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Newsflash - Supreme Court rules on GAAR, TRC and Treaty entitlement in Tiger Global–Flipkart case

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1.0 Background

After almost a year of keeping the ruling of Hon'ble Delhi High Court[1] on stay seeking time for additional consideration, the Supreme Court in the case of ***The Authority for Advance Rulings and Ors vs Tiger Global International II Holdings ('Tiger Global')***[2] held that **the** transaction of selling shares of Flipkart Private Limited, Singapore (Flipkart Singapore) by Tiger Global's Mauritius entities to Fit Holdings S.A.R.L, Luxembourg (Fit Holdings), was illegal, sham and constituted an "impermissible avoidance arrangement" lacking commercial substance. The transaction was designed solely with an intent to evade tax, thereby invoking the General Anti-Avoidance Rule (GAAR) and denying treaty benefits under the India - Mauritius Double Tax Avoidance Agreement ('DTAA' / 'Tax Treaty').

Ushering in the concept of tax sovereignty, this milestone verdict in India's jurisprudential history has swung the pendulum back in demonstrating real substance over form and emphasising that mere production of a Tax Residency Certificate (TRC) is not conclusive in establishing treaty eligibility and safeguarding an arrangement that lacks commercial rationale.

2.0 Facts of the Case

2.1 **Tiger Global International II Holdings, Tiger Global International III Holdings, and Tiger Global International IV Holdings** (collectively referred to as '***Tiger Global Mauritius Entities' or 'the Taxpayers'***), are private limited companies incorporated in year 2011 in Mauritius, holding Category 1 Global Business License ('GBL'), and regulated by the Financial Services Commission in Mauritius.

2.2 The Taxpayers were set up with the primary objective to undertake investment activities to earn long-term capital appreciation and investment income. The management of the business of the Taxpayers was vested in its Board of Directors (BOD), which had 3 directors (2 being Mauritian residents and 1 being a resident of the US). Further, bank accounts, accounting records along

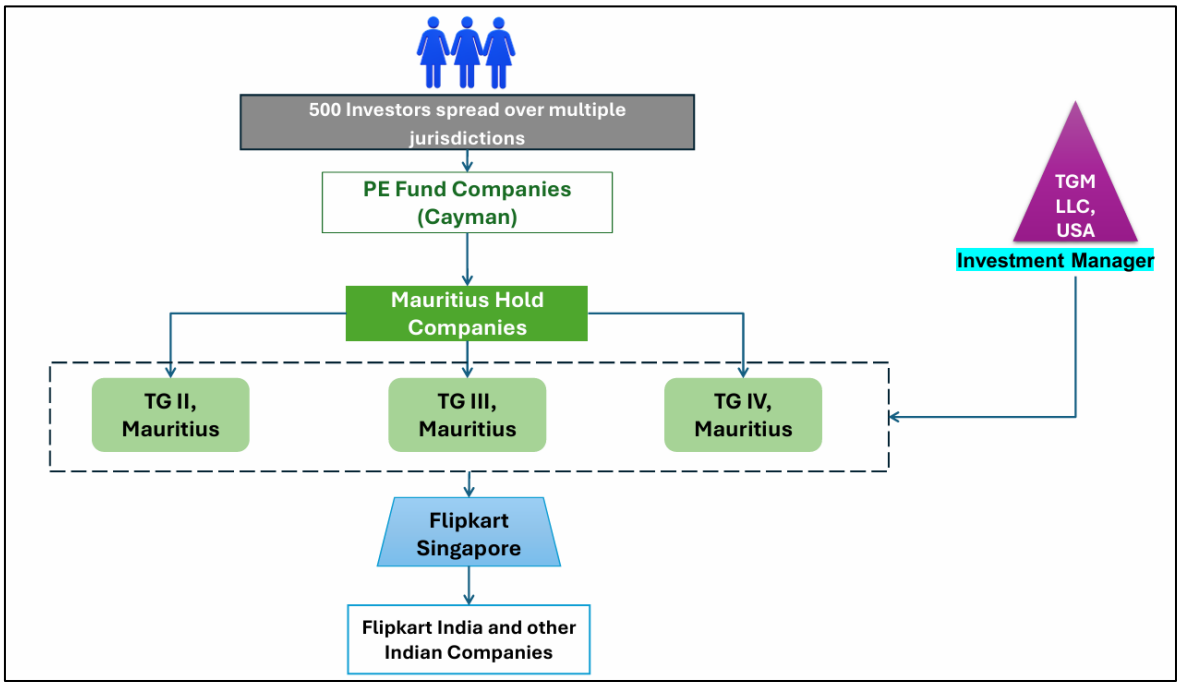
[1] *Tiger Global International III Holdings vs Authority for Advance Rulings (2024) (468 ITR 405) (Delhi High Court)*
[2] *The Authority for Advance Rulings and Ors vs Tiger Global International II Holdings - Civil Appeal No 262 of 2026 (SLP (C) No 2640 of 2025),*
The Authority for Advance Rulings and Ors vs Tiger Global International IV Holdings - Civil Appeal 263 of 2026 (SLP (C) No 2565 of 2025),
The Authority for Advance Rulings and Ors vs Tiger Global International III Holdings Civil Appeal No 264 of 2026 (SLP (C) No 5987 of 2025)

