



Tiger Ruling
Tax, Transactions and
Takeaways

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With you today



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Evolution of India's Anti-Avoidance Stand



McDowell

Tax planning is legitimate; colorable devices and tax avoidance is not

1985

Azadi Bachao

TRC based approach accepted; Emphasis on certainty through negotiated LOB clauses

2003

Vodafone

Anti-avoidance rules can only be invoked where a colorable device, else legal form cannot be pierced

2012

Anti-Vodafone amendment

Retrospective amendment on "indirect transfer" provisions

2012

2026

Tiger Global

TRC not conclusive; substance/ control to be examined; Sovereign right to levy tax

2020

MLI starts coming into force for several treaties

2017

GAAR comes into force but no retrospective amendment, stable tax regime

2016

Singapore/ Mauritius/ Cyprus treaties amended:

Tax on post-1 Apr 2017 acquisitions + LOB-based reduced rate window

Agenda

Headline Summary and Impact

Case in point - Key facts

Key nuances and legal principles from Tiger Global ruling

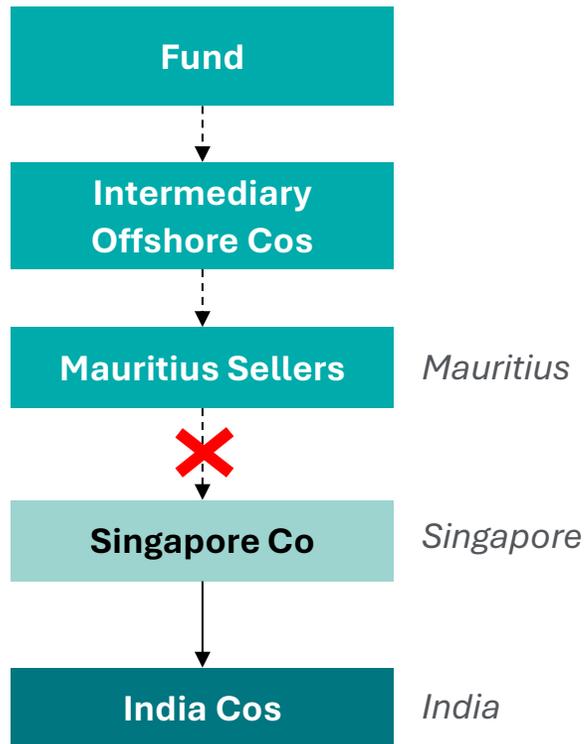
Impact on private deals and public market transactions

Tax insurance: impact of the ruling and practical go-forward considerations

Strategic responses and practical pathways in navigating the post-ruling landscape



Headline Summary: Ruling calls into question offshore investment arrangements



The Structure

Typical multi-tiered PE structure, whereby a Fund used Mauritius Holding Companies to invest in a Singapore company (pre-2017), deriving value from India

The Transaction

Exit business by selling Singapore Shares with NIL Tax

The Ruling

The Indian Apex Court, based on Facts, **ruled against the Seller's Mauritius Tax residency**, citing effective control and management to be in US **and denied Mauritius tax treaty benefit**, basis prima facia evidence that the transaction was not lawful

The Court further ruled that treaty protection cannot shield transactions that lack commercial substance and are merely designed for tax avoidance

The Substance and Rationale Ruling



SUBSTANCE

Standard Test; accustomed to evaluate and prove substance - The “How of the transaction” + Look AT principle



RATIONALE

The Judicial introduction of the Rationale Principle, The “Why of the Transaction” + Look THROUGH principle



FACTS

Key FOCUS on the SPECIFICS – FACTS led CONCLUSION?



CONCLUSION

Once **factually** found that the unlisted equity shares were transferred pursuant to an **arrangement impermissible** under Law, the taxpayer is not entitled to treaty benefits. Transaction was designed **prima facie** for **tax avoidance**



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Case in Point – Detailed Facts**

Case in point - Key facts and matter at dispute [1/2]



Seller Facts

- Mauritius Seller held **GBL-1 license and TRC**
- Entities were **managed** by **Board** in Mauritius, minutes of board meetings maintained
 - **Board** comprised of three directors (2 local, 1 US director)
- **Operational aspects:**
 - **Local presence:** office premises with 2 employees; accounting records prepared and maintained in Mauritius
 - Principal **bank account in Mauritius; Authority with local director only upto a certain threshold**
 - **US Resident was declared the beneficial owner of Mauritius Co** in the application for GBL-1 license
 - **US Resident was the authorized signatory** for immediate shareholder companies and sole director controlling ultimate holding companies
 - **US based Investment Manager role documented**, no power to bind
- **Investment in Singapore company was the only investment held**

