certificate would suffice even in respect of capital gains on sale of shares.

196. Then came the Finance Bill of 2013 which sought to introduce a provision which provided that a TRC would not be sufficient to claim benefits under a treaty. This proposed amendment was ultimately abandoned. The proposed amendment itself was sought to be explained away with the Press Release of 01 March 2013 in unequivocal terms explaining that proposed sub-section (5) was not intended to enable authorities to question the validity of such a certificate when produced. It was thus announced that TRCs' would be duly accepted and that the tax authorities would not go behind that certification and question resident status.

197. The position of a TRC and the extent to which it would be conclusive was succinctly explained by the Bombay High Court in **Bid Services Division (Mauritius) Ltd. v. Authority for Advance Rulings (Income-tax) and Others**[65] when it held: -

> "**45.** No doubt mere holding of a tax residency certificate cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the apex court cited above have clearly upheld the conclusivity of the tax residency certificate absent fraud or illegal activities. Nowhere in the impugned Ruling the existence of tax residency certificate has

[65] 2023 SCC OnLine Bom 2758

been denied. In fact in paragraph 2 of the impugned Ruling, the authority has itself set out the existence of a valid tax residency certificate in the name of the petitioner. Further, except bald allegations, no material has been placed on record to demonstrate or establish that the petitioner was a device to avoid tax or that there was fraud or any illegal activity. There is hardly any discussion in the impugned Ruling on the applicability of the said Circular Nos. 682, 789 or the Press Releases by the Central Board of Direct Taxes/Ministry of Finance discussed above.

50. The said press release expressly provides for grandfathering of capital gains exemption provided under the erstwhile Mauritius Double Taxation Avoidance Agreement. The protocol provides for source based taxation of capital gains arising from alienation of shares acquired with effect from April 1, 2017 in a company resident in India, viz., from financial year 2017- 18. Investments made before April 1, 2017 have been grandfathered and will not be subject to capital gains taxation in India.

51. The authority appears to have clearly missed the clear import of this Circular as the entire sale by the petitioner was prior to April 1, 2017. The arguments of the Revenue with respect to shell company/conduit can only be considered for investments with effect from April 1, 2017 and not case at hand.

52. Therefore, to say that in the joint venture (JV), the petitioner is a shell company without any tangible employees, space, assets, etc., incorporated only a few days before bidding or that it has no management experts or financial advisors on its payroll, thereby the petitioner having no economic or commercial rationale would not be relevant as the concept of limitation of benefits in cases of shell company/conduit would become applicable to investments with effect from April 1, 2017 only.

53. Therefore, for the authority to hold that if the petitioner was not interposed, the Bidvest group in accordance with the Indo-SA Double Taxation Avoidance Agreement would have to pay capital gains on the sale of shares as the same is taxable in India is misplaced as not relevant as the investment is by the petitioner. As noted above, the petitioner has been incorporated in Mauritius, holds a tax residency certificate which is sufficient proof of its residence in Mauritius, which as noted above, cannot be enquired into unless there is a fraud or illegal activity, which in this case, has neither been alleged nor demonstrated. Even if as observed by the authority that the entire value creation activities are happening in India leading to rise in share valuations, in our view absence of any element of fraud or illegality that cannot be a reason to hold the petitioner's investment as a device to evade tax. The

suggestions/findings with respect to shell company/conduit, in our view, would apply only in accordance with article 27A of the Mauritius Double Taxation Avoidance Agreement which is applicable for investment with effect from April 1, 2017 and not prior to that, and therefore, the same would have to be reconsidered in that light.

54. True that there may have been abuse of tax treaty laws and Contracting States have taken corrective measures to prevent abusive transactions by amending the bilateral conventions, however, as noted above, the amendments to the Mauritius Double Taxation Avoidance Agreement for plugging such transactions have been made effective from April 1, 2017, unless there is a fraud or any illegal activity involved. In fact, as noted above, the investments prior to April 1, 2017 have been grandfathered and are not subject to capital gains taxation in India. The Press Release dated August 29, 2016 quoted above also takes care of the transition period from April 1, 2017 to March 31, 2019 where the tax rate has been limited to 50 per cent. of domestic tax rate in India. That taxation in India at full domestic rate is stated to take place from financial year 2019-20 onwards, subject to other conditions.

55. Although the observations of the authority in paragraph 62 with respect to the claim of treaty shopping as well as the doctrine of substance over form in paragraph 63 cannot be faulted with, however, it needs to be emphasized that the limitation of benefits (LOB) clause has been made effective for investments only from April 1, 2017. As noted above, even the Press Release dated August 29, 2016 confirms that investments made before April 1, 2017 will not be subject to capital gains taxation in India. That being the position these observations of the authority appear to be misplaced."

198. The Punjab & Haryana High Court in *Serco BPO* took a narrower and stricter view when it held that once the TRC is found to have been duly issued by the Mauritian authorities, it would be impermissible for the Indian tax authorities to question the same since any other view would be destructive of the faith reposed by the Contracting States in the authorities of the respective States quite apart from being contrary to the position taken by the Union itself in Circular No. 789. We would, however, be inclined to affirm and

follow the legal position as enunciated in *Bid Services* and which appears to have made adequate provision for situations where fraud or illegal activities be alleged. In any case, as would be evident from our conclusions on the legal issues which were canvassed, our decision does not rest on the mere fact that the petitioners hold a valid TRC.

199. The significance and the salutary purpose underlying the issuance of a TRC cannot be overemphasized. Its importance stands duly acknowledged by the Union Government itself as is manifest from a reading of Circular 789 of 2000. Of equal import is the withdrawal of the amendments which were proposed to be introduced in Section 90 and were ultimately shelved. It becomes important to note that a TRC once found to have been issued by the competent authority must be accorded due weightage and its sanctity duly acknowledged. The TRC represents the first level of certification of the holder being a bona fide business entity domiciled in the Contracting State. The issuance of a TRC constitutes a mechanism adopted by the Contracting States themselves so as to dispel any speculation with respect to the fiscal residence of an entity. It therefore can neither be cursorily ignored nor would the Revenue be justified in doubting the presumption of validity which stands attached to that certificate bearing in mind the position taken by the Union itself of it constituting "sufficient evidence" of lawful and bona fide residence. Taking any other view would clearly be destructive of what *Serco BPO* aptly described as resulting in an erosion of faith and the trust reposed by the parties to the convention in each other.

200. Regard must also be had to the fact that when *Vodafone* was rendered, the DTAA was yet to incorporate provisions regulating

entitlement of benefits. The TRC concept came to be adopted subsequently followed by the incorporation of a specific LOB clause in the Treaty itself. The observations appearing in *Vodafone* are thus liable to be appreciated bearing in mind the crucial amendments which have subsequently come to be included in the DTAA. Even otherwise the observations appearing in *Vodafone* in the context of piercing of the corporate veil and the extent to which the Revenue could enquire and investigate despite a TRC were confined to cases of tax fraud, sham transactions, where the entity has no vestige of economic substance or the transaction is alleged to be aimed at camouflaging an illegality. These charges if raised would have to meet an extremely high and exacting standard of proof, since expressions such as fraud or sham though loosely used in common parlance, have a specific connotation in law. The Revenue would thus have to base such an allegation on cogent and convincing evidence as opposed to a mere conjecture, doubt or a perceived need to investigate and enquire. Such an allegation would have to be established at the outset itself before the Revenue being recognised as entitled to discard the presumption of validity which would spring into existence once a TRC is produced and the LOB conditions shown to be fulfilled.

N. INTERNATIONAL PERSPECTIVES ON TREATY SHOPPING

201. Having reviewed the Indian position, we then deem it apposite to briefly dwell upon the international perspectives pertaining to treaty shopping. Action 6 of the BEPS Action Plan was principally concerned with the development of treaty provisions which would prevent the extension of benefits in inappropriate circumstances.

Action 6 was responsible for the adoption of measures such as LOB clauses in treaties and the evolution of the PPT. As is evident from a reading of the OECD Commentary on Article 29 and which deals with Entitlement to Benefits, treaties incorporate disentitlement provisions to deprive persons who are otherwise not entitled to treaty benefits and who may adopt indirect methods to avail of those benefits and thus violate the bilateral and reciprocal understanding of Contracting States and which constitutes the foundation of all conventions. However, even the Commentary recognises and acknowledges the establishment of an entity for legitimate business reasons. It goes on to explain that where entities resident in a Contracting State undertakes business activities in that State, it would be inappropriate to characterize its activities as constituting treaty shopping. *Cadbury Schweppes* is yet another decision which holds that the mere establishment of a subsidiary in a favourable tax location would not in itself or per se amount to treaty shopping. It cautions against the adoption of a test which may amount to a *"general presumption"* of tax evasion or avoidance. *Cadbury Schweppes* lays emphasis on the charge of abuse or fraudulent conduct being based on objective evidence that may obtain in the facts of a particular case.

202. This decision, too thus reinforces our view that there cannot be an assumption of treaty shopping or abuse merely because a subsidiary or a related entity is established in a tax friendly jurisdiction. An allegation of abuse or fraudulent conduct would ultimately depend upon cogent material and evidence that may be found to exist in a particular case. In any case, the Revenue would be wholly unjustified in basing that view on a hypothetical and initial

presumption. Each case would thus have to be tested on the basis of facts which obtain and which require the Revenue to examine and ascertain whether actual and tangible business activity was undertaken by such an entity. What treaties abhor are artificial arrangements and those which fail to pass the test of economic reality.

203. Similar was the view expressed in *Burlington* and which was a tax convention case where the Court held that the guiding principle should be that of denial of treaty benefits where it be found that the main purpose of entering into a transaction was to secure a "more favourable tax position" and where that favourable treatment would be *"contrary to the object and purpose of the relevant provisions"*. Thus, the quest or search for a more favourable tax position would result in a disentitlement only if it were found that the extension of that benefit would be contrary to the underlying spirit of the treaty and its avowed objectives. *Burlington* too frowns upon abusive arrangements and transactions which fail to satisfy the economic substance test.

204. The position which thus emerges is that authorities across various jurisdictions appear to have taken the consistent position of treaty benefits being liable to be denied in cases where fraud is sought to be perpetrated, where the transaction is a mere sham, entities are mere dummies and have come to be created to merely act as conduits and where the extension of benefits would be contrary to the object and purpose of the treaty itself. However, a conclusion in that respect cannot be based on some unstated presumption of invalidity or founded upon a failure to holistically examine the transaction as a whole and the Revenue coming to the irresistible and justifiable conclusion that the sole intent of the transaction was to evade taxes,

perpetuate an illegality and to obtain an inappropriate advantage. A finding based on objective evidence that the activity would fall in the category of an abusive transaction would constitute a sin qua non and a legal imperative before denial of benefits or the rendering of a verdict of disentitlement.

