Supreme Court Redefines Tax Treaty Protection: GAAR Trumps DTAA in Indirect Transfers

Brief Overview

1. In its landmark judgement[1] dated 15 January 2026 in the case of *Tiger Global International III Holdings and others*, the Honourable Supreme Court (**"SC"**) has set aside the Delhi High Court's ("**HC**") decision[2] dated 28 August 2024.

2. The SC upholding the ruling of the Authority of Advance Rulings ("AAR"), states that the arrangement proposed in the transaction under consideration was 'prima facie' for the avoidance of tax. Thereby, overturning the order of the Delhi High Court on this issue. Further, the SC also makes several observations regarding the applicability of the General Anti Avoidance Regulations ("**GAAR**"), sufficiency of a Tax Residency Certificate ("**TRC**") for the purpose of claiming tax treaty benefits under the India-Mauritius Double Taxation Avoidance Agreement (IM DTAA) especially for investments/ arrangements made prior to April 2017, etc.

Background and facts

3. In May 2018, Walmart announced its acquisition of Flipkart Singapore for USD 16bn. As part of this transaction, three Mauritius-based entities, viz. Tiger Global International II Holdings, Tiger Global International III Holdings, and Tiger Global International IV Holdings ("**Taxpayers**"), sold shares of Flipkart Singapore (**capital asset**/ s**hares**) to a Luxembourg entity for an aggregate consideration of approximately INR 131bn. These entities had acquired their shares between October 2011 to April 2015, which was before 1 April 2017, the date relevant for the grandfathering provision under Article 13(3A) of the IM DTAA.

4. The Taxpayers operated under a Category 1 Global Business License regulated by the Financial Services Commission of Mauritius and held a valid TRC issued by the Mauritius Revenue Authority. The Taxpayers engaged Tiger Global Management LLC (TGM) to provide services in connection with their investment activities, subject to oversight and final approval by the Taxpayers' Board of Directors.

5. The Taxpayers approached the Indian Revenue Authority ("**IRA**") seeking a nil withholding certificate under section 197 of the Income-tax Act, 1961 ("**ITA**"), contending that the capital gains arising from the transfer of the shares were exempt under the DTAA. It was argued that the shares were acquired prior to 1 April 2017 and thus were grandfathered under Article 13(3A) of the DTAA.

6. The IRA rejected the application and directed the Buyer of the shares to withhold tax at 10%, reasoning that the Taxpayers lacked independent control and management, which was allegedly exercised by their ultimate shareholder i.e., TGM , a USA based entity. The IRA further contended that the Taxpayers were mere conduits created to exploit DTAA benefits.

7. The Taxpayers filed applications before the AAR in February 2019 seeking an advance ruling on the taxability of the transaction. The Taxpayers contended that they were bona fide tax residents of Mauritius, holding valid TRCs, and that the transaction was a genuine commercial exit. They also emphasized that Article 13(3A) of the IM DTAA exempted gains arising on transfer of shares acquired before 1 April 2017 and that the beneficial ownership concepts were irrelevant for the 'Capital Gains' Article under the IM DTAA.

8. The IRA, on the other hand, contended that the Taxpayers were "see-through entities" with no real substance in Mauritius. The IRA referred to the board minutes and banking arrangements to argue that the 'head and brain' of the Taxpayers was outside Mauritius. They also asserted that
   - the real control rested with a Representative of the ultimate shareholder;
   - the funds originated from the USA, making the arrangement a preordained tax avoidance device.
   - IM DTAA exemption was intended only for shares of Indian companies, not foreign companies like Flipkart Singapore.

