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## Achieving Alpha

Understanding the **Tiger Global Ruling**  
and its broader implications



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[0:05-1:02]

**Darryl Kinneally:** Hello everyone, and welcome today to our podcast. My name is Darryl Kinneally. I'm an MD based in our Singapore tax practice. And today I'm joined by my fellow tax MD, Vishal Hakani, who is based in India. Today, we're going to be discussing a recent tax case in India.

And India does have a history of producing tax cases that make the rest of the world sit up and take notice.

The Vodafone case from quite some years ago now is a good example, particularly, when it comes to offshore transactions linked to India.

We now, most recently have another potentially far-reaching decision from the Supreme Court, and it's commonly referred to as the Tiger Global case. It also involves offshore structures.

But the implications could be even broader this time. For listeners who may not be tax experts, Vishal, can you explain what an "indirect share transfer" means in the Indian tax context?

[1:03-1:44]

**Vishal Hakani:** Sure, Darryl. I think the easiest way to think about this is, this more of a look through tax.

Normally if you sell shares in an Indian company, India taxes the gain. But many foreign investors hold Indian businesses through offshore companies, for example, a Singapore holding company, in this case.

India's law says that if more than 50% of the value of that offshore company comes from Indian assets, then the selling offshore company is treated as selling Indian assets. In this case, India claims it's right to tax the gain even though the sale happens outside India. That look through idea sits at the heart of the Tiger Global case.

[1:45-1:49]

**Darryl Kinneally:** And Vishal, with that background, what actually happened in the Tiger Global case?

[1:50-2:47]

**Vishal Hakani:** I think this case arose from Tiger Global exit from Flipkart in 2018. The investment was held by Tiger Global under a Singapore company. That Singapore company in turn was owned by a Mauritius entity.

When the exit happened, the sellers argued India shouldn't tax the gain because the sellers were based in Mauritius and they were entitled to protection under India-Mauritius tax treaty.

However, the tax department disagreed with the same. Their view was the Mauritius companies does not reveal that they have real commercial substance and were mainly being used to access or abuse the treaty benefits.

The Delhi High Court initially agreed with the view suggested by the taxpayers, but the tax department was aggrieved by it and appealed before the Supreme Court, and Supreme Court overturned that decision. And as a result, India was allowed to tax the gain which was very significant in this case.

[2:48-2:54]

**Darryl Kinneally:** Right. And I guess Vishal, before we move on, can you briefly explain how this dispute arose in practical terms?

[2:55-3:29]

**Vishal Hakani:** Yeah, I think that's very important. Because of the facts of the case..clearly were like..before the transaction actually closed, the seller applies to the Indian tax authorities for a nil withholding tax certificate.

This matters because, without it, the buyer would have been required to withhold tax before paying the consideration to the sellers.

The sellers were effectively saying that they were entitled to treaty protection, and so no Indian tax should be withheld. However, the tax authorities disagreed, and this disagreement itself led to a trigger to the litigation in this case.

[3:30-3:35]

**Darryl Kinneally:** Understand. So why is this really being described as such an important decision?

[3:36-3:39]

**Vishal Hakani:** It is because it changes the way how the structures are judged or perceived. In the past, having the right paperwork itself carried a lot of weight. This ruling makes it clear that paperwork alone is not enough. The focus has really shifted as to why the structure exists and where the real decisions are actually made in first place. That's a meaningful change in approach, especially from a foreign investors' standpoint.

[4:00-4:10]

**Darryl Kinneally:** It's interesting. I mean at the first instance, the High Court placed a lot of importance on the tax residency certificate, which I guess has historically been the position. How did the Supreme Court view that?

[4:11-4:29]

**Vishal Hakani:** The Supreme Court said the certificate is still important. It's only a starting point. It allows you to claim the treaty benefit, but it does not guarantee them.