O. LOB PROVISIONS IN THE DTAA

205. However, and insofar as the present case is concerned, the task of the Court becomes relatively easier in light of the DTAA itself embodying appropriate provisions designed to deprive an entity of benefits. The DTAA, post its amendment in 2016 and the insertion of Article 27A now and with sufficient clarity enumerates the circumstances in which an entity may be denied benefits of Article 13(3B) or where it would be deemed to be a mere shell/conduit company. It defines a shell/conduit company as being one with negligible or nil business operations or one which fails to exhibit the carrying on of a real and continuous business. Paragraph 3 of Article 27A then specifies the empirical standards on the basis of which the status of an entity is liable to be ascertained based upon the extent of its expenditure on operations. Of significant import is Paragraph 4 and which specifies the circumstances in which it would be impermissible to assume that the entity is a shell or a conduit company. Article 27A thus not only lays in place a criterion where an entity would be deemed to be a shell or a mere conduit as well as contingencies in which a negative legal fiction would operate and dispel any assumption of that entity being a shell or a mere artifice. The DTAA thus specifically adopts provisions concerned with entitlement to benefits and thus embodies standards and tests which both Contracting

States chose to adopt for the purposes of tackling instances of treaty shopping and abuse.

206. In our considered opinion, once LOB provisions come to be incorporated in a convention, it would be those provisions which would govern and be determinative of an allegation of treaty abuse or a benefit being illegitimately claimed. The doubts of the Revenue or the material that it may gather in support of its allegation of abuse would have to be demonstrative of the LOB provision being breached or violated. The right to question the validity or character of a transaction notwithstanding duly articulated LOB provisions being met would have to meet an extremely high, exacting and compelling standard of proof with the onus lying squarely upon the Revenue to establish that the substance of the transaction clearly warrants the entity being deprived of treaty benefits. These would stand confined to cases of fraud or sham, transactions tainted with illegality and where circumstances unerringly prove that the Contracting States never intended it to be covered by the beneficial treaty provisions.

207. The Contracting States having neither originally intended nor countenanced individual taxing authorities of those two States deploying their own standards and tests of probity is further evidenced from the LOB provisions having adopted verifiable and certifiable standards to dislodge any presumption of treaty abuse. In the facts of our case, we are additionally faced with a LOB clause which creates a negative legal fiction against such an assumption being harbored. Our view is further fortified from a reading of the proposed Article 27B and which links the issue of disentitlement to the objects and purpose of the various provisions of the treaty. In our considered opinion,

taking another view would amount to recognizing the individual taxing authorities as being empowered under domestic legislation to create a disqualification criterion over and above that which the Contracting States chose to adopt. It would in essence amount to recognizing a jurisdiction inhering in the taxing authorities of respective States to question the validity of a transaction on parameters wholly alien to the treaty and contrary to the negotiated terms.

208. In our considered view, therefore, the TRC as well as the LOB provisions comprised in the DTAA more than adequately, nay comprehensively, address themselves to treaty abuse and it would thus be wholly impermissible for the Revenue to construct additional barriers or qualification standards for the purposes of extending benefits under the DTAA. This would of course be subject to the limited caveat and narrow confines of fraud, illegal activity or where the transaction be contrary to the underlying objective and purpose of the treaty itself. Such conclusions would have to additionally meet the stringent degree of proof that we have spoken of in the preceding parts of this decision. We arrive at this conclusion bearing in mind the various Circulars issued by the Union from time to time, the roll back of the proposed 2013 amendment as well as the fact that despite the treaty having been renegotiated and amended in 2016, the Contracting States chose to carefully articulate the contingencies in which benefits could be denied and specified the qualification standards.

209. It is also pertinent to recall that Article 27A came to be included in the DTAA at a time when Chapter X-A had already come to exist on the statute book in terms of Finance Act, 2013 and with effect from

01 April 2016. The Contracting States being aware of the aforesaid as well as other significant amendments, including those pertaining to taxation of indirect transfers, made to the Act chose to grandfather all transactions pertaining to alienation of shares and which had been consummated prior to 01 April 2017. What we seek to emphasise is the Contracting States being fully conscious of the legislative amendments which had occurred in their respective taxing statutes and chose to renegotiate the terms of the treaty in that light. We thus find ourselves unable to recognise an authority inhering in the Revenue to create additional barriers or invent novel grounds for disentitlement.

P. THE ECONOMIC SUBSTANCE QUESTION

210. Quite apart from the above, we find ourselves unable to sustain the view taken by the AAR in light of the following undisputed facts which exist on the record. Undisputedly the petitioners came to be incorporated in Mauritius in 2011. They hold a Category 1 GBL granted under the Financial Services Act, 2007 and are regulated by the Financial Services Commission of Mauritius. They are stated to have aggregated funds from more than 500 investors domiciled across 30 jurisdictions worldwide. It was their consistent stand that they had been incorporated to act as pooling vehicles for funds received from various investors. The details of their principal shareholders have already been noted in the preceding parts of this decision. TGM LLC was the investment manager/management company a crucial fact which has been lost sight of by the respondents and who had proceeded on the incorrect premise that it was the holding or the parent company. The assertion of the petitioner that TGM LLC neither held shares nor had it made any investments in them has gone

unrebutted. Both the respondents as well as the AAR appear to have proceeded on the incorrect premise that the petitioner had admitted to TGM LLC being the holding company despite the pleadings and the material which existed on the record and which clearly asserted to the contrary.

211. The initial shares which the petitioners acquired in Flipkart Singapore were issued against a capital contribution of USD 109,020.10. As the Minutes of the Board Meeting records, the initial investment was to be preceded by the extension of a Bridge Loan of USD 15 million. The entire stock holding was acquired between October 2011 to April 2015. The introduction of the LOB provisions in the DTAA, the tax implications arising out of sale of shares were facts duly disclosed and acknowledged in its Financial Statement which forms part of our record as Annexure P-12. Flipkart Online had made a slump sale of its India business in December 2011. The petitioners transferred their holding in Flipkart Online to Fit Holdings SARL, a company incorporated under the laws of Luxembourg on 18 August 2018. The petitioner is also stated to have incurred expenditure amounting to USD 1,063,709 roughly translating to MUR 36,436,182 as against the threshold of MUR 1,500,000 as prescribed in Article 27A. From the Financial Statement [P/12] for the period ending 31 December 2017 of Tiger Global II we further find that its total liabilities and shareholders' equity stood at USD 1,764,819,299. The net increase in shareholders equity resulting from operations was pegged at USD 267,633, 593. Based on the aforesaid facts and which have remained uncontested or questioned, we find ourselves unable to hold that the petitioners lacked economic substance, had not

undertaken any economic activity or were domiciled in Mauritius solely for the purposes of treaty abuse.

Q. CHAPTER X-A AND GAAR

212. At this juncture, we deem it appropriate to briefly recapitulate the arguments made by learned counsels in relation to the applicability of the provisions of GAAR. To recall, Mr. Srivastava had submitted that Chapter X-A which came to be introduced by the Finance Act, 2013 gave effect to sub-section (2-A) of Section 90 which came into effect from 01 April 2013. Learned special counsel further submitted that the provisions of Chapter X-A placed a reverse burden of proof qua Impermissible Avoidance Arrangements and additionally laid down the repercussions which would ensue against arrangements purported to be lacking in commercial substance and those constituting impermissible tax arrangements. Mr. Srivastava had additionally commended for our acceptance the position that notwithstanding the grandfathering clause contained in Rule 10U(1)(d), Rule 10U(2) mandated the applicability of Chapter X-A provisions to arrangements regardless of the date in which they were entered into and with respect to tax benefits availed with respect to the said arrangements on or after 01 April 2017.

213. In summation, learned counsel for the respondents had essentially argued that even if an arrangement may have been entered into prior to 01 April 2017, the taxation benefits emanating from the said arrangement on or after 01 April 2017 would be subjected to Chapter X-A provisions. Mr. Srivastava, while proceeding on the basis of us being inclined to accept the aforenoted contentions, took us through the provisions of Section 97 and 98 to explain when an

arrangement could be said to be lacking in commercial substance and the consequences that would arise as a result thereof. In view of the above, Mr. Srivastava argued that the transaction in question would fail to satisfy the tests of bona fide purposes, commercial substance and would accordingly be liable to face the repercussions as envisaged under Section 98.

214. Responding to those submissions, Mr. Kaka firstly drew our attention to the fact that the respondents had failed to render formal pleadings with respect to GAAR at any stage. However and without prejudice to the aforesaid it was contended that the provisions of GAAR were inapplicable in light of Rule 10U(1)(d) rendering Chapter X-A inapplicable to income derived by persons from investments made before 01 April 2017 and that Rule 10U(2) could not be read in a manner inconsistent with Rule 10U(1)(d) despite the former comprising of a "*without prejudice*" clause. Learned counsel additionally submitted that Section 101 explicitly provides that GAAR ought to be applied in accordance with conditions that may be prescribed, such as those appearing in CBDT Circular No. 7 of 2017 and which we propose to advert to in greater detail in subsequent parts of this decision. Mr. Kaka had also argued that GAAR cannot be invoked once anti-abuse rules such as LOB clauses within taxation treaties are satisfied.

215. Prior to examining the correctness of the rival submissions addressed on this score, we deem it appropriate to provide a brief background pertaining to the formative history behind the enactment of the GAAR provisions. GAAR was first introduced on 16 March 2012 in the Finance Bill 2012 and draft guidelines to GAAR came to

be released on 28 June 2012. Subsequent to the release of the said guidelines, an Expert Committee came to be constituted on 17 July 2012 consisting of Dr. Parthasarathi Shome and three others, to undertake consultations with myriad stakeholders, provide clarity on the legal conundrum arising as a result of the introduction of the said provisions and thereby finalize guidelines for application of GAAR. Accordingly, the Expert Committee submitted its report on 30 September 2012 and which came to be referred to as the "*Shome Committee Report*". We find that the said report renders illuminating recommendations which may aid us in addressing the arguments articulated in relation to the applicability of Chapter X-A.