[1] C.A. No. 000264 / 2026 Registered on 15-01-2026

[2] [TS-624-HC-2024(DEL)]

9. The AAR[3] rejected the applications at the admission stage applying the clause (iii) of proviso to section 245R(2)[4] of the Act on the basis that the transaction was *prima facie* designed for avoidance of tax. The AAR *inter alia* held the following:
   - The Taxpayers were conduit entities, their real control and management lay in the USA, and the arrangement lacked commercial substance.
   - Grandfathering benefit under Article 13(3A) of the IM DTAA did not extend to shares of a Singapore company, even if those shares derived substantial value from assets located in India.
   - The Taxpayers had no other investments and were set up solely to avail IM DTAA benefits, thereby failing the "look at" test laid down in the SC ruling of Vodafone International Holdings B.V[5]. In the said Ruling, it has been iterated that IRA is entitled to examine a transaction as a whole and disregard an interposed Mauritian entity if found to be a device, taxing the underlying real transaction instead.

10. The Taxpayers challenged the AAR decision before the **HC** through writ petitions[6], taking the following key arguments:
   - AAR erred in disregarding the TRCs, which were conclusive evidence of residence under settled law.
   - AAR erred in importing concepts of beneficial ownership into Article 13 of the IM DTAA, which does not contemplate such a requirement.
   - The transaction was a genuine commercial exit and that the IRA could not impose additional conditions beyond those stipulated in the IM DTAA. Therefore, the AAR cannot reject the application absent a clear evidence of premediated tax avoidance.

11. The IRA reiterated their stance that the Taxpayers were shell companies lacking economic substance, that GAAR principles applied, and that the IM DTAA did not cover indirect transfers of shares of foreign companies.

HC's order

12. The HC set aside the AAR's ruling and also rendered its findings on merits of the case, which are summarized below:
   - TRC issued by a contracting state is sacrosanct unless fraud or sham is established following the SC decision in the case of Azadi Bachao Andolan[7], which the IRA had failed to prove.
   - Beneficial ownership concepts cannot be invoked for Capital Gains under Article 13 of the IM DTAA
   - Grandfathering provision applied to shares acquired before 1 April 2017, irrespective of whether the company was incorporated in India or abroad.
   - IRA cannot manufacture additional eligibility conditions beyond the Limitation of Benefits ("**LoB**") clause in the DTAA.
   - GAAR provisions do not override DTAA protections, absent illegality or abuse.

13. The IRA challenged the HC order before the SC[8], which was heard in March 2025 and disposed of by the SC vide order dated 15 January 2026. **The SC has upheld the AAR's decision and set aside the HC order.** Thereby, reversing the well settled judicial principle in the context of investments made prior to 2017, that TRC issued by the overseas revenue authorities suffices tax residency. The SC has also made observations on the long-standing debate around DTAA eligibility in respect of grandfathered shares and indirect share transfer.

[3] [2020] 116 taxmann.com 878 (AAR - New Delhi)

[4] This clause states that the AAR shall not allow an application where the question *inter alia* raised in the application relates to a transaction or issue which is designed prima facie for the avoidance of income tax.

[5] [(2012) 6 SCC 613]

[6] W.P.(C) Nos. 6764, 6765 and 6766 of 2020 before

[7] (2004) 10 SCC 1

[8] Civil Appeal No. 262, 263 and 264 of 2026

Key principles emerging from the SC ruling

The key principles emerging from the SC's detailed ruling are indicated below.

1. **AAR Empowered to Reject Applications on *prima facie* Tax Avoidance Grounds:** Where initial examination of the documents indicate that an arrangement is structured for tax avoidance, the AAR is empowered to dismiss the application on grounds of maintainability, without entering into adjudication on the merits.

2. **TRC is Necessary but not Sufficient; Authorities can 'look behind it':** A TRC is an eligibility document under the Act to claim DTAA benefits. However, pursuant to the amendments to section 90 and the introduction of GAAR, TRC alone does not establish residency or beneficial entitlement. In potential abuse cases involving treaty abuse of conduit structures, the IRA can deny DTAA benefits. The same would hold true even for shares which are Grandfathered.

3. **GAAR overrides DTAA – Focuses on Tax Benefits, not Investment Timing:** GAAR applies to any arrangement yielding a tax benefit after 1 April 2017, even if the investment predates that date. Grandfathering under the DTAA safeguards genuine investments but not abusive structures. Rule 10U of the Income-tax Rules, 1962 ensures that scrutiny focuses on the arrangement producing the tax benefit, rather than the timing of the investment.