If the tax authorities believe the company exists mainly to avoid tax, they can look beyond the certificate. And it did clearly deny those tax benefits. So the certificate opens the door, but it does not lock you behind it.

[4:34-4:46]

**Darryl Kinneally:** Understood. So, I mean many, you know, many investors have relied on earlier Supreme Court decisions when setting up these types of structures. Has that position changed?

[4:47-5:11]

**Vishal Hakani:** Yes, it has in some way. Those earlier decisions were decided before India introduced stronger anti avoidance rules. The Supreme Court is now saying that we are in a different legal environment.

Today's substance matters much more than form. While those older decisions still exist, but they don't carry the same practical comfort or weight as they once did.

[5:11-5:21]

**Darryl Kinneally:** Yeah. So clearly some uncertainty as a result of that. I mean, a lot of a lot of people have assumed that older investments were protected. Is that assumption still safe or not?

[5:22-5:38]

**Vishal Hakani:** No, not necessarily. The court said even the older structures can be challenged if they were mainly set up to obtain the tax benefits, and especially if they don't have a real commercial purpose. Being an old older investment does not orderly make a structure safe.

[5:39-5:47]

**Darryl Kinneally:** And the judgement has focused quite heavily on where decisions are actually made and actually taken. Why was that considered to be so important?

[5:48-6:12]

**Vishal Hakani:** The court has assessed whether the Mauritius companies were generally operating out there, whether they have real substance. In this case, the court felt that important decisions were being made outside of Mauritius and that the board in Mauritius does not have really the control over the investment. And that undermined the argument that these companies were generally based in Mauritius.

Essentially, the head and brain were not sitting in Mauritius.

[6:13-6:25]

**Darryl Kinneally:** Right. Yeah, okay. I mean, it's an old common law concept, concept around residency that they've used there. I mean, if, if a company technically meets treaty conditions, does that still help?

[6:26-6:48]

**Vishal Hakani:** It helps, but it no longer is an end of conversation.

The court also made it absolutely clear that even if a company meets formal treaty conditions such as expenditure test or an eligibility threshold, the tax authorities do have a power to step back and ask whether the overall structure exists mainly for tax reasons.

And if it does, they are in their power to deny the tax treaty benefits.

[6:49-7:18]

**Darryl Kinneally:** I mean, there's also some discussion in the decision about income not being taxed anywhere. You know, sitting here in Singapore, that's a potential issue from my perspective.

And as much as, if we were talking about circumstances involving a Singapore company, given that Singapore doesn't tax capital gains, you know, we might end up with a situation of non-taxation in, in any of the jurisdictions.

You know, why is why was it considered such an issue in this case? Where, where is the court coming from?

[7:19-8:03]

**Vishal Hakani:** So, I think this is one of the most key and controversial observation which was made by Supreme Court in this ruling. Clearly, this is also in some form or manner contradictory to the earlier ruling of Supreme Court in the case of Azadi Bachao.

What this ruling or observation does is, it gives an handle to the tax authorities to go after or deny the tax treaty benefit especially if it is, especially if it results into double non-taxation.

Having said this, we do expect some controversy around this aspect in future ruling, especially the one which is one before the Supreme Court and is expected to be scheduled in couple of months' time in the case of Blackstone.

[8:04-8:16]

**Darryl Kinneally:** Right. Yeah. I mean it's going to be interesting to see, see what decision comes out of that. What, what does this decision mean in practice for structures using Mauritius? Is it over?

[8:17-8:43]

**Vishal Hakani:** Yeah, I think Mauritius, I think, using Mauritius without real operations is now very risky. In fact, to my mind, Mauritius is dead. Having said that, where there are genuine business activities, real people, real decision making in Mauritius, Mauritius can still work.

But the key issue here is substance. I would say, I would say substance, yeah, I would say substance is king.

[8:44-9:38]

**Darryl Kinneally:** Yeah, it's interesting. This, this case has made me think back to many years ago.

I used to be the tax lead in a corporate based in Hong Kong and we, and this is quite some time ago, but we used to use Mauritius as a holding jurisdiction into several countries including India.

