
[2026] 182 taxmann.com 709 (Article)

[2026] 182 taxmann.com 709 (Article)©Date of Publishing: **January 28, 2026****Tiger Global Case Judgment: Treaty Abuse, Commercial Substance and Tax Uncertainty****GOPAL NATHANI**

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I. Introduction

In Civil Appeal No. 262 of 2026, dated 15 January 2026 in *Authority for Advance Rulings (Income Tax) & Ors. v. Tiger Global International II Holdings*, the Supreme Court examined the taxability of gains arising from the indirect transfer of Indian business interests through offshore entities in 2018. The decision has significant ramifications for foreign investors relying on Double Taxation Avoidance Agreements (DTAAs), particularly the India–Mauritius treaty. The ruling revisits the delicate balance between preventing treaty abuse and ensuring tax certainty—an equilibrium earlier emphasised by the Court in *Vodafone International Holdings B.V. v. Union of India* [(2012) 6 SCC 613]

II. Factual Background, Transaction Structure and question before advance ruling authority

The case concerned three companies incorporated in Mauritius which held indirect interests in Indian entities through a Singapore intermediary. The Mauritius entities sold their shareholding in Flipkart Private Limited, Singapore to Fit Holdings S.A.R.L., a Luxembourg entity. The transaction resulted in capital gains, and the applicants sought a ruling on whether such gains were taxable in India under the Income-tax Act, 1961 read with the India–Mauritius DTAA with the following precise question:-

1. Whether, on the facts and in the circumstances of the case, gains arising to the Applicants (a private company incorporated in Mauritius) from the sale of shares held by the Applicants in Flipkart Private Limited (a private company incorporated in Singapore) to Fit Holdings S.A.R.L. (a company incorporated in Luxembourg) would be chargeable to tax in India under the Income-tax Act, 1961 read with the Double Taxation Avoidance Agreement between India and Mauritius?

III. Findings of the Authority for Advance Rulings

Upon examining the capital structure and transactional arrangement, the AAR concluded that the Mauritius entities were mere shell or conduit companies. It held that the structuring of the transaction lacked commercial substance and was designed primarily to derive undue benefits under the DTAA. Invoking clause (iii) of the proviso to section 245R(2) of the Act, the AAR rejected the application on the ground that the transaction involved prima facie tax avoidance and therefore could not be the subject of an advance ruling.

IV. Delhi High Court Decision

In a detailed 224-page judgment reported in *Tiger Global International III Holdings v. Authority for Advance Rulings* ((2024) 165 Taxmann.com 850 (Del)), the Delhi High Court undertook an exhaustive examination of the factual and legal aspects of the case. It analysed all aspects of the transactions and holdings of investments be it the promoter structure, management structure, pumping of money for investments, capital contributions, the investments pattern, the financial statements both assets and liabilities, expenditure thresholds, the DTAA subjects, the protocols, interplay of JAAR and GAAR perplexities along with reference to judicial trends. The judgement is orchestrated by Justice Yashwant Varma who is currently facing impeachment motion in the Parliament. The High Court studied the financial statements in great depth. Their findings are not controverted by the revenue at any stage. On their examination of financial statements, the following facts are appreciated by the Court: (Paragraph 211)

'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.'

Article 27A defines what is a shell entity to limit the benefits under the treaty. Each of the three Mauritius entities did overcome the limitations which fact is not in dispute and therefore establish bona fide business activities in the residence state. Relying heavily on the financial statements and undisputed factual material, the High Court held that the Mauritius entities satisfied the Limitation of Benefits (LOB) conditions under Article 27A of the DTAA. The Court noted that the entities had substantial assets, liabilities, shareholder equity, and operational expenditure well above treaty thresholds. Importantly, the Revenue did not controvert these findings at any stage. The High Court concluded that the entities possessed sufficient economic substance and were not incorporated solely for treaty abuse. Accordingly, it allowed the application, holding that the impugned transaction was not designed for tax avoidance.