4. **Domestic Source Rule Controls Indirect Transfers in Abuse Cases:** Indirect transfer provisions covered under section 9 of the Act for taxing transactions where underlying value comes from Indian assets would have primacy over DTAA relief if anti-abuse provisions apply.

5. **Effective Management Determines Company's Residency:** If real control and decision-making occur outside the claimed country of residence, Tax Treaty entitlement fails. The SC has emphasized that mere incorporation or formal compliance cannot substitute genuine residence.

6. **Burden of Proof on the Taxpayer to Negate Impermissible Avoidance Arrangement:** The SC reiterated that GAAR provisions provide that Impermissible Avoidance Arrangement is presumed where facts indicate design for tax benefit. The taxpayer must rebut this presumption with strong evidence of bona fide commercial purpose.

7. **Grandfathering and Limitation of Benefits Limited to Direct Transfers**: The SC clarified that Article 13(3A) of the IM DTAA, which provides grandfathering and the related LOB clause apply only to direct transfers of Indian shares. Indirect transfers fall under the residuary Article 13(4) of the IM DTAA and therefore do not enjoy LOB or grandfathering protection.

8. **Judicial Anti Avoidance Rules ("JAAR") Exposure, Despite GAAR Non-Applicability:** The SC clarifies that with respect to certain arrangements even if one could technically argue that GAAR does not apply, the provisions under JAAR could still apply.

A&M key takeaways

In light of the SC Ruling, businesses and investors must recalibrate tax strategies and risk frameworks. The Ruling's impact extends beyond the immediate parties, influencing fund structuring, exit planning, and dispute management across the foreign investment ecosystem and even to shares acquired prior to 2017. The following strategic takeaways merit attention:

1. **Heightened GAAR Risk for Investment Companies:** Investment companies/ funds using multi-jurisdictional holding structures may need to assess the impact of this Ruling on their structures. Further, structures lacking commercial substance or centralized control in the claimed jurisdiction may be vulnerable. Likewise, pooling vehicles set up in tax friendly jurisdictions may face heightened scrutiny and litigation. In effect, both strategic and passive investments routed through jurisdictions offering preferential tax rates on capital gains, interest and dividends under DTAA provisions are expected to attract an even stricter scrutiny, especially under GAAR.

   PE/ VC Funds, pooling vehicles and strategic investors should therefore proactively review

governance, ensure board independence and commercial and operational substance in Tax Treaty jurisdictions.

2. **Restructuring and Pre-Exit Planning Are Critical:** Any restructuring or pre-exit planning must now factor GAAR and substance tests. Simply relying on TRCs or grandfathering under DTAAs would no longer be sufficient. Teams should incorporate tax diligence early in the transaction lifecycle and consider alternative routes (e.g., onshore pooling vehicles or tax-efficient jurisdictions with robust substance). While Principal Purpose Test ("**PPT**") was not discussed in the subject Ruling, PPT evaluation is also critical.

3. **Open Cases and Litigation Strategy:** For ongoing disputes involving indirect transfers or DTAA claims, the Ruling establishes a strong precedent for tax authorities. Taxpayers should therefore reassess litigation positions, particularly where evidence of control and management is weak. Greater scrutiny can be expected on 'head and brain' tests and board-level decision-making.

4. **Deal Insurance and Risk Allocation:** In M&A transactions, tax risk allocation is set to become a critical focus area. Insurance providers are likely to tighten coverage for treaty-based capital gains exemptions, particularly in indirect transfer scenarios. Buyers should negotiate robust indemnities and explore appropriate mechanisms to mitigate potential exposure.

In essence, the SC has drawn a clear line whereby tax outcomes will now be driven by substance, intent, and timing. The formal compliance structures and TRCs are no longer safe harbours. For PE/VC funds as well as strategic investors, proactive planning is essential prior to any transaction to stay ahead in this evolving tax landscape.