with the statutory financial statements were being maintained/prepared from Mauritius only. Also, the Taxpayers held a valid Permanent Account Number (PAN) issued by Indian tax authorities.

2.3 Since incorporation, the Taxpayers have had office space in Mauritius with 2 employees and have held valid TRC's issued by the Mauritius Revenue Authorities, thereby claiming to be tax residents of Mauritius under the laws of Mauritius and under the India - Mauritius tax treaty.

2.4 The immediate shareholders of Tiger Global were Mauritian companies whose shareholders in turn were private equity funds consisting of almost 500 investors across 30 jurisdictions around the globe. The Taxpayers engaged **Tiger Global Management LLC ('TGM US')**, a company incorporated in the US, to provide services with respect to their investment activities. TGM US or its affiliates at any point in time did not invest in the Taxpayers or in the private equity funds that had indirectly invested with them. Further, services rendered by TGM US were subject to review and approval of the BOD of the Taxpayers and in no manner were binding.

2.5 From 2011 to 2015, the Taxpayers held shares of Flipkart Singapore, which in turn had invested in multiple companies in India, thereby the value of shares was being derived substantially from assets located in India. In the year 2018, the Taxpayers transferred the shares held in Flipkart Singapore to Fit Holdings as part of a broader transaction involving the majority acquisition of Flipkart Singapore by Walmart Inc.



2.6 Prior to such share transfer, the Taxpayers approached the Indian Tax Authorities (ITA), seeking a nil withholding tax certificate under section 197 of the Income-tax Act, 1961 ('the Act'). However, the ITA denied tax treaty benefit alleging that the Taxpayers were not independent in their decision making relating to the purchase and sale of shares, and the real control did not vest in Mauritius rather than outside Mauritius. Consequently, withholding tax certificates in

respect of the sale of shares were issued prescribing tax deduction at rates ranging between 6.05% to 8.47%.

2.7 Aggrieved with the above, the Taxpayers approached the Authority for Advance Rulings ('AAR') under section 245Q(1) of the Act to determine whether capital gains arising from the sale of shares held in Flipkart Singapore would be chargeable to tax in India under the Act read with the India-Mauritius Tax Treaty. However, ***the AAR rejected the applications under section 245R(2)(iii) of the Act and held that the transaction lacked commercial substance and is prima facie designed for tax avoidance, with the Taxpayers being mere conduit companies aimed at deriving undue benefits under the tax treaty***

Challenging the above, the Taxpayers filed a writ petition before the Hon'ble Delhi High Court ('Delhi HC') and vide order dated 28 August 2024, ***the Delhi HC quashed the AAR's order and held that the Taxpayers were not mere conduit companies lacking economic substance and were entitled to treaty benefits with income not chargeable to tax in India.***

Snapshot of the observations of the AAR and Delhi HC are tabulated below -

Issue	AAR	Delhi High Court
Organizational Structure	• Taxpayers were part of TGM US and were held through its affiliates via a web of entities based in the Cayman Islands and Mauritius.	• TGM US acted only as an investment manager with no equity participation and was not the parent / holding company of the Taxpayers
'Head and Brain' Test	• Overall control and management of the Taxpayers did not lie with the BOD in Mauritius but in the USA • Mr. Charles P Coleman, based in the USA (connected with the Tiger Global Group as signatory / Director) was the sole decision maker, signing authority to bank accounts/ documents and was declared as the beneficial owner in the application for the GBL -1 filed before the relevant Mauritius Authorities, thereby making Mauritius entities act as '*mere puppets'.*	• Actual management and control vested in Mauritius, and just because Mr. Charles P Coleman is connected with the Tiger Global Group does not mean that the Taxpayers were acting as '*mere puppets'* and were not independent. • Board resolutions and Minutes to Board meetings reveal that all decision making was done by the BOD collectively, including the decision to make Mr. Charles P Coleman as an authorized signatory.