216. The Shome Committee Report observed that GAAR constituted an advanced instrument of tax administration intending to encourage deterrence of tax avoidance measures as opposed to the facilitation of revenue generation. The Government of India was stated to find tax mitigation measures, which impliedly suggests the utilization of tax incentives in a legal and transparent manner so as to achieve tax efficiency, to be unobjectionable. It was observed that while tax evasion is universally considered to be illegal, tax avoidance measures on the other hand represents a grey area for tax authorities, since though such measures teetered the line of legality and could dependent upon the facts be viewed as contravening the spirit underlying taxation treaties.

217. It was in that backdrop that GAAR was introduced so as to target tax avoidance by means of concrete legislation. Notwithstanding the technical legality of tax avoidance, the same was understood to represent tax planning with the sole objective of

availing tax benefits without any other commercial, economic or business purpose. The Shome Committee Report accordingly took the view that GAAR provided the legal framework and mechanism necessary for examining the purpose behind business structures, albeit from the narrow purview of examining transactions for evaluation of misuse or abuse, so as to determine if the same would fall within the ambit of tax avoidance. The Shome Committee Report took the view that tax avoidance posed a significant risk of furthering discrepancies in the tax burdens imposed upon comparable taxpayers and among differently placed businesses, diminished the ability of the State to collect revenue and distorted allocation of resources which was undoubtedly undesirable in economic terms. Accordingly, it was deemed to be counterproductive to enable taxpayers to avail of legal paradigms to structure their businesses and transactions so as to avoid tax.

218. It was in the aforesaid backdrop that the Shome Committee Report emphasized the importance of subjecting to tax the "*correct tax base*", encourage caution against aggressive tax planning measures and highlighted the prevailing international practices of codifying the substance over form approach. The following observations thus came to be rendered in the Indian context: -

> "In the Indian case, GAAR has, therefore, been enacted as a codification of the proposition that, while interpreting the tax legislation, substance should be selected over a legal form. Transactions have to be real and are not to be looked at in isolation. The fact that they are legal, does not imply that they are acceptable with reference to the underlying meaning embedded in the fiscal statute. Thus, where there is no business purpose except to obtain a tax benefit, the GAAR provisions would not allow such a tax benefit to be availed through the tax statute. These propositions have comprised part of jurisprudence in direct tax laws as reflected in various judicial decisions. The GAAR provisions codify this

> 'substance' over 'form' basis of the tax law. It is, therefore, necessary and desirable to introduce a general anti-avoidance rule which will serve as a deterrent against such practices"

219. The Shome Committee Report contemplated tax mitigation to be an "*intended consequence of the legislation*" and to be an "*attempt to minimize tax liability by the taxpayer as per existing law*". Therefore, it was suggested that tax mitigation not only meets the threshold of legality in technical terms but is also consistent with the letter and spirit of the enactment, although the same may not equally apply to tax avoidance. It was accordingly stated to be of utmost importance to distinguish the two. It was in the aforesaid light that the Shome Committee Report laid down an illustrative but "non-exhaustive" negative list of those circumstances which would constitute tax mitigation and accordingly preclude the applicability of GAAR provisions. That list was populated as under:

> "(i) Selection of one of the options offered in law. For instance –
> (a) payment of dividend or buy back of shares by a company
> (b) setting up of a branch or subsidiary
> (c) setting up of a unit in SEZ or any other place
> (d) funding through debt or equity
> (f) purchase or lease of a capital asset
> (ii) Timing of a transaction, for instance, sale of property in loss while having profit in other transactions
> (iii) Amalgamations and demergers (as defined in the Act) as approved by the High Court.
> (iv) Intra-group transactions (i.e. transactions between associated persons or enterprises) which may result in tax benefit to one person but overall tax revenue is not affected either by actual loss of revenue or deferral of revenue."

220. Accordingly, the Shome Committee Report came to conclude as follows:

> "**(1) Tax mitigation should be distinguished from tax avoidance before invoking GAAR.**
> **(2) An illustrative list of tax mitigation or a negative list for the purposes of invoking GAAR, as mentioned above, should be specified.**

> **(3) The overarching principle should be that GAAR is to be applicable only in cases of abusive, contrived and artificial arrangements.**"

221. The Shome Committee Report additionally took note of the concerns raised by various stakeholders regarding the potential retrospective applicability of GAAR provisions. As a result, the Committee recommended that GAAR be applicable only to income received, accruing or arising or deemed to accrue or arise to the taxpayer on or after the date from which the GAAR provisions come into effect. This is evident from the following recommendations made by the Committee: -

> "**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**."

222. Speaking specifically on Circular 789 of 2000, the Committee pertinently observed: -

> "**3.15 Status of Circular 789 of 2000 with reference to Mauritius Treaty**
>
> Stakeholders also raised an issue regarding the status of Circular No 789 of 2000 issued by the Govt. The Circular provided that a Certificate of Residence (TRC) issued by the Govt. of Mauritius would constitute sufficient evidence for accepting the status of residence of a person as well as beneficial ownership for applying the tax treaty. Currently, the Revenue cannot look into the genuineness of residence of a company incorporated in Mauritius based on commercial substance, or other criteria, once a TRC is issued by the Mauritius authorities. Thus, the Circular would be in direct conflict with GAAR provisions. Hence, clarity was sought by stakeholders whether the Circular would be withdrawn after commencement of GAAR or, if not withdrawn, whether it would still be applicable to avail treaty benefit.
>
> **In view of the above, the Committee recommends that, where Circular No. 789 of 2000 with respect to Mauritius is**

> **applicable, GAAR provisions shall not apply to examine the genuineness of the residency of an entity set up in Mauritius.**
>
> As needed, the Mauritius treaty itself should be revisited if policy so dictates, rather than challenged indirectly through the use of the GAAR instrument".

223. The Committee accordingly opined that anti-avoidance rules would play an important role in the prevention of abuse of tax treaties. Reliance in that respect was placed on the OECD commentary on the Model Convention to hold that if GAAR contemplates situations that are not reflected in taxation treaties then GAAR may be invoked as there would be no conflict between the two, but in situations where the treaty itself contemplates anti-avoidance provisions, such as LOB clauses, then such provisions ought not be substituted by GAAR and the latter would not override the provisions of the treaty. The Committee had resultantly recommended as follows:-

> "**In view of the above, the Committee recommends that that where SAAR is applicable to a particular aspect/element, then GAAR shall not be invoked to look into that aspect/element. Similarly where anti-avoidance rules are provided in a tax treaty in the form of limitation of benefit (as in the Singapore treaty) etc., the GAAR provisions shall not apply overriding the treaty. If there is evidence of violations of anti-avoidance provisions in the treaty, the treaty should be revisited, but GAAR should not override the treaty.**
>
> **As specific treaty override has been provided in the Act (through amendment of section 90 and 90A of the Act vide Finance Act, 2012) for the purposes of application of provision of GAAR, it would require amendment of the Act.**"

224. Circular No. 7 of 2017 came to be issued by the CBDT on 27 January 2017 titled "*Clarifications on implementation of GAAR provisions under the Income Tax Act*" and in terms of which the following pertinent clarifications came to be issued: -

> "**Question no. 1:** Will GAAR be invoked if SAAR applies?
> **Answer:** It is internationally accepted that specific avoidance

provisions may not address all situations of abuse and there is need for general anti-abuse provisions in the domestic legislation. The provisions of GAAR and SAAR can coexist and are applicable, as may be necessary, in the facts and circumstances of the case.

Question no. 2: Will GAAR be applied to deny treaty eligibility in a case where there is compliance with LOB test of the treaty?
Answer: Adoption of anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. If a case of avoidance is sufficiently addressed by LOB in the treaty, there shall not be an occasion to invoke GAAR.

xxxx xxxx xxxx

Question no. 4: Will GAAR provisions apply where the jurisdiction of the FPI is finalised based on non-tax commercial considerations and such FPI has issued P-notes referencing Indian securities? Further, will GAAR be invoked with a view to denying treaty eligibility to a Special Purpose Vehicle (SPV), either on the ground that it is located in a tax friendly jurisdiction or on the ground that it does not have its own premises or skilled professional on its own roll as employees.
Answer: For GAAR application, the issue, as may be arising regarding the choice of entity, location, etc., has to be resolved on the basis of the main purpose and other conditions provided under Section 96 of the Act. GAAR shall not be invoked merely on the ground that the entity is located in a tax efficient jurisdiction. If the jurisdiction of the FPI is finalised based on non-tax commercial considerations and the main purpose of the arrangement is not to obtain tax benefit, GAAR will not apply

Question no. 5: Will GAAR provisions apply to (i) any securities issued by way of bonus issuances so long as the original securities are acquired prior to 01 April, 2017 (ii) shares issued post 31 March, 2017, on conversion of Compulsorily Convertible Debentures, Compulsorily Convertible Preference Shares (CCPS), Foreign Currency Convertible Bonds (FCCBs), Global Depository Receipts (GDRs), acquired prior to 01 April 2017, (iii) shares which are issued consequent to split up or consolidation of such grandfathered shareholding?
Answer: Grandfathering under Rule 10U(1)(d) will be available to investments made before 1st April 2017 in respect of instruments compulsorily convertible from one form to another, at terms finalized at the time of issue of such instruments. Shares brought into existence by way of split or consolidation of holdings, or by bonus issuances in respect of shares acquired prior to 1st April 2017 in the hands of the same investor would also be eligible for

grandfathering under Rule 10U(1)(d) of the Income Tax Rules.

Question no. 6: The expression "investments" can cover investment in all forms of instrument - whether in an Indian Company or in a foreign company, so long as the disposal thereof may give rise to income chargeable to tax. Grandfathering should extend to all forms of investments including lease contracts (say, air craft leases) and loan arrangements, etc.
Answer: Grandfathering is available in respect of income from transfer of investments made before 1st April, 2017. As per Accounting Standards, 'investments' are assets held by an enterprise for earning income by way of dividends, interest, rentals and for capital appreciation. Lease contracts and loan arrangements are, by themselves, not 'investments' and hence grandfathering is not available".

225. To recall, Mr. Srivastava had addressed extensive submissions on the scope and applicability of Chapter X-A and the statutory GAAR provisions which find place in that section of the Act. It was the submission of learned Special Counsel that the provisions of GAAR would stand attracted and operate above and beyond the prescriptions in the DTAA concerned with entitlement of benefits. Faced with Article 13(3A) of the DTAA, it was submitted that sub-section (2A) of Section 90 is a clear indicator of the intent of the Legislature to accord an overriding effect upon the provisions contained in Chapter X-A and the Revenue thus being entitled to test a transaction on principles laid out in that section of the Act. Mr. Srivastava had also based his submissions on Rule 10U(2) to submit that the determinate date of 01 April 2017 stands overridden and would not save the transaction in question. Although the AAR has not alluded to GAAR or the various provisions comprised in Chapter X-A, since lengthy arguments were addressed on this score, we deem it appropriate to render the following observations.