Case in point - Key facts and matter at dispute [2/2]



Tax claim by the Seller

- Tax Treaty benefit availed by Mauritius Co under India-Mauritius treaty for sale of S Co's shares, ***despite tax being triggered under domestic tax laws***
- ***Tax treaty claim based on interpretation of the current applicable treaty provisions*** and relying on past precedents and stated tax law provisions



Adjudication History

- **Nil Tax withholding application** made – Treaty eligibility denied
- **Authority for Advance Ruling** – Admission of application rejected citing prima facie tax avoidance
- **High Court** – Ruled in favor of the taxpayer



**Key nuances and legal principles
from Tiger Global ruling**

In summary – what the SC ruled?

The three -tier approach



Mauritius residency challenged

- **Effective Management and control** – prima facie **not in Mauritius**; **substance tested**
- **Historical Jurisprudence + CBDT circulars cannot override** subsequent amendments to treaty and domestic law
 - *Mere Holding of TRC not conclusive evidence*



GAAR – Principles applied

- Empowering tax authorities to determine residential status – Investigating **centre of management**
- **Rationale questioned**
- **Independent Analysis** of facts rather than reliance on TRC
- **Investments** are **Grandfathered** but **NOT Arrangements**



Judicial Anti-Abuse Rules

- Enshrined in Past Landmark judgements to question **Tax Evasions / colorable devices**
- **Intent reiterated**
- Where GAAR inapplicable, **JAAR can still apply**

The above used to pierce the structure and deny Treaty benefits where transaction lacks genuine commercial substance

Tax Residency Certificate

- A TRC is **mandatory but not decisive**
- It establishes ***prima facie* residence, not treaty entitlement**
- Considering statutory amendments made to the Act and introduction of GAAR, TRCs have **limited evidentiary role**
- **Past circulars and SC judgements** on TRC supremacy overridden
- Significant departure from previous view that TRCs served as presumptive proof of residence and beneficial ownership
- Apex Court held TRCs to be ***‘non-decisive, ambiguous and ambulatory, merely recording futuristic assertions without any independent verification’***
- Statutory authorities were entitled to “go behind TRC” in cases of tax avoidance

“After the amendment has come into effect, there can be no doubt whatsoever that a **TRC alone is not sufficient to avail the benefits** under the DTAA, and reliance upon earlier judgments dealing with circulars issued in the pre-amendment regime cannot ipso facto come to the aid of the respondents. Rather, the **facts will have to be independently analysed** to decide on the applicability of Chapter XA.”

**TRC necessary
but not sufficient for establishing residency**

Substance over legal form

- **Endorsed AAR’s approach** of examining **economic reality over legal form**
- **Upheld AAR’s findings, confined its review to question of law**
- Placed **substance at the centre** of treaty entitlement analysis
- Legal form answers “how” an entity exists, substance answers “why” and “how” it actually functions
- Granting treaty benefits to entities lacking substance would:
 - **Defeat the object** of the DTAA
 - Convert treaties into **tools for double non-taxation**

*“The commercial motive behind a transaction often reveals its true nature. In the present case, the respondents seek exemption from the Indian Income tax while, at the same time, contending that the transaction is also exempt under Mauritian law, which runs contrary to the spirit of the DTAA and presents a **strong case** for the Revenue to deny the benefit as such an **arrangement is impermissible.**”*

Bar for establishing substance significantly enhanced



Observations on GAAR

- Applicability of GAAR is determined by the **timing of the tax benefit, not date of investment**
- **Legacy investments** are no longer fully protected
- **GAAR grandfathering applies to “Investments” and not “Arrangements”**
- Where GAAR inapplicable, **JAAR can still apply**
- LOB clause in Tax treaties – protects against tax avoidance
- **Dual non-taxation** becomes a strong case for triggering anti-abuse provisions

*“The Revenue distinguishes between mere **“investments”** (which are grandfathered under Rule 10U for pre-2017 investments) and **“arrangements”** (which are not grandfathered if the transfer occurred post 01.04.2017). It was contended that even if the investment was made prior to 2017, the subsequent indirect transfer of shares post-2017 brings the transaction within GAAR scrutiny.”*

- **Multi-jurisdictional holding structures to explain rationale**
- **Pooling vehicles in tax friendly jurisdictions may face heightened scrutiny**