Issue	AAR	Delhi High Court
Economic substance	• No investment other than in shares of Flipkart Singapore was made by the Taxpayers, hence, the real intention behind obtaining TRC's was to avail treaty benefits. • Taxpayers were conduit entities, with no business operations nor any taxable revenue generated in India; hence, the transaction was a '*preordained arrangement*' designed for tax avoidance and hence, qualified as an 'arrangement' that lacked economic substance.	• Structured to operate as pooling vehicles for investments and being Category 1 GBL holders regulated by the Financial Services Commission in Mauritius, the Taxpayers do not lack economic substance. • Period of investment in shares for more than a decade, viewed in conjunction with the financial statements that reflected the shareholder's equity, liabilities, along with the expenditure incurred, revealed the real and continuous business activities of the Taxpayers. • Just because the Taxpayers are situated in Mauritius, and investments are being routed through Mauritius, it cannot result in a default adverse inference or raise a presumption of illegality or such an entity being a colourable device.
TRC and Circulars 682, Circular 789 read with past precedents[3]	• TRC would not constitute conclusive evidence. • Mere holding a TRC does not prevent an enquiry into a tax fraud by the Revenue authorities if suspected that the corporate structures come to be interposed as part of a colorable device	• TRC to be considered as sacrosanct and conclusive evidence to prove the bona fide status of the entity, and the Revenue authorities will not question or go behind the TRC. • Corporate veil can only be pierced when there is compelling evidence of tax fraud, a sham transaction, or complete absence of economic substance.

[3] *UOI vs Azadi Bachao Andolan (2003) 263 ITR 706 (SC) and Vodafone International Holdings BV vs UOI (2012) 341 ITR 1 (SC)*

Issue	AAR	Delhi High Court
India Mauritius Tax Treaty read with Protocol	• Capital Gains were derived from the sale of shares of a Singapore Company and not shares of an Indian Company, hence the benefit under the tax treaty cannot be availed and would not fall under the ambit of Article 13(3A)- Capital Gain	• The transaction of sale of shares would fall under the ambit of Article 13(3A) - Capital Gain, since the shares sold derived substantial value from underlying Indian assets, satisfying the test for indirect transfers. • Taxpayers have qualified the expenditure test stipulated in Article 27A - Limitation of Benefits (LOB) clause. Hence, the right to question the validity of the transaction remains erroneous, and the taxpayer cannot be said to be lacking in economic substance or that it was domiciled in Mauritius with a sole view of engaging in treaty abuse.

2.8 **Aggrieved by the decision of the Delhi HC, the Revenue preferred appeals before the Supreme Court (SC) by filing a Special Leave Petition wherein the issue for consideration were-**

i. Whether the AAR was correct in *prima facie* characterizing the transaction, being the sale of shares of Singapore Company (Flipkart Singapore), deriving substantial value from Indian assets by a Mauritian company (the Taxpayers) controlled by a US parent (TGM US), as an arrangement designed for avoidance of tax; and

ii. Consequently, whether such a transaction could be examined to determine the taxability of the resultant capital gains in India under the Act, read with the India–Mauritius tax treaty.

3.0 Contentions of the Taxpayers and the Revenue Authorities

Line of Contention	Taxpayers	Revenue Authorities
Determination of Residence under the Tax Treaty	• As per Article 4 of the tax treaty, the determination of residence is exclusive to the residence state only. The ITA cannot reassess residence, except in cases of dual residency.	• Tax Treaty merely allocates taxing rights between Contracting States and does not involve abdication or surrender of sovereign taxing power.