226. However, and before we proceed down this path, it would be pertinent to note that it was the conceded position of parties of Article 13(3A) being of critical importance for the purposes of adjudging whether the transaction stood grandfathered and placed in a safe harbour. This since undisputedly the shares in question were acquired prior to 01 April 2017. Our observations are thus 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 treaty provisions. We are in the facts of the present case, essentially concerned with whether Chapter X-A could have any application in light of the grandfathering clause comprised in the treaty read alongside the provisions of the Act.

227. It must at the outset be noted that Paragraph 3A of Article 13 clearly embodies the intent of the Contracting States to safeguard and provide safe passage to all transactions which had been consummated prior to 01 April 2017. As noticed above, these amendments came to be introduced after our Act had adopted the principles of taxing indirect transfers and where shares may derive a substantial value from assets situate in India. Quite apart from the unambiguous language and apparent intent informing Paragraph 3A and being representative of the avowed objective to tax capital gains emanating from a sale of shares acquired after the determinate date, we find a replication of that intent in Paragraph 3B which prescribes two separate tax rates for the period beginning 01 April 2017 up to 31 March 2019 and thereafter. Article 13 for obvious reasons does not prescribe a tax rate for capital gains pertaining to shares acquired prior to 01 April 2017. Similarly, the LOB provision also stands restricted

to gains covered under Article 13(3B). There is thus a clear and evident intent of the Contracting States to leave out capital gains that may arise or accrue with respect to shares acquired prior to the stated date.

228. Faced with the above, Mr. Srivastava then sought to rely upon Rule 10 U (2) to submit that the transaction in question would not stand grandfathered. That submission proceeded on the premise that since sub-rule (2) commences with the phrase "*without prejudice to the provisions of clause (d) of sub-rule (1)….",* benefits that may accrue after 01 April 2017 would become subject to the provisions of Chapter X-A. We find ourselves unable to sustain that submission for reasons which follow.

229. It must at the outset be noted that we should eschew from interpreting a provision appearing in domestic tax legislation in a manner which brings it in direct conflict with a treaty provision. We must also desist from interpreting domestic legislation as seeking to override provisions contained in a DTAA. That, as we had held in **Commissioner of Income Tax- International Taxation-3 v. Telstra Singapore Pte Ltd.**[66], would be wholly impermissible. We had in that judgment held that adoption of such a line of reasoning would amount to accepting the right of the Legislature of one of the States to unilaterally amend or override provisions of a treaty. While rejecting such a contention we had in *Telstra* ultimately held as follows: -

> "**69.** Once we recognise the Convention as the constant, it becomes apparent that changes in domestic legislation cannot, principally speaking, override the treaty provisions. If a contrarian position were to be accepted, it would lead us to hold that treaty provisions could be amended or overcome based upon the will of Legislatures of

[66] 2024 SCC OnLine Del 5016

> independent nations to amend domestic legislation unilaterally and without being bound by the Convention. That is clearly not the position which merits acceptance from either a constitutional or statutory point of view. It is this fundamental position which appears to have weighed upon the Court in *New Skies Satellite* to observe that a treaty cannot be overridden by independent legislative amendments that a contracting nation may choose to introduce. The fact that treaty provisions supervene and the option available to the assessee to opt for the more beneficial scheme stands statutorily recognised and reiterated in Section 90(2) of the Act."

230. More fundamentally, accepting the submission of Mr. Srivastava would lead us to recognise a delegatee of the Legislature while framing subordinate legislation being competent to override a treaty provision. A subordinate legislation would thus stand elevated to a status over and above a treaty entered into by two nations in exercise of their sovereign power itself. We thus find the argument based on Rule 10 U wholly unmerited.

231. Apart from the above, if the argument of Mr. Srivastava were to be accepted, it would amount to sub-rule (2) immediately taking away what stood saved in the immediately preceding provision, namely, clause (d) of sub-rule (1). If the submission of Mr. Srivastava were to be upheld, it would lead to a wholly irreconcilable conflict between the two aforenoted provisions. However, the arguments addressed along the aforesaid lines are clearly erroneous since it fails to consider the meaning liable to be ascribed to the expression "*without prejudice to*....." which appears in sub-rule (2). That expression was pithily explained by the Supreme Court in **ITO Vs. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd.**[67] as neither being inconsistent with or prejudicial to the preceding rule. The relevant passage from that decision is extracted hereunder: -

[67] (1975) 2 SCC 721

"**5.** It was suggested before the High Court that the order of the Income Tax Officer amounted to an irrevocable agreement which could not be varied merely because the rate of interest contained in sub-section (2) of Section 220 of the Act was enhanced. Mr. S.C. Choudhry learned counsel for the respondent, however, has fairly conceded that there was no question of an agreement or settlement because Section 220(3) does not empower the Income Tax Officer to enter into agreement or settlement in order to bind the Revenue. We find ourselves in complete agreement with this view. Section 220(3) merely empowers the Income Tax Officer to extend the time for payment or allow payment by instalments on such conditions as he may impose. In the instant case the Income Tax Officer merely exercised his powers under sub-section (3) of Section 220 by imposing the condition that the assessee shall be allowed to pay the arrears by instalments if he paid interest at the rate of 5% per annum offered by him. What is important however, is that sub-section (3) is not independent of sub-section (2) but is interconnected with it. The words "without prejudice to the provisions contained in sub- section (2)" clearly show that any order passed by the Income Tax officer under sub-section (3) must neither be inconsistent with nor prejudicial to the provisions contained in sub-section (2). In other words, the Position is that although sub-section (3) is an independent provision the power under this sub-section has to be exercised subject to the terms and conditions mentioned in sub-section (2) so far as they apply to the facts mentioned in sub-section (3). Thus if sub-section (2) of Section 220 provided that the rate of interest chargeable would be four per cent per annum any order passed under sub-section (3) could not vary that rate, and if it did, then the order to that extent would stand superseded. The argument of the assessee is that sub-sections (2) and (3) of Section 220 were independent provisions which operated in fields of their own. We are, however, unable to accept this somewhat broad proposition of law. Sub-sections (2) and (3) form part of the same section, namely, Section 220, and are therefore closely allied to each other. It is no doubt true that the two sub- sections deal with separate issues but the non obstante clause of sub-section (3) clearly restricts the order passed under sub-section (3) to the conditions mentioned in sub-section (2) of Section 220 of the Act."

R. BENEFICIAL OWNERSHIP

232. Proceeding on the premise that TGM LLC was the controlling entity of the writ petitioners, Mr. Srivastava, had also sought to impute the principles of beneficial ownership to the transaction in question. It was the submission of learned counsel that although the monies from

the sale of shares were ostensibly received by the writ petitioners, the same was beneficially held for and on behalf of TGM LLC.

233. Quite apart from us having already found that the assumption of TGM LLC being the parent entity being incorrect on facts, we note that the principles of beneficial ownership itself would have arisen provided it were established that the petitioner, TG III and TG IV were contractually or otherwise acting on behalf of TGM LLC and were enjoined to remit all revenues generated by the transaction in question to a third party. The principle of beneficial ownership would have been attracted provided the respondents were able to establish that the petitioner, TG III and TG IV were placed under a contractual or legal obligation to pass on the payments received to another entity.

234. We note, in this connection, that while there is one school of thought which advocates the principles of beneficial ownership being concerned with the creation of conduit companies, the other view seems to suggest that beneficial ownership is essentially a rule with respect to attribution of income. However, and as would be evident from the discussion which ensues, the OECD Model Commentary canvasses a position where beneficial ownership and aspects pertaining thereto would have to be evaluated on the basis of the *"forwarding approach"*.

235. In the series on **Tax Treaty Entitlement**[68], the subject has been examined by Florian Navisotschnigg and where the learned author explains the principles of forwarding approach in the following terms:-

[68] Chapter 4, "Beneficial Ownership", Florian Navisotschnigg; Tax Treaty Entitlement, European and International Tax Law and Policy Series

"4.2.3. The forwarding approach

Since its update in 2014, the OECD Model Commentary now states when someone cannot be regarded as the beneficial owner, namely when the "recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person".

However, prior to this addition to the Model Commentary (2014), various courts had already applied this forwarding approach. Nevertheless, the manner in which such an obligation may arise so that beneficial ownership is denied was not answered uniformly. In general, there are two different lines of reasoning; First, the legal approach that asks whether there is a legal obligation to forward the received payment. Second, the economic approach according to which a factual obligation to forward the income is also harmful to beneficial ownership.

For example, in the Canadian Prévost case, the court followed the legal approach. It found that a Netherlands holding company, which had no employees and no assets other than the shares of a Canadian subsidiary (Prévost) could be regarded as the beneficial owner of the received dividends since there was "no predetermined or automatic flow" of these dividends to its shareholders (i.e. it was under no legal obligation to pass on the payment). Also, a shareholders' agreement between the two shareholders of the Netherlands holding company that stipulated that 80% of the profits of the Netherlands holding company were to be distributed to them was not considered to impose any legal obligation on the Netherlands holding company, because the company itself was not a party to the agreement.

Conversely, in the British Indofood case, the economic approach was applied. The court ruled that an (hypothetical) interposed company in the Netherlands between a Mauritian subsidiary and its Indonesian parent company would not be the beneficial owner of the interest it received, although the company would not have been under a legal obligation to pass on the payment (back-to-back loan structures). Rather, the court found that the term "beneficial ownership" was not to be limited by a legal approach but regard was to be had to the substance of the matter. Hence, the court concluded that, in practical terms, the Netherlands company would be bound to forward the interest it received and that it was impossible to conceive of any circumstances in which it could derive any benefit from the received interest other than to fund its liability (i.e. the factual obligation upon it to forward the payment). Consequently, the potentially interposed Netherlands company did not have the '"full privilege' needed to qualify as the beneficial owner, but rather its position equates to that of an 'administrator of

the income."'.