And even at that time, you know, I was a bit concerned about residency and substance.

So we had two onshore directors, I think from a law firm, and I was the third director. And I, I travelled to Mauritius once a year for board meetings, which wasn't a particular hardship given how nice a location Mauritius is.

But in today's environment, on those limited sorts of facts with, you know, a couple of directors from a law firm and you know, director from the actual group travelling in, you know, once a year to have board meetings.

Would you agree that approach likely is no longer sufficient to access treaty benefits?

[9:39-9:56]

**Vishal Hakani:** Clearly not. I think, Darryl, we really need to have a lot more than what's been contemplated, right. What we are talking about is real world substance.

That's what is expected. You need qualified directors sitting out there and actually making decisions.

[9:57-10:14]

**Darryl Kinneally:** Yeah, which I mean, for many, for many groups, that's likely not the case in in Mauritius.

I mean, just thinking about that though, you know, in contrasting that to Singapore, many funds use Singapore as a genuine investment platform. How do you see this applying in those sorts of circumstances?

[10:15-11:11]

**Vishal Hakani:** No, clearly, I think...first of all, it's very important to understand why Singapore is part of this discussion.

Historically, Singapore capital gain protection, that treaty with India, was closely linked to the Mauritius tax treaty.

So, when the court tightens the rule around treaty access or substance in the Mauritius context, those principles naturally spill over into Singapore structures. Having said that, Singapore structures are in a stronger position because usually there is lot of presence and management out there.

I've seen many situations where often Singapore as a platform, right. They use it for pooling purposes, they use it for leverage, they use it as a geography to invest in multiple geographies in the region or sometimes also as a co-investment structures.

So, if you have some of these things, it does help more credibility to those of a platform and your ability to prove substance only increases.

[11:12-11:19]

**Darryl Kinneally:** I guess though, the risk is that this ruling could be applied too broadly at the working level.

[11:20-11:50]

**Vishal Hakani:** I would definitely agree with that. While the decision is fact specific, there is always a risk at an operating level, tax authorities may try and stretch its application.

That's why having a clear substance and strong documentation is more important than ever. This ruling, while it's very fact specific, but where an investor can clearly show general

commercial activity, substance and decision making in the treaty country, treaty protection ideally should be still possible.

[11:51-11:59]

**Darryl Kinneally:** And just to clarify, how relevant is this decision in connection with investments made after 2017?

[12:00-13:00]

**Vishal Hakani:** Darryl, I would put it in three baskets.

Essentially anything which has been acquired post 2017, this doesn't matter to some extent because essentially as you are aware Mauritius tax, Mauritius-Singapore tax treaties were renegotiated in March 2017.

So any investment, any direct investment post 2017, if you exit now, you pay tax to an extent this judgement is a limited application. But wherein this comes in, the moment you have any grandfather investment there - This judgement comes into play; the moment you try and take treaty benefit in the context of indirect transfer - this decision comes in play.

The moment you try and take treaty benefit in the context of securities other than shares like **rate invert or debt securities**, this comes in play.

And one more thing which I can think of is the moment you try and take treaty benefit in the context of lower withholding rates, in the context of dividend interest, royalty, etcetera - this decision will have a relevance now.

[13:01-13:08]

**Darryl Kinneally:** Now, I appreciate this decision is fairly recent, but what impact are you seeing it already having on transactions that are happening today?

[13:09-13:54]

**Vishal Hakani:** I think, deal making, will certainly take longer, because risk is being examined very closely. What people are talking about what was the norm, right?

The norm was to expect a robust strong opinion and get your covers, you know get yourself covered through an insurance is no more a market or no more standard now. Especially in the context of Mauritius, people will need to demonstrate strong substance, and it also has to come out very clearly in the opinion, and the insurer should also get comfortable underwriting such risk, right.