Line of Contention	Taxpayers	Revenue Authorities
	• Applying JAAR or GAAR to determine Mauritian residency is impermissible. • India has no right to examine the residency of the Taxpayers since the same is determined as per the Laws in Mauritius.	• Residence under the tax treaty must be determined according to the domestic law of the alleged State of Residence, and such determination can be independently examined by the tax authorities to examine treaty abuse. • India, being the 'Source state' has the right to tax the transaction and deny treaty benefit if the transaction is abusive or lacking commercial substance.
Taxability of Indirect transfers under the Act and the India Mauritius Tax Treaty read with the Protocol	• Under section 90(2) of the ITA, tax treaty provisions prevail if more beneficial. Section 9(1)(i) of the Act read with Explanation 5 (Indirect Transfers) not applicable owing to beneficial treaty provisions. • Article 13(4) of the tax treaty is applicable to indirect transfer of shares and hence, the transaction is taxable only in Mauritius.	• Post Protocol, direct transfers are governed exclusively through Article 13(3A) and Article 13(3B), while Indirect transfer under Article 13(4) of the tax treaty, which contains no LOB or grandfathering. • Article 27A - LOB clause denies benefit of Article 13(3B) to shell/ conduit companies. Hence, Article 13 (3A) and (3B) and Article 27A apply only to direct transfers and not to indirect transfers. • Article 13(4) is not subject to any LOB provision; hence, once treaty abuse is established, the benefit under the tax treaty ceases to exist, and taxability under section 9(1)(i) of the Act, read with Explanation 5, arises.

Line of Contention	Taxpayers	Revenue Authorities
Relevance of TRC read with past precedents[4]	• TRC constitutes sufficient and conclusive evidence of residence under the tax treaty. • ITA cannot go behind the TRC, except in cases of dual residency requiring application of the tie-breaker clause. • *"Substance over form"* cannot be invoked to deny treaty benefits in the absence of express treaty language to that effect. Treaty provisions operate as a self-contained code, and unilateral domestic doctrines (such as GAAR, JAAR) cannot override them. • Transaction can be disregarded only if it's a sham or a colorable device, which is not there in the present case.	• TRC constitutes only *prima facie* evidence of residence and cannot override the principle of "*substance over form".* • Test of control and management is central to examining the genuineness of residence and the bona fides of the transaction. • "Substance test" is not a test for treaty entitlement *per se*, but an independent anti-abuse safeguard. • Merely having TRC does not foreclose inquiry into actual control and management of the application of *"Substance over form"* • The real nature of the transaction can be examined. If the transaction is genuine, taxing rights vest in Mauritius else, treaty protection stands denied, and the transaction is taxable under the Act.
Circular 682 and Circular 789 read with Press Release 01 March 2013	• Mere reliance on ***Circular 682 and Circular 789 read with Press Release 01 March 2013***, clarifying TRC obtained from Mauritian authorities is sufficient to establish tax residency and beneficial ownership. • In the absence of any limitation clause restricting the applicability of the mentioned Circulars, a disabling condition	• ***Circular No. 789*** was a policy measure intended to provide certainty to Foreign Institutional Investors (FII) and similar investors. It does not apply to business investments or indirect transfers. • Past Circulars and precedents cannot override and are no longer relevant due to subsequent legislative

[4] [4] *UOI vs Azadi Bachao Andolan (2003) 263 ITR 706 (SC) and Vodafone International Holdings BV vs UOI (2012) 341 ITR 1 (SC)*

Line of Contention	Taxpayers	Revenue Authorities
	laying TRC is not sufficient evidence and cannot be held true.	amendments, and in the specific factual context.
GAAR (Chapter X-A of the Act)	• GAAR is applicable prospectively only to investments made on or after 1 April 2017, and pre – 2017 investments are fully grandfathered. • Every purchase of shares made prior to 1 April 2017 constitutes an investment immune from GAAR • In the current case, GAAR cannot be applied since shares acquired before 1 April 2017 were transferred in 2018.	• GAAR can be invoked after 01 April 2017 to deny treaty benefits to business structures and arrangements that lack commercial substance as well. • All investments do not stand insulated from GAAR merely by reason of temporal precedence. If the transaction is found to be an impermissible avoidance arrangement, GAAR is attracted notwithstanding the vintage of the initial investment. • Post 1 April 2017, any income-earning transaction forming part of an arrangement must undergo scrutiny under GAAR, regardless of whether the underlying investment or structure originated before that date. Hence, GAAR is applicable in the case of the Taxpayer. • Section 90(2A) clarifies that GAAR overrides tax treaty benefits where an arrangement is an impermissible avoidance arrangement.
Judicial Anti Avoidance Rule (JAAR)	• JAAR cannot be applied/ imposed onto treaty interpretation. • Section 90(2A) of the Act provides a GAAR override, which cannot be judicially extended to JAAR	• Recognized continued applicability of JAAR. • Can be used to pierce the corporate structure and deny treaty benefits if the transaction lacks commercial substance