V. Supreme Court Judgment

The Supreme Court, while acknowledging the principles laid down in *Vodafone*, adopted a markedly different approach. In paragraph 49 of its judgment, the Court emphasised that commercial intent is central to determining whether a transaction constitutes an artificial arrangement. It held that where an assessee seeks exemption both in India and in the country of residence, such an arrangement may undermine the spirit of the DTAA. Although the Court did not expressly dispute the factual findings recorded by the Delhi High Court regarding economic substance, it held that the presumption of tax avoidance under section 96(2) of the Act had not been rebutted. The Court observed that only if the assessee is liable to tax in Mauritius could treaty benefits be claimed. Notably, the judgment refers to "Article 13(c)" of the DTAA, a provision that does not explicitly exist either in the treaty or in the 2016 Protocol, raising questions of interpretative clarity. The Court ultimately concluded that the arrangement amounted to impermissible tax avoidance and that the Revenue was entitled to deny treaty benefits.

The following is the text of Paragraph 49:

49. The *Vodafone* judgment provides crucial insight into this issue. It implies that business intent behind a transaction serves as strong evidence of whether the transaction is deceptive or an artificial arrangement. 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. Here again, it may be stated that this stand would again strengthen the reasoning that whether the sale is of shares of an Indian company then, will not be germane for

consideration because only if the assessee is liable to pay tax in Mauritius, he can derive benefit under the provision under Article 13(c) of the DTAA as amended. Section 96(2) places the onus on the taxpayer to disprove the presumption of tax avoidance. This represents a significant shift in the burden of proof. In the case at hand, there is clear and convincing prima facie evidence to demonstrate that the arrangement was designed with the sole intent of evading tax, and the assessee has failed to furnish sufficient material to rebut this presumption. Though it is permissible in law for an assessee to plan his transaction so as to avoid the levy of tax, the mechanism must be permissible and in conformity with the parameters contemplated under the provisions of the Act, rules, or notifications. Once the mechanism is found to be illegal or sham, it ceases to be "a permissible avoidance" and becomes "an impermissible avoidance" or "evasion". The Revenue is, therefore, entitled to enquire into the transaction to determine whether the claim of the assessee for exemption is lawful.'

VI. What happened post 2018: A Missing Link

An important factual aspect remains unaddressed in the judgment—namely, the post-2018 conduct of the Mauritius entities following the sale of Flipkart shares. Whether these entities continued business operations or were subsequently dissolved could have provided additional insight into the true commercial intent behind their incorporation. The absence of such analysis leaves an evidentiary gap in assessing the alleged treaty abuse.

VII. Tax Sovereignty

In a concurring opinion, Justice Pardiwala emphasised the importance of tax sovereignty and the need for a proactive approach in addressing international tax avoidance. Justice Pardiwala went slightly forward and prescribed a more proactive approach to tackle tax evasion by international investors. He laid down certain key yardsticks some or most of which may have been practiced by the Government. He demanded a more proactive approach to tackle tax evasion events. When we talk of tax sovereignty it is also important for the Government to black list foreign investors who resort to treaty abuse and evade taxes. Also recovery of taxes subsequently upon unearthing any tax abuse in future may be extremely difficult and may make the whole action costs ineffective. However, any such approach or action must operate within a predictable and principled framework to avoid deterring bona fide foreign investment.

VIII. Conclusion

The Tiger Global decision once again brings tax certainty into sharp focus—a concern eloquently articulated by the Supreme Court itself in Vodafone. Certainty and stability form the foundation of any credible fiscal system, particularly in the context of cross-border investments. While combating impermissible avoidance is undoubtedly legitimate, abrupt shifts in judicial interpretation risk unsettling long-settled understandings of treaty law. The Apex Court therein left certain advice to Government in Paragraph 91 as under:

"91. FDI flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. Legal doctrines like "Limitation of Benefits" and "look through" are matters of policy. It is for the Government of the day to have them incorporated in the Treaties and in the laws so as to avoid conflicting views. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws. As stated above, the Hutchison structure has existed since 1994. According to the details submitted on behalf of the appellant, we find that from 2002-03 to 2010-11 the Group has contributed an amount of `20,242 crores towards direct and indirect taxes on its business operations in India."

India continues to seek foreign capital while simultaneously expanding its treaty network. According to Ruchir Sharma, a prominent Indian-American investor, columnist, global strategist and Chairman of Rockefeller International and founder of Breakout Capital India need to import more foreign capital so as not to risk its long-term growth objects. India is also signing various trade and investment deals with various countries. In this context, the Tiger Global ruling may raise concerns among foreign investors regarding the predictability of India's international tax regime. The Government's initial assurance that similar cases will not be reopened offers some comfort. Nonetheless, greater legislative clarity or reconsideration by a larger bench may be desirable to restore confidence and coherence in this critical area of tax law.

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