The current OECD Model Commentary (2017) leaves leeway for both approaches when it states that "[s]uch an obligation will normally derive from relevant legal documents but may also be found to exist the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person". Some authors argue that an obligation to forward a payment can never be "factual", but is always a legal obligation. Only in the absence of legal documents can the facts and circumstances help establish the existence of a legal obligation that the recipient has to forward the payment. However, "it is not possible to prove that a person generally should not be considered beneficial owner of a particular income payment on the basis of facts and circumstances". Jiménez (2011) also notes that "one of the major problems of host of the decisions studied (with the exception of Prúvost) is their tendency to resort to 'economic interpretation', when all that was needed in the cases they considered was probably no more than 'legal interpretation"'

236. Proceeding further to explain beneficial ownership on a more fundamental plane, the learned author makes the following pertinent observations:-

"**4.5 Beneficial ownership as a basic principle**

As stated by Arnold (2011), "the concept of beneficial ownership is a basic principle of income taxation: the beneficial owner of income is the person who should be taxed on the income. Accordingly, this basic principle of taxation on the basis of beneficial ownership is implicit in all of the distributive articles of the tax treaty and, to that extent, the explicit reference to 'beneficial owner' in Arts. 10, 11, and 12 of the OECD Model does not add anything". Accordingly, the term "beneficial owner" has no normative meaning on its own.

Similarly, Lang (2008) also takes the view that the term has no normative meaning, but is merely an "indication that one has to apply an economic - and not a formal - approach in interpreting tax treaties". The reason why beneficial ownership is only expressly mentioned in articles 10-12 is that these articles deal with the types of income that are the most susceptible to abuse. However, "the usage of the term 'beneficial ownership' makes it clear for all tax treaty provisions as well that tax treaty terms have to be interpreted

applying an economic approach”.”

237. The author proceeded to formulate the following conclusion:-

“**4.6. Conclusion**

The meaning of beneficial ownership is still highly contentious. At this point. it may be questioned whether a uniform meaning of the term can still be achieved, as courts in different jurisdictions have already established a line of jurisprudence on the term and probably may not deviate from it without profound reason, that is, only a further amendment of the OECD Commentary.

This is especially daunting when considering that the historical analysis of the beneficial ownership concept indicates that the term was not meant to add anything of substance to a treaty but was only a clarification of a self-evident principle. However, amendments to the OECD Commentary and “[t]he temptation for desperate tax authorities to use (misuse) any weapon at their disposal to combat tax avoidance” resulted in a meaning for the term that it was probably never intended to have from a historical point of view. Furthermore, a major problem is that the concept was enhanced via amendments only to the OECD Model Commentary but not to the OECD Model itself. Moreover, different OECD publications are often inconsistent regarding the content of the beneficial ownership test and are thereby creating further confusion.

The historical analysis also suggests that the concept of beneficial owner-ship was - as a basic principle - equally applicable to all distributive articles of a tax treaty. However, as soon as any normative meaning is ascribed to the term albeit only via the OECD Model Commentary - it seems likely that only the articles in which the beneficial ownership test is explicitly enshrined contain this requirement.

The latest update of the OECD Model Commentary in 2014 regarding the beneficial ownership test may help to clarify a few contentious issues but certainly also leaves some questions unanswered. Nevertheless, the tendency to view beneficial ownership as a broad anti-abuse rule similar to a GAAR will probably be halted, especially due to the recent introduction of the PPT into the OECD Model (2017). Indeed, it will be interesting to observe how courts will assess the relationship between these two provisions. Maybe the PPT will be regarded as the sole means of tackling conduit company situations, which will eventually render the discussion on the meaning of beneficial ownership insignificant.”

238. Angelika Meindl Ringler, in her work titled **"Beneficial Ownership in International Tax Law"**[69] offers the following insights. Referring firstly to Klaus Vogel's work on double taxation conventions, Meindl Ringler observes:-

> "1. KLAUS VOGEL
>
> Klaus Vogel in his book on Double Taxation Conventions states that the reason for the inclusion of beneficial ownership in the OECD Model was to prevent treaty shopping by the use of intermediaries. Beneficial ownership should not be interpreted with reference to domestic law, as precise definitions cannot be found in the domestic tax systems in question. Rather, beneficial ownership should be interpreted taking into account the context of the treaty and the purpose of the limitation of tax, since here the context requires otherwise according to Art. 3(2) OECD Model.
>
> In Vogel's opinion, treaty benefits should not depend on mere formal title but rather on "real" title, which means that substance should prevail over form. According to Vogel, the substantive right to receive income depends on the right to decide on the use of the assets (and therefore, whether income should be realised) or/and the right to decide on the use of the income. If a person is restricted legally or factually in regard to both, only formal ownership exists. "Hence, the 'beneficial owner' is he who is free to decide (1) whether or not the capital or other assets should be used or made available for use by others or (2) on how the yields therefrom should be used or (3) both." As long as one of the requirements is fulfilled, even a trustee can be the beneficial owner. In the case of a joint stock company, Vogel mentions that the company can be the beneficial owner of income even if the company has to distribute all of its profits to its shareholders. However, the situation might - depending on the facts of the individual case - be different where the decision-making power rests with a controlling shareholder and the management must comply with this shareholder's will.
>
> Vogel focuses on the power to decide on the use of assets or income as the main attribute of ownership relevant in determining beneficial ownership. Ownership attributes are the attributes that, at least in a common law context, are necessary to achieve a position of ownership. Commonly cited ownership

[69] Chapter 4, "Scholarly Discussion", Beneficial Ownership in International Taxation Law, Angelika-Meindl Ringler

attributes are possession, use, control and risk. Sometimes it can be difficult to strictly distinguish between these attributes, as there can be a certain overlap. For example, in the Canadian Velcro decision, the Tax Court in determining the existence of different attributes of ownership stated that "[many] of the comments referred to in the interpretation of the phrases 'possession', 'use' and 'risk', equally apply to 'control'". Vogel's focus on the power to decide on the use of assets or income mainly concerns control over the income and assets. Under Vogel's approach, not only the power to decide on the use e! the income but also of the assets or capital can be decisive in determining the beneficial owner of the income. However, Vogel links the power to decide on the use of the asset to the income in question because the decision to use the asset for generating income is a necessary prerequisite for the income flow. Vogel's approach has a strong substance-over-form focus, which becomes even clearer when he talks about the factual and legal restrictions of control over the assets or income."

239. Noticing the explanation of the precept of beneficial ownership as explained by Philip Baker, the learned author observes as under:-

"According to Philip Baker, the OECD uses beneficial ownership to exclude agents, nominees and "any other conduit who … has very narrow powers over the income which render the conduit a mere fiduciary or administrator of the income on behalf of the beneficial owner" from claiming treaty benefits. Simply being a conduit is, thus, not sufficient to be excluded under the beneficial ownership test. Even a trustee can qualify as the beneficial owner of income as long as he is not an agent, nominee or conduit with very narrow powers. Baker finds the OECD's approach focusing on a binding obligation to forward the income to another person appropriate. Also, beneficial ownership is intended to counter only one specific type of treaty shopping since otherwise, the anti-avoidance rules mentioned in the Commentary and used by contracting states (e.g., LoB clauses) would be superfluous.

In Baker's opinion, beneficial ownership should have an international fiscal meaning, since the context requires otherwise under Art. 3(2) OBCD Model. This is supported by the fact that beneficial ownership was introduced into international tax law by the OECD and that the meaning of the concept must be consistent with equivalent terms used in treaties in other languages, e.g., "bénéficiaire effectif" in French. Also, some countries that use beneficial ownership in their treaties know the concept in domestic law, whereas others do not.

Baker raises the question whether, for instance, a company controlled by another company would be treated as the beneficial

> owner of dividends if the company was likely but not legally bound to pay the income to its ultimate owners. To determine whose income a payment constitutes in reality, he proposes the following test:
>
> [What] would happen if the recipient went bankrupt before paying over the income to the intended, ultimate recipient? If the ultimate recipient could claim the funds as its own, then the funds are properly regarded as already belonging to the ultimate recipient. It, however, the ultimate recipient would simply be one of the creditors of the actual recipient (if even that), then the funds properly belong to the actual recipient."

240. The emphasis laid on ownership attributes while examining the aspect of beneficial ownership as advocated by yet another leading authority on international tax planning was noted by Meindl Ringler in the following terms:-

> "Luc De Broe argues for an international tax meaning of beneficial ownership. He finds that beneficial ownership should not be understood as a subject-to-tax clause, since the OECD originally decided against this. Also, it would be curious if beneficial ownership had the same meaning as such a well-known concept. In addition, it would be wrong to cite the Partnership Report in support of such an interpretation, as the report only talks about liability to tax.
>
> The focus should rather be on ownership attributes in regard to the income in question. According to De Broe, such an understanding should be a strictly legal one based on the facts available (not taking into account the economics of an arrangement) and should exclude agents, nominees and conduits with very narrow powers over the income from treaty benefits. Also, beneficial ownership is not a matter of ultimate ownership but of who receives the income for one's own benefit.
>
> Based on these conclusions, De Broe proposes a two-step test for determining beneficial ownership. In a first step, the focus should be on whether the state of residence attributes income to the intermediary (i.e., on the liability to tax). If so, in a second step, the ownership attributes of the intermediary should be taken into account. The question is whether (1) the intermediary has the fructus, i.e., whether it can "claim the income for its own account and benefit" (hereby. Baker's insolvency scenario can be of assistance). Also, it is relevant whether (2) the conduit has the "usus of the income and of the assets or the claim on the income

and the potential of abusus of the income and of the assets or the claim". It is, thus, necessary that "the conduit is able to freely avail of the income" and that it is not contractually obligated to forward the income to another person. This means the intermediary should be able to freely use the payments received to discharge its liabilities and to decide on how to spend the money. To qualify as the beneficial owner, an intermediary's obligation to forward the income must be independent from the obligation of the initial payor. In addition, (3) the intermediary should assume risk. An indicator in that respect can be whether the intermediary earns an own spread of the income. The more of these features are absent, the higher the likelihood that the intermediary is an agent or nominee.

De Broe's approach to beneficial ownership takes into account a number of aspects. On the one hand, the attribution of income under the law of the residence state is of importance. On the other, attributes of ownership must be considered as well and in determining whether the intermediary can freely dispose of the income, De Broe uses the forwarding approach (similar to the OECD in the 2014 Commentary)".

241. The learned author proceeded to summarize the legal position as under:-

"The views presented above illustrate very well just how controversially the interpretation of beneficial ownership is discussed in academic literature. Well-known authors take very different positions when it comes to the meaning of beneficial ownership. Most authors, however, favour an international tax meaning of the term.