Line of Contention	Taxpayers	Revenue Authorities
		• JAAR is grounded in the doctrine of substance over form. Reliance placed on ***McDowell & Company Ltd v. Commercial Tax Officer***[5] • Continue to operate in parallel with GAAR. • Empowers the Revenue authorities to deny treaty benefits in case of conduit or illegal transactions.

4.0 Analysis and Decision of the Supreme Court

4.1 Applicability of GAAR:

The SC has held that GAAR is applicable without any doubt in the instant case, which allows the tax authorities to enquire into the residence and the effective control and management of the Mauritian entities beyond the TRC issued.

The SC held that whilst **Rule 10U(1)(d)[6] of the Income Tax Rules,1962 ('the Rules') grandfathers income from transfer of investments made before 1 April 2017**, **Rule 10U(2)[7]ensures that GAAR applies to any arrangement yielding tax benefits post-1April 2017, irrespective of when the arrangement was entered into**. Hence, as per the SC, the prescription of the cut-off date (01 April 2017) of investment under Rule 10U(1)(d) stands diluted by Rule 10U(2), if any tax benefit is obtained based on such arrangement.

As per the SC's analysis, any benefit arising out of any arrangement that has yielded a benefit of more than INR 3 Crores after 01 April 2017 when the amount of tax benefit arising in aggregate to all the parties is above INR 3 Crores can be subject to scrutiny under GAAR, and the taxpayer simply cannot walk away by citing that the investments were made prior to 1 April 2017.

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[5] *McDowell & Company Ltd vs Commercial Tax Officer (1985) 3 SCC 230*

[6] ***Application of General Anti Avoidance Rule***
Chapter X-A not to apply in certain cases-
Rule 10U. (1) *The provisions of Chapter X-A shall not apply to—*
(a) an arrangement where the tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does not exceed a sum of rupees three crore
(b) …
(c) …
(d) (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.

[7] ***Rule 10U. (2)*** *Without prejudice to the provisions of clause (d) of sub-rule (1), the provisions of Chapter X-A shall apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from the arrangement on or after the 1st day of April, 2017.*

Since in the instant case, though shares were acquired by the taxpayers prior to the cut-off date (01 April 2017), the proposal and execution of the transfer of investments occurred thereafter, and hence the provisions of GAAR were squarely applicable.

4.2 TRC is not conclusive and permits enquiry post introduction of GAAR provisions.

The SC held that the CBDT Circulars, including ***Circular Nos. 682 and 789*** as well as judicial precedents rendered in the pre-amendment regime such as ***Azadi Bachao Andolan***[8] *(which supports TRC as conclusive evidence to consider residency test)* operate only within the legal framework prevailing at the time of their issuance. With subsequent statutory changes, including amendments (particularly the introduction of the GAAR framework), such circulars and precedents cannot override or dilute the amended law.

The SC held that post-amendment, a TRC alone is not sufficient to establish treaty eligibility, notwithstanding earlier circulars issued in the pre-amendment regime. The SC emphasized that Section 90(4) of the ITA only speaks of TRC as an "eligibility condition", not as "sufficient" evidence of residency.

The TRC is not binding on statutory authorities or Courts unless independently examined and verified. The SC found that the TRC's relied upon were non-decisive, ambiguous, and ambulatory, merely recording futuristic assertions without independent verification, thus lacking the qualities of binding orders.

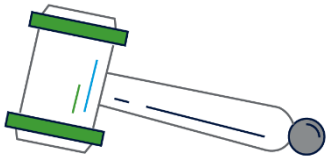
The mere holding of a TRC cannot, by itself, prevent an enquiry subsequent to the amendments brought into the statute, particularly by the introduction of Section 90 (2A) and GAAR (Chapter X-A) of the Act read with the Rules, if it is established that the interposed entity was a device to avoid tax.

