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Delhi High Court Upholds Mauritius Treaty Exemption for Tiger Global International

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Background and Facts in brief

Delhi High Court recently overturned an order of Authority of Advance Rulings ('AAR')[1] which denied private equity firm Tiger Global tax exemption under the India-Mauritius Double Tax Avoidance Agreement ('DTAA').

The Petitioner ('TGI entities'), incorporated and resident under the laws of Mauritius, acquired shares in Flipkart, a Singapore-based company. Flipkart holds shares in several Indian companies operating the e-commerce platform Flipkart.com in India, implying that the value of Flipkart's shares is significantly derived from Indian assets.

The Petitioner sold Flipkart shares to a Luxembourg-based company as part of Walmart Inc.'s acquisition of Flipkart. Petitioner subsequently applied under Section 197 of the Income Tax Act ('the Act')[2] for withholding tax certificate at Nil rate from Indian tax authorities. Indian Revenue ruled that the capital gains exemption under India-Mauritius DTAA was not available as Mauritius entities were 'see-through entities' and thus ineligible for treaty benefits.

The Petitioner sought clarification on taxability of the transaction by filing an application with the AAR. The AAR rejected the application on the ground that the transaction was *prima facie* designed for avoidance of tax. Below are the key observations made by AAR:

i. The Applicants were set up in Mauritius for making investment to derive DTAA benefits between India and Mauritius, indicating a clear intent to avoid tax obligations.

ii. The control and management of the Applicants, particularly the strategic decision-making (relied on board meeting minutes) were largely influenced by individuals in US, demonstrating that the Applicants functioned primarily as conduits for the real beneficiaries based in US.

iii. The AAR observed that financial control and signing authority was vested with a US-based individual not on the Applicants' board, further confirming that the effective management and control was situated in US.

iv. The AAR ruled that, according to Article 13 of the India-Mauritius DTAA[3], capital gains only from the sale of shares in Indian companies was eligible for exemption, whereas gain from shares in Singapore companies (such as Flipkart) was not. Capital Gains under India – Mauritius DTAA. The AAR observed that the transaction was designed to exploit DTAA benefits in a way not originally intended by the treaty's signatories.

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[1]'AAR' – A quasi-judicial body authorized to issue binding decisions or interpretations on specific tax-related inquiries from taxpayers. Its primary role is to offer certainty on tax implications of proposed transactions or arrangements.
[2]Section 197 of ITA - Certificate for deduction at lower rate
[3]Capital Gains under India – Mauritius DTAA

In a Writ before Delhi High Court, overruling the AAR the Court made a number of important observations on principles for interpretating Indian Tax Code and treaties.

Below are key takeaways from the High Court Ruling:

i. Mauritius Investments are not inherently suspect - Entities domiciled in Mauritius are neither liable to be viewed on a negative plane nor are they obliged to satisfy a separate standard of legitimacy.

ii. Following Apex Court in *Azadi Bachao Andolan*[4] and *Vodafone*[5], Court held that treaties are formulated by nations in exercise of their sovereign powers. These are based on political and economic considerations, and it was not for Courts to question or doubt the validity of such reciprocal arrangements.

iii. Economic Substance requirements inbuilt in India Mauritius Treaty - Assessee satisfied TRC Requirement and substance test (LOB Clause) inbuilt in Tax Treaty. Extent of investment made by the assessee, the holding period and expenditure incurred in Mauritius cumulatively dispelled the assumption that there was no economic substance.

iv. Ring-fencing of investments prior to April 1, 2017 - GAAR provisions (Chapter X-A)[6] do not apply to these investments as Article 13(3A)[7] of India-Mauritius DTAA protects investments by way of grandfathering all acquisitions prior to April 1st, 2017. This protection is reinforced by the clear language of Rule 10U(1)(d)[8] of Indian Rules on GAAR).

v. Mere ownership, parental control or management of a subsidiary would not be sufficient to pierce or lift the corporate veil. 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.

vi. Importance of Tax Residency Certificate (TRC) - The issuance of TRC by the competent authority must be considered as sacrosanct and due weightage must be accorded to the same. Piercing of 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. The establishment of these charges by Revenue must meet stringent and onerous standards of proof.

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[4][(2004) 10 SCC 1]
[5][(2012) 6 SCC 613]
[6]The General Anti-Avoidance Rule (GAAR) was introduced in India's domestic tax litigation in 2012 and came into force in 2017.
[7]ART 13(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."
[8]Rule 10U(1)(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." (This Rule under GAAR specifically exempts income arising from transfer of investments made before April 1,2017)

vii. Beneficial ownership would get attracted only 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. The Court Ruled that on facts of the case Revenue had failed to demonstrate that beneficial ownership of shares vested with entity(ies) other than the assessee. Hence entitlement to Treaty benefits could not be denied to TGI entities.

Conclusion

Despite landmark decisions by Supreme Court ('SC') in *Azadi Bachao Andolan v. UOI*[9] and Vodafone[10] which clarified that TRC issued by Mauritian Authorities *"will constitute sufficient evidence for accepting the status of Residence"* controversy on treaty benefit entitlement continues to haunt Non-Resident investors under India-Mauritius tax treaty. **Tiger Global** is not an isolated instance of Revenue's failure to align with judicial principles established by Hon'ble Supreme Court. There are numerous cases wherein High Courts have reversed lower authorities' decisions and allowed treaty benefits for investments made before April 1, 2017. In **Sanofi Pasteur Holding**[11] the High Court underscored that it would be inconsistent with hierarchal discipline for AAR to question correctness of SC's decision in *Azadi Bachao Andolan.* **In Serco BPO Private Limited**[12]**,** High Court placed considerable importance on TRC and Circular 789[13] stating that the TRC was based on 'trust' reposed by Indian government in Mauritian authorities & that its validity cannot be questioned by Indian authorities. **In JSH (Mauritius) Limited**[14], High Court rejected Revenue's stand that taxpayer is merely a shell company and has no business/commercial substance as it never nominated anyone on the Board at any point of time and it never incurred expenses of wages, salaries of staff, electricity, water and telephone charges, rent, directors of emoluments. **Recently in Blackstone Capital Partners**[15], HC reiterated that Revenue could not question TRC which is sufficient evidence for claiming eligibility for DTAA benefit. In **Bid Service Division (Mauritius) Limited**[16]**:** Mumbai High Court held that LOB clause clearly grandfathered investments made before April 1,2017 and could not be ignored by the Revenue.

Above decisions reflect a pattern of judicial consistency across different High Courts and collectively underscore a judicial consensus on entitlement of treaty benefits under India-Mauritius Tax Treaty. Tiger Global becomes the latest addition to the long list of High Court Rulings wherein administrative Circulars and established principles on treaty interpretation have been respected reinforcing certainty in taxpayer rights. This is a welcome trend as non-resident investors can expect to smooth sail at higher levels even if choppy waters may have to be negotiated at lower levels before tax authorities.

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[9]*[(2004) 10 SCC 1]*
[10]*[(2012) 6 SCC 613]*
[11]*[TS-57-HC-2013(AP)] (2013)*
[12]*[TS-484-HC-2015(P & H)] (2015)*
[13]*Circular 789 dated April 13, 2000, issued by Central Board of Direct Taxes ('CBDT') clarifies that the TRC shall be considered as sufficient evidence for establishing the residential status of a Mauritian resident.*
[14]*[TS-308-HC-2017(BOM)] (2017)*
[15]*[TS-41-HC-2023(DEL)] (2023)*
[16]*[TS-101-HC-2023(BOM] of 2023*

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