A lot of authors apply an economic substance-over-form approach to beneficial ownership and often focus on the attributes of ownership, particularly on control or the power to dispose of the income (in some cases, the focus is even on ownership or control of the underlying assets). An indicator in that regard can be whether payments have to be forwarded in another person (the forwarding approach). While the attributes-of-ownership approach is often applied in an economic sense, it is also possible to leave the factual aspects aside and consider the attributes of ownership from a more legal perspective (see du Toit). Others understand beneficial ownership as an attribution-of-income principle (either in the sense of liability to tax with a specific item of income or similar to a subject-to-tax clause). Such legal approaches are sometimes combined with a second test that focuses on whether the person that is attributed income is a mere agent or nominee. Also,

> combinations of the attribution-of-income, attributes-of-ownership and forwarding approach can be found. The best example in that regard is the approach taken by De Broe"

242. As is manifest from the aforesaid passages and the views expressed by leading authorities on international tax planning, emphasis is essentially laid on the facet of ownership attributes. The views so expressed thus bid us to discern a legal obligation which binds the recipient to forward the income to another person. The views expressed commends the question to be posed being whether the intermediary could claim the income for its own account and benefit. It thus proposes that if it were found that the conduit was able to avail the income itself, and was not contractually obligated to forward that income to another person, it would clearly be incorrect to impute the principles of beneficial ownership in such a contextual setting. The core of the aforesaid precepts would appear to be aspects of ownership and control over the income, a right of disposal or a contractual obligation to pass on the same to another.

243. Both Vogel and Baker thus bid us to ascertain and discern the true controller of the income, the entity which decides the use of the asset and the income and which could also include an administrator or trustee. Tested on the basic rule of substance over form, the concept of beneficial owner would get attracted to cases where the recipient of income or the holder of the asset is found to be merely the ostensible depository and which may hold the income either in the capacity of an administrator or even as a trustee. For this charge to be accepted, it would have to be established that the recipient or holder of income has no right or control over the income and merely holds the same to be deployed on the instruction of another. While the obligation to

forward the income or gain may be either legal or contractual dependent upon the position of parties, it would certainly require a finding on fact that the income is held at the behest of another, is controlled and regulated by a third party entity and the ostensible owner having no real or substantive control over the same.

244. Tested on the aforesaid precepts, it becomes manifest that the allegation of the revenue earned from the transfer of shares being beneficially held by the petitioner, TG III and TG IV is thoroughly misconceived and untenable. This since the respondents do not rest or found this allegation on any material or evidence which may be read as even remotely suggestive of the petitioners being under a contractual or legal obligation to transmit the revenues to TGM LLC. The respondents also do not base these submissions on any material which may have tended to indicate that the revenue obtained from the transfer of shareholding was an action undertaken by the writ petitioners acting for and on behalf of TGM LLC**.** In fact and as was noted by us in the preceding parts of this decision, the allegation of beneficial ownership itself rested on straws with the respondents still seeking to discover the ultimate beneficiaries of the revenue earned from the transfer of shares.

245. The reliance placed on *Aditya Birla Nuvo* was also clearly misconceived since that was a decision which proceeded on the basis of the existence of a "*permitted transferee*". It becomes pertinent to note that on facts the Bombay High Court had clearly found that AT & T Mauritius was a permitted transferee of AT & T USA. It had also held that AT & T Mauritius had made payments towards the equity shares of the JVC for and on behalf of the AT& T USA. What also

appears to have weighed upon that High Court on facts was the RBI approval to the transaction itself proceeding on the basis of the JVA and which had contemplated the shares allotted to the Mauritian entity ultimately vesting in the US principal. It was in the aforesaid facts that the High Court came to hold that the Mauritian entity was a permitted transferee of AT & T USA. It ultimately came to hold that the TRC held by AT & T Mauritius would be of no avail.

246. It would be pertinent to recall that Mr. Srivastava had argued that the petitioners had not disclosed the identity of the entity who may have received the sale consideration. However, and in the absence of any material or evidence on which the assertion of beneficial ownership was sought to be founded, we are constrained to observe that the submission noticed above proceeded on mere surmises and conjectures. This, since the respondents have not pointed to any evidence of the revenue obtained by the petitioner, TG III and TG IV having been forwarded to a third party. The search for the ultimate recipient too proceeds on the conjecture and premise that the revenue may have been transmitted to a third party. Quite apart from such a course being wholly arbitrary and purely conjectural, we are of the firm opinion that an allegation of income being beneficially held cannot be sustained on mere surmises or an avowed intent to investigate and probe. The allegation would have to rest on a sounder footing and shown to be plausible from the material on record.

S. OUR SUMMATION

247. In summation we would hold as under. Mauritius and entities domiciled in that nation are neither liable to be viewed on a negative plane nor are they obliged to satisfy a separate standard of legitimacy.

The stand struck by the two Contracting States clearly dispels any assumption of a roll back of the Mauritian Route or an avowed intent to place residents of that nation to a stricter degree of proof. The data relating to investments flowing from that nation and in terms of the facilitative DTAA regime lays all doubts, in this respect, to rest. The tests of a legitimate investment stand duly incorporated in the DTAA and the various Protocols entered into from time to time representing the exclusion of those which are not intended to reap the benefits of the Convention. The adoption of the LOB provisions was clearly intended to subserve those objectives. The intent of the Contracting States to adhere to the globally accepted standard of substance over form stands further fortified from the recent Protocol which has been executed and is yet to be notified.

248. The establishment of an investment vehicle in a tax friendly destination, in today's time, is neither considered to be an anathema nor does it, ipso facto, give rise to a presumption of tax evasion or treaty abuse. The thread which permeates and continues to be the constant of all taxing conventions is the test of underlying object and intent of Contracting Nations and the subjects who were intended to avail benefits of such treaties. The object of such treaties is principally aimed at aiding global commerce, transcending trade barriers and the mutual benefit that nations may reap from reciprocal arrangements.

249. Corporate structuring which enables businesses to access jurisdictions and markets is today accepted as the global norm. It constitutes the new standard of cross-border commerce. This necessarily entails corporate entities incorporating units and subsidiaries which register their footprint across jurisdictions. It would

be fundamentally incorrect to view such structuring as being motivated by ulterior motives or a design to reap illegitimate benefits. The precept of piercing the corporate veil owes its genesis to striking at illegality, attempts to perpetuate fraud and abuse of benefits. Unless it be found and established that such structuring is designed to obtain illegitimate or illegal gains, abuse the underlying objective of conventions, it would be wholly erroneous to place such entities under an initial or negative burden of proof.

250. Those precepts when juxtaposed with the favourable foundation which Mauritius laid in place for businesses to base themselves in that island nation leads us to hold that the Revenue would be clearly obliged to meet a high standard of proof when alleging avoidance and abuse. Our view in this regard stands further fortified from the various clarificatory directives issued by the Union from time, the roll back of the 2013 amendments and the amending Protocols which came to be signed from time to time. Those executive actions were clearly aimed at allaying and squashing any preconceived notions that may have been harboured.

251. As the Supreme Court explained in *Azadi Bachao Andolan* and *Vodafone*, treaties are formulated by nations in exercise of their sovereign powers. These are based on political and economic considerations. It is not for us to question or doubt the validity of such reciprocal arrangements. It is for the contracting parties to delineate the qualifying conditions which must be met and adhered to by parties seeking to avail the benefits thereof. It would be wholly incorrect for courts to conjure or create disqualifications or grounds of deprivation in addition or over and above those adopted by contracting parties.

This more so in light of the Act itself conferring an overriding and supervening sheen on such conventions. Section 90 and the scheme of the Act itself is a testament of the legislative intent. We had an occasion in *Telstra* to notice the interplay between domestic legislation and treaty provisions in some detail. That decision had also taken note of the consistent position struck by courts and which had spoken in unison of treaty benefits not being overridden by provisions contained in domestic laws. This basic principle was propounded bearing in mind the sanctity which attaches to a treaty and a party thereto being restrained from attempting to scuttle its provisions by resort to the devise of unilateral amendments.

252. It is this central theme which imbues Section 90(2) of the Act and confers an overriding effect upon provisions of a treaty. A subject thus is enabled to revert to a provision contained in domestic legislation only if it be more beneficial. Section 90(2A) and the GAAR family of provisions seek to provide a statutory basis for taxing authorities to ascertain whether a transaction can be said to be contrary to the underlying intent and objectives of the Contracting States.

253. However, and in the facts of our case, we have found that Chapter X-A would be inapplicable in light of Article 13(3A) of the DTAA and which grandfathers all acquisitions prior to 01 April 2017. The clear intent of the Contracting States to ring-fence those transactions is evident not just from the plain language of Article 13(3A) but additionally fortified by the stated language of Rule 10U (1) (d). We have also negatived the argument based on Rule 10U (2) and have found that the same does not override or eclipse the

protection accorded by clause (d) of Rule 10U(1). In view of the above, the circumstances and the extent to which Chapter X-A may apply needs no further elaboration.

254. Subsidiaries are ordained by law to have a distinct and independent legal persona and which is liable to be ignored only in rare contingencies. Absent apparent and evident attempts at sustaining or perpetuating fraud, camouflaging sham transactions, shroud an illegality, the said precept is not liable to be readily or lightly invoked. It is only in cases where it is found that the entity so created has no apparent or real economic substance that one would be justified in imputing that precept. As our Supreme Court lucidly explains, the sheen of corporate personality is liable to be ignored where the entity be found to have been created to perpetuate an illegality or where it is found to have no real personality having been merely interposed to overcome legal requirements and barriers. It is in the aforesaid context that the Supreme Court spoke of entities being puppets and lacking in economic substance.

255. When tested on the aforenoted basic principles and viewed in light of the facts of our case, the position which emerges is as follows. The petitioner, III and IV clearly appear to have been incorporated to act as pooling investment vehicles to access new markets and opportunities. The petitioners came to be domiciled in Mauritius principally on account of the investor friendly environment prevalent in that nation and the bouquet of bilateral trade agreements to which it was a party. It was on that basis that the petitioners also obtained Category 1 GBLs under the Financial Services Act, 2007. The petitioners made substantial investments in Flipkart Singapore

between the years 2011 to 2015. The transfer of holding took place in 2018 as part of a larger takeover scheme spearheaded by Walmart Inc. The petitioners were entrusted with funds provided by as many as 500 individual investor entities situate in 30 jurisdictions across the globe. The placement of those funds clearly comes across as a prudent commercial decision since it enabled the writ petitioners to deploy those funds and make capital investments rather than its shareholders/investors making individual forays. The extent and quantum of investments made by the petitioner, TG III and TG IV, the period for which those investments were held, the expenditure incurred in Mauritius when considered cumulatively clearly dispels any assumption of they lacking in economic substance. In fact, one of the initial investments was also backed by the furnishing of a bridge loan by the petitioner to Flipkart Singapore.