4.3 Judicial Anti-Avoidance Rules ('JAAR') i.e., Substance over Form approach shall apply even if GAAR is not applicable.

The SC held that even if GAAR were to be held inapplicable, the Revenue is entitled to invoke JAAR provisions that are grounded in the doctrine of *substance over form*, as consistently recognized in the Indian jurisprudence, including in the cases of ***McDowell***[9] *and* ***Vodafone***[10]*.* JAAR continues to operate in parallel with GAAR and empowers tax authorities to deny treaty benefits in cases of treaty abuse, conduit arrangements, or lack of genuine commercial substance.

[8] *Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1*
[9] *McDowell & Company Ltd v. Commercial Tax Officer (1985) 3 SCC 230*
[10] *Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613 (3 Judge Bench)*

Referring to the Vodafone judgement, the SC further held that the commercial intent in a transaction is a critical indicator in determining whether the arrangement is genuine or merely an artificial device. In the instant case, the SC noted that the Respondent sought exemption from Indian income tax while simultaneously asserting that the transaction was also exempt under Mauritian law, a position found to be contrary to the spirit of the DTAA. This dual non-taxation claim was considered prima facie ground to support the Revenue's contention that the arrangement was impermissible and designed to obtain unintended treaty benefits.



The SC further held that there existed clear and convincing *prima facie* evidence demonstrating that the arrangement was structured with the sole intent of evading tax, and that the Respondents had failed to furnish sufficient material to rebut the presumption of tax avoidance.

While recognising that tax planning *per se* is permissible, the SC reiterated that such planning must remain within the parameters of the Act, the Rules, and applicable notifications. Once a mechanism is found to be illegal, sham, or lacking in commercial substance, it ceases to be permissible tax planning and amounts to impermissible avoidance or evasion, thereby entitling the Revenue to enquire into and deny the claimed exemption.

Overall conclusion

The SC held that once it is factually found that shares were transferred pursuant to an impermissible arrangement, the taxpayer is not entitled to claim exemption under Article 13(4) of the DTAA. The SC further held that the Revenue had successfully demonstrated, on a *prima facie* basis, that the transactions constituted impermissible tax-avoidance arrangements, thereby attracting the applicability of GAAR. Accordingly, the SC concluded that capital gains arising from transfers effected after the cut-off date (01 April 2017) are taxable in India under the Act.

5.0 Our Comments

- The golden era of placing reliance on the TRC for residence status and beneficial ownership to grant tax treaty benefit has now ended. TRC is a necessary "eligibility condition" but it is not sufficient and that resultantly, does not debar the Income Tax Authorities to evaluate or enquire if the transaction is 'sham' or 'illegal'.

- The cardinal pillars - Substance, Conduit Status and Commercial purpose, shall now need to demonstrate the genuine and true purpose of the transaction.

- "Head & Brain Test" cannot be met by mere reliance on paperwork. Actual overall conduct and management of business operations is to be seen than operational convenience, to determine the residency and validity of the transaction / arrangement.

- The ruling may be used as a weapon by the Indian tax authorities to evaluate complex layered structures, which may come under the radar for detailed scrutiny.

- GAAR operates as a supervening anti-abuse code whose efficacy cannot be diluted by interpretative carve-outs. Its application is to be determined from the date the tax benefit is realized and is not limited to the date of investment. Hence, blanket immunity to investments made prior to 1 April 2017 cannot be provided.

- It is interesting to note that SC has put a solo remark on coverage of indirect transfer of shares under Article 13(4) of the DTAA as below:

  "Thus, an indirect sale of shares would not, at the threshold, fall within the treaty protection contemplated under Article 13."

  As the observation was made in brief, it leaves scope for further clarity, particularly on the manner in which Article 13 would apply in such cases. While the judgment proceeds on the facts before it, where residence test, commercial substance, and anti-avoidance considerations were determinative, the broader implications of this observation may require contextual reading in future cases.

- As per the news in the print media[11], to reassure investor confidence, the CBDT has indicated that it may not touch past cases; however, this aspect may need to be closely monitored.

[11] *https://www.thehindubusinessline.com/economy/sc-ruling-in-tiger-global-matter-old-cases-not-to-be-reopened-assures-cbdt/article70514004.ece*

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