So, this is something which is under an early stage but we would expect this to get bit tighter as we go ahead.

[13:55-14:02]

**Darryl Kinneally:** And is there any concern that, you know, the tax authorities might open up past transactions as a result of this?

[14:03-14:21]

**Vishal Hakani:** Clearly, especially the tax authority, what we are hearing is they have already sent notices to a dozen funds, right, where the tax only is already open.

So, this decision gives the tax department a stronger basis to question the past exits, particularly where the substance was weak.

[14:22-14:29]

**Darryl Kinneally:** And I guess, I mean, investors are obviously having to take a look at this from a, from a practical perspective, how are they attempting to manage this risk?

[14:31-15:01]

**Vishal Hakani:** I think, I think people are, people will get conservative. They won't be absolutely sure before they give any kind of tax treaty benefit. And even if they're securing an insurance, I, I think they should expect the insurance premium to go up.

They should expect the ATP may not be a standard, and at the same time there's a lot of negotiation which may happen around the withholding aspect the moment you are negotiating a deal.

[15:02-15:17]

**Darryl Kinneally:** Yeah, I guess, I mean, given all of this, what practical steps do you think companies or funds can take? Restructuring can be expensive and have tax leakage associated with it and building substance isn't always easy or practical either.

[15:18-15:42]

**Vishal Hakani:** That's, that's absolutely right.

I think, Darryl, what matters is the starting point should essentially be how the structure really works, why it has been set up in first place, right? Having said this, company should definitely review where the decisions are made, how the board actually functions, and whether the structure generally makes commercial sense. Better documentation and earlier planning can make a big difference.

[15:43-15:55]

**Darryl Kinneally:** Yeah. So, I mean, any companies that are or funds that are planning exits now you'd be suggesting that they, you know, review those structures well in advance.

[15:56-16:07]

**Vishal Hakani:** Yeah, the minimum they should definitely review the structures, ideally couple of years well in advance and potentially factor the tax exposure, if any, in the pricing and negotiation as well.

[16:08-16:12]

**Darryl Kinneally:** So at a high level, Vishal, you know, can treaty benefits still be claimed going forward?

[16:13-16:20]

**Vishal Hakani:** Yes, they can definitely be claimed, but the burden is now on the taxpayer to prove that the structure is genuine and it's commercially driven.

[16:21-16:31]

**Darryl Kinneally:** Yeah, understood. I think that's, I think that's come through quite clear.

But before we wrap up though, do you see this decision having any broader global implications?

[16:32-16:54]

**Vishal Hakani:** Yeah, we have seen this before as well, right, especially in Vodafone case. The other countries generally watch, how India approaches some of these things, right.

And I would not be surprised if tax authorities around the world look into this decision and try interpreting in the context of their own rules and structures.

[16:55-17:02]

**Darryl Kinneally:** To wrap up, Vishal, if you had to describe the post Tiger Global Tax landscaping in one word, what would that be?

[17:04-17:22]

**Vishal Hakani:** Subjectivity, I guess. Because we have moved from a rule-based system where having the right certificate was often enough, to a principle-based system, where the intent is under the microscope.

Documentation is no longer just about compliance; it's more about proving your story or narrative as the case may be.

[17:23-17:25]

**Darryl Kinneally:** And any final thoughts for investors?

[17:26-17:42]

**Vishal Hakani:** I think the decision in itself is not as any kind of signal to stop investing in India. I think it's clearly a signal to build something stronger, more credible structures.

And if the story behind your structure is commercial and genuine, you, you should be good.

[17:41-17:52]

**Darryl Kinneally:** I'm not surprised you said it's not, it's a decision. It isn't a decision to stop investing in India. No surprise there.

But Vishal, thank you and thanks to everybody for listening.

[17:53-17:55]

**Vishal Hakani:** Thank you. Thank you, Darryl for having me.