256. The petitioner, TG III and TG IV held valid TRC's as well as a Category 1 GBL issued by the competent authority in Mauritius. The writ petitioners also qualified the LOB stipulations as embodied in the DTAA. Of significance is the legal fiction comprised in Article 27A and which forbids one from viewing an entity as a conduit once the conditions prescribed therein are satisfied and met. These aspects not only merited due consideration but were also liable to be accorded rightful treatment and weight bearing in mind the provisions of the DTAA.

257. The petitioners undisputedly qualified the fiscal prescriptions stipulated in Article 27A of the DTAA. The shares were ultimately transferred in August 2018. The aforesaid transfer or the ultimate divestment of shareholding was stated to be a part of a broader

transaction involving the acquisition of Flipkart Singapore by Walmart Inc. All of the above clearly convinces us to hold that the submissions addressed in the context of economic substance are clearly untenable.

258. It is also pertinent to recall that the petitioner, TG III and TG IV made the investments in Flipkart Singapore on the strength of funds which were provided by its equity shareholders. It was their categorical case that those funds did not originate from TGM LLC and that in fact, the said entity was not even an equity partner in any of the petitioners. The charts and the holding structure as depicted by the respondents proceeded on the unsubstantiated allegation that the said entity was the parent or the holding entity. This assumption was not only contrary to the stand of the petitioners, namely, of TGM LLC merely being the investment manager, it also proceeded in ignorance of their categorical stand that the said entity held no shareholding or other investment interest in the pooling vehicles. It was also not shown to have invested through the 500 investors who had entrusted funds for deployment with the petitioner, TG III and TG IV.

259. Although elaborate submissions were addressed by Mr. Srivastava doubting the independence and authority of the BoD of the petitioners, those submissions have left us unimpressed for the following reasons. It must at the outset be noted that it would be wholly incorrect to commence an inquiry while dealing with such an allegation on the premise that a subsidiary would not enjoy an independent status. The petitioners had proved that they had remained invested in Singapore for more than a decade and had participated in investments amounting to USD 330 million over a span of ten years.

260. In our considered opinion, a parent or holding company would legitimately claim the right to exercise oversight and retain a broad supervisory role over the affairs of its subsidiaries. This could legitimately take the shape of seats on the BoD, placement or selection of key managerial personnel, regular audit of the affairs of the subsidiary or a periodical review and reporting process. These aspects were duly acknowledged and highlighted by the Supreme Court in *Vodafone* which recognized the well settled position of companies and other incorporated entities being viewed as economic entities with legal independence. While dealing with the control that may be exercised by a group parent company, it was observed that merely because the parent may exercise shareholder influence over its subsidiary would not lead one to draw an adverse inference of the latter being a mere puppet. The concurring opinion in *Vodafone* resonates the aforesaid view when it observed that mere ownership, parental control or management of a subsidiary would not be sufficient to pierce or lift the corporate veil. It was pertinently observed that the persuasive position in which a parent is placed, would not warrant the jettisoning of the separate legal persona which the subsidiary enjoys.

261. The Supreme Court held that even if the subsidiary were to comply with requests of the parent company, the same would be clearly justifiable and would not compel one to assume that the subsidiary had become wholly subservient. It was only in a situation where it were to be found that the parent company's control and interference with activities amounted to a complete takeover and the subsidiary deprived of the power to administer and manage that an

adverse inference may be drawn.

262. Thus, merely because two of the members of the Board also happened to be connected with the larger conglomerate would not convince us to hold that the petitioner, TG III and TG IV were reduced to mere puppets. While much was sought to be derived from the minutes of the board meetings having used the expression "noted" and "ratified", we find that the submission is firstly based on a selective reading of parts of the minutes. The contention also fails to bear in mind that the resolutions as ultimately drawn when read in their entirety would unerringly point towards the decisions being ultimately taken by the Board collectively. Those minutes speak of the BoD of the petitioner, TG III and TG IV having resolved to take the various decisions which stood recorded therein.

263. Equally misconceived was the argument which proceeded on the basis of the signing power which came to be granted to Mr. Charles P Coleman, where remittances over USD 250 million were involved. It must at the outset be noted that the petitioners had firstly explained that the power conferred on certain individuals to operate the bank accounts was a decision taken by the Board as a whole. The placement of those individuals was itself explained to be on account of the fiduciary duty which stood placed on the investment manager. We also bear in mind the resolution passed on 03 November 2014 and when the Board resolved that all payments and wire instructions would be necessarily countersigned by Group C and which comprised of the Mauritian resident directors. It is therefore apparent that no payments could have been authorized without the approval of those members of the Board.

264. It becomes pertinent to note that most of the members of the BoD, including Mr. Moussa Taujoo, Mr. Mohammad Akshar Maherally and Mr. Steven D. Boyd were signatories to the Constitution document. They were thus individuals who had signed what we in Indian corporate and legal terms commonly understand to be the Memorandum of Association. The petitioners had also drawn our attention to the resumes of those Directors to contend that they were all respected authorities in their individual fields and thus clearly qualified to be members of the BoD.

265. As we view the entire arrangement, we find ourselves unable to come to hold that the BoD of the petitioner, TG III and TG IV stood completely deprived of a decision making power or that they had been rendered totally subservient to the wishes of a parent entity if the existence of such a corporate entity were to be even assumed.

266. We also note that the lack of economic substance argument also clearly falters and falls when we bear in consideration the dividend which was declared by the petitioners in favour of their constituent shareholders by virtue of a decision taken in the meeting of the BoD on 13 August 2018. The aforesaid declaration of dividend followed the principled decision to undertake the sale of shares of Flipkart Singapore and which was taken by the BoD on 04 May 2018 itself. Bearing in mind the significant amounts which constituted the interim dividend declared and was towards repayment of capital contribution, it would be wholly incorrect and erroneous to hold that the petitioners lacked economic substance.

267. Equally misconceived were the following observations and conclusions of the AAR. The AAR had firstly held that the sale of

shares was not covered by Article 13(3A) of the DTAA since the same would only be applicable to the sale of shares of a company resident in India. It proceeded further to observe that since the capital gains accrued from the sale of shares of a Singapore company, the case of the petitioners fails on the ground of treaty eligibility itself. It further held that the immediate investment destination was Singapore and not India. These findings are wholly unsustainable when we bear in mind that it was the stated case of the petitioners that those shares derived their value from underlying assets situate in India. If the aforesaid flawed reasoning of the AAR were to be accepted, the transaction itself would have been freed of any tax implications under the Act. The AAR clearly failed to bear in mind that the sale transaction had been undertaken at a time by which the Act had brought indirect transfers within the realm of taxation under Section 9. This thus does not even appear to have been an issue of disputation. In fact if the respondents had doubted this proposition, their very authority to tax or for the subject transaction being exigible under the Act would have been rendered unsustainable. The AAR has thus essentially built a case which was neither urged nor canvassed by either side.

268. The AAR has also drawn adverse inference from the role assigned and conferred upon Mr. Coleman ignoring the asserted case of the petitioners that he did not hold any shares in the three Mauritian entities let alone a controlling equity interest in them. It also appears to have doubted the commercial wisdom of placing non-Mauritius residents on the BoD. The petitioners had asserted that those members had been placed to enable the investment company to exercise a broad overview over the functioning of the petitioner, TG III and TG IV.

This contention has not been accorded any consideration at all. In any case, we find ourselves unable to appreciate how the AAR could have been even legitimately concerned with a commercial decision or the expediency of placing certain members on the BoD. The issue of signing powers and bank operations has already been considered by us in the previous parts of this decision and are thus not being repeated here.

T. CONCLUSIONS AND TAKEAWAYS

269. Our conclusions are, for the sake of ease of reference, summarised hereinbelow:-

A. The finding in the impugned order that TGM LLC is the holding or parent company of the petitioner is wholly erroneous. The petitioners have consistently taken the unvacillating position with respect to the shareholding position of the writ petitioners and of TGM LLC being the investment manager of the petitioner and not the holding or parent company. Furthermore, none of the funds invested in the petitioner originated from TGM LLC, there has been no equity participation or investments made by TGM LLC in the writ petitioners or any evidence put forth with respect to any monies being repatriated to TGM LLC from the writ petitioners.

B. As a result, we find that the AAR erred when it concluded that TGM LLC is the parent or holding company and has incorrectly observed that the said contention was uncontroverted by the petitioners. This incorrect and misconceived finding of fact by the AAR has thus sullied the impugned order and rendered it riddled with manifest and patent errors.

C. The facts as they emanate from the record categorically establish that the petitioner cannot be said to be an entity lacking in economic substance. The petitioners were intended to operate as pooling vehicles for investments, held a Category 1 GBL, had aggregated funds from more than 500 investors located across 30 jurisdictions worldwide and had TGM LLC as its investment manager.

D. The entire stockholding in Flipkart Singapore was acquired between October 2011 to April 2015 and the share transfer in question was undertaken on 18 August 2018. The petitioner is stated to have incurred expenditure amounting to USD 1,063,709 roughly translating to MUR 36,436,182 as against the threshold of MUR 1,500,000 as prescribed in Article 27A and additionally had its total liabilities and shareholders' equity at USD 1,764,819,299 with its net increase in shareholders equity resulting from operations being pegged at USD 267,633,593. Therefore, and in view of the aforenoted facts the petitioner cannot be said to be lacking in economic substance or that it was domiciled in Mauritius with a sole view of engaging in treaty abuse.

E. A parent or a holding company would have a legitimate right to exercise oversight and broad supervision over the affairs of its subsidiaries which could conceivably take the form of seats on the BoD, appointment of key managerial personnel, auditing of affairs of the subsidiary and so on. Subsidiaries are also recognised in law to have a distinct and independent legal persona which is liable to be ignored only in the event of

apparent fraud, being interposed with a view to camouflage sham transactions or of being created to perpetuate an illegality and of being a mere puppet and lacking in economic substance.

F. Merely because a parent entity may exercise shareholder influence over its subsidiary that would not lead to an assumption that the subsidiary in question was operating as a mere puppet or that it was wholly subservient to the parent entity. In light of the aforesaid, it is clear that merely because two of the members of the Board of the petitioner, namely, Mr. Charles P. Coleman and Mr. Steven Boyd are connected with the TG Group does not in itself render credence to the argument that the writ petitioners are mere puppets. An overall conspectus of the board resolutions reveals that the decisions were undertaken by the BoD of the petitioner collectively. Furthermore, though Mr. Charles P. Coleman was authorised to permit expenditures exceeding USD 250 million, the power thus conferred was a decision taken by the Board as a whole and any such decisions were necessarily required to be countersigned by the Group C Mauritian based directors. Moreover, the members of the BoD were also signatories to the Constitution document. In view of the aforesaid facts, the BoD of the writ petitioners cannot be said to be deprived of decision-making powers or reduced to a subservient status.