Indirect transfer

- Technical treaty protection under Article 13(4)
 - i. Person claiming qualifies as ‘Resident’
 - ii. Property directly held by such person
- Supreme Court observes **that Indirect sale of shares at that threshold does not fall within Article 13**
- Round tripping specifically called out
- AAR’s observation – **treaty never meant to cover cases of indirect transfer**

*“...it seems clear that for the benefit under Article 13(4), the person claiming treaty protection must not only qualify as a “resident” of the other State i.e., Mauritius, but also establish that the movable property or shares forming the subject matter of the transaction are directly held by such resident entity. Thus, an **indirect sale of shares would not, at the threshold, fall within the treaty protection contemplated under Article 13.**”*

*“Amendments to the DTAA were made through a Protocol signed on 10.05.2016. They were made for the purpose of **shutting the back door** that was available to residents of the Contracting Parties to completely evade taxation, and to **residents of foreign countries to have wrongful access** to tax advantages under the treaty through evasive practices such as treaty shopping, establishment of conduit structures, **round-tripping**, hybrid structures, shell companies, etc.”*

- **Ambiguity created on treaty protection for indirect transfers – “Abuse” vs “Genuine cases” vs “Intent”**
- **Technical arguments in non-abusive fact patterns?**



Tiger Global – Other key observations of the Apex Court [5/5]

Sovereign right to tax

- “Taxing an income arising out of its own country is an inherent Sovereign right to that country.
- Any application of filters or diffusers to this is a direct attack or threat to its sovereignty which can affect a Nation’s long-term interest”

Only Prima facie evidence?

- SC reference only to determine Prima facie Tax avoidance
- **Door open for conclusive evidence?**

Treaty interpretation & applicability

- **Intent of treaty** – prevent double tax not facilitate avoidance
- **Residual clause interplay** vis claiming treaty eligibility for indirect transfers, securities other than shares (ie debentures units etc)
- **Contemporaneous interpretation for applying beneficial circulars**



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**Impact on private deals and
public market transactions**

Potential Impact Areas

Treaty eligibility scrutiny intensifies, payer withholding bar increases and a number of transactions are impacted

Income streams Impacted

- **CGT position** on Direct + Indirect transfers
- **Cash extraction** - Dividends, Interest, Royalties
- **Higher “tax” diligence protocols** for income recipient/ Seller(s) - Practical approach for Listed Co transactions?

Instruments impacted

- **Shares** – Grandfathered investments; favorable treaty Jurisdictions
- **Debt/ Hybrid instruments** - NCDs, OCDs, CCDs
- **Units** of investment funds – AIFs, REITs, InvITs

Transactions impacted

- **Primary risk + Secondary risk** differ for on-market and private transactions
- Open offer trigger for control deals + take private transactions – Off-market acquisitions ~ WHT impact
- Share transfers as a run upto IPOs/ REITs/ InvITs – **Higher scrutiny** by Regulators/ Bankers

Other impact areas

- Global restructuring
- POEM positions to be revisited?





Tax insurance: Impact of the ruling and practical go-forward considerations

Tax insurance: impact of the ruling and practical go-forward considerations

1

Approach

Short term impact and a cautious approach, but medium-term continuity

2

Coverage

Litigation costs and ATP cover to watch out for – Pricing the initial litigation funding cost

3

Underwriting

Stricter. Increased focus on Group structure; Commercial rationale; Operational expenditure; Legal and beneficial ownership; Director's profile; Diversity of holdings

4

Pricing

Cost benefit analysis changes



**Strategic responses and
practical pathways in navigating
the post-ruling landscape**

Strategic responses and practical pathways in navigating the post-ruling landscape

Strategic responses

- **Impact Assessment for**
 - Matters under litigation
 - Deals undertaken in last 7 years
- **Strategic communication with Investor universe**
 - Directional discussions and facts distinguishment
 - Risk quantification - valuation impact?
 - Claw back provisions for past deals
- **Franchise/ Reputation risk assessment**

Practical Pathways

Go forward negotiations on live deals

- Enhanced factual analysis
- Impact on deal timelines

Risk mitigation Tools

- 197 certificate?
- Indemnities and fund guarantee
- Tax Insurance
- Holdbacks/ Actual WHT



Things to watch out for

- Impact of the judgment on the **Mauritius protocol** yet to be notified
- **Government's directional** policy stance



Q&A

Thank you!

- Kindly spare a minute to help us with your valuable feedback for today's session...
- For any queries, please feel free to write to us at intax@deloitte.com



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