G. The mere factum of an entity being situated in Mauritius and of investments in Mauritius being routed through that nation 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.

H. An overall conspectus of the data and material forming a part of public record reveals Mauritius is one of the more favourable jurisdictions for FII's seeking to invest in India as a result of its proximity to India as well as the wide array of agreements that it had entered into with various nations across the globe. Liberalized exchange controls, favourable investment climates and the prevailing socio-political stability appears to have additionally favoured facilitation of Mauritius as a gateway for investments flowing into the Asian and African continent and accordingly lead to Mauritius becoming the preferred destination for various investors wishing to route investments towards South East Asian economies and with India subsequent to the liberalization measures adopted in 1991 seeing almost fifty percent of the FDI volume in India originating from Mauritius in the year 2012.

I. Accordingly, and bearing in mind the observations rendered in *Azadi Bachao Andolan*, *Vodafone* and the facts and data available on the record, we are of the view that 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.

J. The establishment of investment vehicles in tax friendly jurisdictions cannot be considered to be an anomaly or give rise to a presumption of being situate in those destinations for the

purpose of evading tax or engaging in treaty abuse. The decision of *Azadi Bachao Andolan* acknowledged how nations seek to compete with each other by highlighting treaty benefits that could be obtained by investors from its treaty networks, because of which there was nothing inherently objectionable about treaty shopping but that any concerns surrounding the practice of treaty shopping is best left for the consideration of the executive which may examine the political and economic implications of any measures taken by it to combat treaty shopping, particularly in light of the changing world order requiring nations to adopt measures to attract capital and technological inflows.

K. In a similar vein the decision of *Vodafone* noted that there has been a steady increase in multinational corporations seeking to invest in markets and businesses across the globe, which would thus lend credence to the position that establishment of offshore companies could be motivated by bona fide commercial purposes. Accordingly, the decisions of the Supreme Court accepted the changed world order necessitating cross-border movement of capital and investments and those in turn resulting in the creation of trans-national corporations, the incorporation of entities in different jurisdictions and thus facilitating investments in diverse parts of the world which inevitably led to entities seeking to reside in jurisdictions with established treaty networks. The creation of new investment pathways ought not be halted by skepticism or mistrust except on the basis of well-established parameters.

L. The principles of substance over form must be considered to be the prevailing norm and the Revenue entitled to doubt the bona fides of a transaction only in those situations where it be found that the transaction involves a sham device intended to achieve illegal objectives or formulated based on illegal motives. In light of the decisions rendered in *Azadi Bachao Andolan* and *Vodafone*, treaty shopping in itself cannot be rendered abhorrent unless it were categorically established that the device was incorporated with a view to evade tax and in a manner contrary to the intent of the Contracting States to the treaty. Therefore, it is only in those situations where no other conclusion can be drawn other than the entity being a conduit or lacking in commercial substance and intending to perpetuate fraud that the Revenue would be justified in doubting the nature and character of that transaction.

M. The issuance of a TRC by the competent authority must be considered to be sacrosanct and due weightage must be accorded to the same as it constitutes certification of the TRC holding entity being a bona fide entity having beneficial ownership domiciled in a Contracting State to pursue a legitimate business purpose in a Contracting State. The Revenue would thus not be justified in doubting the presumption of validity attached to the TRC as it would inevitably result in an erosion of faith and trust reposed by Contracting States in each other.

N. The circumstances under which the Revenue could pierce the corporate veil of a TRC holding entity is restricted to extremely

narrow circumstances of tax fraud, sham transactions, camouflaging of illegal activities and the complete absence of economic substance and the establishment of those charges would have to meet stringent and onerous standards of proof and the Revenue being required to base such conclusions on cogent and convincing evidence and not suspicion alone. It is only when the Revenue is able to meet such a threshold that it can disregard the presumption of validity which would be attracted the moment the TRC is produced and LOB conditions are fulfilled.

O. Treaties are entered into by Contracting States in exercise of their sovereign powers and based on economic and political considerations. In view of the same, such reciprocal arrangements cannot be subjected to aspersions cast on its validity. It would accordingly be erroneous for courts to manufacture grounds of disqualification from treaty benefits over and above those as formulated by the Contracting States. Section 90 of the Act itself formulates the legislative intent to lend primacy to treaty enactments. Courts have accordingly taken the consistent stand that treaty benefits ought not be overridden by provisions and that the sanctity which attaches to a treaty restrains parties from attempting to subvert the same by way of unilateral amendments.

P. 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. Action 6 of BEPS Action Plan, which paved the way for adoption of LOB clauses

and PPT test in treaties as well as the principles emanating from the OECD Commentary on Article 29 reveals that treaties incorporate disentitlement provisions to deprive persons who were not intended to fall under the ambit of the treaty availing those benefits in an indirect manner.

Q. In that light and bearing in mind decisions rendered by foreign Courts in *Cadbury Schweppes* and *Burlington*, it would be erroneous to characterise legitimate business activities undertaken by entities as constituting treaty shopping, merely because it was situated in a favourable tax jurisdiction.

R. Therefore, both Indian and International authorities have taken the consistent position that treaty benefits may be denied only in those cases where the transaction is a sham, where fraud is sought to be committed or where entities are incorporated as mere conduits and in a manner contrary to the schema of the treaty itself.

S. The incorporation of LOB provisions in a taxation convention will result in those provisions being determinative of allegations of treaty abuse and purported illegitimate claims of treaty benefits. Furthermore, the right of the Revenue to cast aspersions on the validity or legitimacy of a transaction would be constrained by the requirements of exacting and compelling standards of proof with the onus placed squarely in the domain of the Revenue to establish that a transaction in question would be disentitled to the benefits of a treaty being a sham, a colourable device and imputed with illegality and giving rise to

the conclusion that Contracting States never intended for such transactions being accorded treaty benefits.

T. It is also apparent that the Contracting States did not intend for domestic taxation authorities to deploy their own subjective standards in view of the enactment of LOB provisions which had also adopted ascertainable standards to defenestrate presumptions of treaty abuse. It is the finding of this Court that taking any view to the contrary would amount to privileging domestic legislation over and above the enactments in the treaty provisions adopted by Contracting States and would amount to holding that jurisdiction inheres in taxing authorities to question the validity of transaction on parameters alien to the negotiated terms of the treaty.

U. Furthermore, the LOB clause in the India-Mauritius DTAA came to be included when Chapter X-A had already come to exist and Article 27A accordingly chose to grandfather all transactions relating to alienation of shares acquired prior to 01 April 2017. This further lends credence to the position that the Contracting States formulated LOB provisions bearing in mind the enactments in the domestic legislation because of which the Revenue is not entitled to erect additional barriers towards the receipt of treaty benefits by parties.

V. In view of the aforesaid we find that LOB provisions and the TRC comprehensively and adequately addresses concerns in relation to potential treaty abuse and it would be impermissible for the Revenue to manufacture additional roadblocks or standards that parties would be required to meet in order to

avail of DTAA benefits, subject to caveats of illegality, fraud and the transaction being in contravention of the underlying object and purpose of the treaty.

W. The provision of Article 13(3A) embodies the intent of the Contracting States to ring-fence all such transactions which had been consummated prior to 01 April 2017. Article 13(3B) restricted its scope to prescribing separate tax rates for the period between 01 April 2017 till 31 March 2019 but no such tax rate was prescribed for capital gains arising from sale of shares acquired prior to 01 April 2017 which categorically demonstrates the intent of the parties to the India-Mauritius DTAA to exclude capital gains emanating from shares acquired prior to 01 April 2017 from the ambit of taxation. Therefore, the grandfathering clause in Article 13(3A) would exclude the transaction undertaken by the writ petitioners from the ambit of capital gains tax.

X. Domestic tax legislation cannot be interpreted in a manner which brings it in direct conflict with a treaty provision or with an overriding effect over the provisions contained in a DTAA since the same would in effect amount to accepting the right of the Legislature of one of the Contracting States to unilaterally amend or override the provisions of a treaty and would result in the elevation of a domestic subordinate legislation over that of the provisions embodied in a treaty entered into between sovereign nations.

Y. In light of the aforesaid, the argument that the transaction undertaken by the petitioners would not be grandfathered in

light of Rule 10U is sans merit, as is the claim that sub-rule (2) takes away from the preceding provision of clause (d) of sub-rule (1), since the term "without prejudice" is intended to mean that sub-rule (2) would operate in contingencies not contemplated by sub-rule (1)(d) of Rule 10U.

Z. The imputation of beneficial ownership of TGM LLC over the writ petitioners is manifestly erroneous in light of the principles governing attributability of beneficial ownership. Notwithstanding that on facts it has been established that TGM LLC is not the parent or holding company of the petitioner, it is apparent in would be incorrect to ascribe beneficial ownership if a conduit was entitled to avail of income itself and was not contractually obligated to forward that income to any other entity.

AA. The concept of beneficial ownership would get attracted if it be established that the holder of income had no control over the income and merely holds the same till such time it be instructed to deploy that income to another entity or if the income is controlled or regulated by a third party with the holder having no real or substantive control over that income.

BB. Tested on those precepts, it is apparent that TGM LLC cannot be said to be the beneficial owner of shares since no evidence has been rendered to suggest that the writ petitioners are under a contractual or legal obligation to transmit revenue to TGM LLC or that the revenue obtained from transfer of shareholding was as a result of actions undertaken by the writ petitioners at the behest of TGM LLC. As a result, and in the absence of any material or

evidence underlying the claims made with respect to beneficial ownership, we are of the view that such submissions are based on mere surmises and conjectures.

U. OPERATIVE DIRECTIONS

270. We consequently and for all the aforesaid reasons come to the firm conclusion that the impugned order of the AAR dated 26 March 2020 suffers from manifest and patent illegalities. The impugned order takes a wholly untenable and unsustainable view with respect to the transaction in question. Its conclusion, therefore, that the transaction was aimed at tax avoidance is rendered arbitrary and cannot be sustained. The transaction, in our considered opinion, stands duly grandfathered by virtue of Article 13(3A) of the DTAA.

271. We accordingly allow these writ petitions and quash the impugned order dated 26 March 2020. We affirm the view canvassed by the writ petitioners of the impugned transaction not being designed for avoidance of tax. The petitioners shall be entitled to all consequential reliefs.

YASHWANT VARMA, J

PURUSHAINDRA KUMAR KAURAV, J.

AUGUST 28, 2024/neha/kk/rsk/rw