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In this article, the authors explore the Supreme Court of India's *Tiger Global* decision clarifying that treaty benefits must be

accompanied by underlying economic substance.

The views in this article are the authors' and do not constitute legal or professional advice of Khaitan & Co.

Introduction

In a recent landmark decision concerning the interpretation of indirect transfers and antiabuse principles, the Supreme Court of India has clarified that treaty benefits cannot be claimed merely on the basis of legal form if the underlying

economic substance indicates otherwise.¹ The Supreme Court held that benefit under the India-Mauritius double taxation avoidance agreement would not be available to an "arrangement impermissible under law" applying the economic substance doctrine. The court further observed that even in the absence or nonapplicability of statutory general antiavoidance rules, judicial antiavoidance principles may be invoked to deny treaty benefits. The decision underscores a decisive shift in jurisprudential trajectory toward substance-based scrutiny, India's assertion of tax sovereignty, and is expected to reshape how international private equity funds, hedge funds, and multinational enterprises deliberate on structuring, valuation, and tax risk while investing in India.

Brief Facts of the Case

The taxpayer Tiger Global was an entity incorporated in Mauritius in 2011. Its immediate shareholders were Mauritius-based entities, with its indirect shareholders being private equity funds that raised capital from about 500 investors across 30 jurisdictions. The entity's investment manager was Tiger Global Management LLC, a Delaware-based firm. Also, Tiger Global held a category 1 global business license issued by Mauritius and had obtained a tax residence certificate (TRC) from Mauritian authorities.

Tiger Global had acquired shares of Flipkart Private Limited, a Singapore entity, before April 1, 2017. Flipkart Singapore indirectly held significant investments in India. In 2018 Tiger Global sold these shares to the Walmart group on

¹ *Authority for Advance Rulings (Income Tax) v. Tiger Global International II Holdings*, 182 taxmann.com 375 (SC) (2026) (Civil Appeal No. 262 of 2026; No. 263 of 2026; and No. 264 of 2026).

which it sought an exemption under the tax treaty. To ascertain its taxability under the proposed transaction, it approached the Authority for Advance Rulings (AAR).

The AAR rejected the application on the maintainability basis, the premise being that the arrangement was, *prima facie*, for tax avoidance holding, *inter alia*, that treaty benefits were intended only for transfers of shares of an Indian company; the “head and brain” (the control and management) of Tiger Global was in the United States (not Mauritius); and the structure was devised primarily to obtain treaty benefits.²

However, in August 2024, the Delhi High Court appellate authority held in favor of the taxpayer, granting treaty protection and reiterating the settled position that a TRC is sacrosanct proof of tax residence for availing treaty benefits and that the validity of a TRC cannot be questioned in the absence of fraud, sham, or illegality.³ Our analysis on the ruling of the Delhi High Court’s judgment can be viewed here.⁴

Decision of the Supreme Court

The Supreme Court overturned the Delhi High Court’s decision and upheld AAR’s order that the arrangement was, *prima facie*, for tax avoidance and consequently that the \$1.6 billion exit was ineligible for tax treaty benefits and therefore taxable in India. Key takeaways of the Supreme Court include:

1. **TRC not sacrosanct:** A TRC is not, by itself, sufficient to claim tax treaty benefits. While the court acknowledged that government circulars and clarifications (including those subsequently upheld by the courts) had treated TRC as conclusive evidence of residence and entitlement to treaty benefits, it observed that the introduction of Indian general antiavoidance rules and the express legislative override of treaty provisions

under domestic laws have significantly affected the legal landscape and that a TRC constituted only one of the eligible conditions, and not conclusive proof, for treaty entitlement.

2. **Treaty benefits contingent on taxation in the state of residence:** The court observed that treaty benefits cannot be claimed where an arrangement results in double nontaxation, that is, where the taxpayer simultaneously contends that the source state does not have the taxing rights (India in the present facts) and the income is also nontaxable in the resident state.
3. **Binding nature of circulars and precedents rendered pre-GAAR:** The court held that circulars and judicial precedents rendered before the introduction of the GAAR and related statutory changes cannot be mechanically relied upon to claim treaty benefits. Once the legislature has fundamentally altered the legal regime through express amendments, earlier judicial interpretations must yield to the new statutory framework.
4. **Indirect transfers not covered by article 13:** The court observed that the indirect transfer of shares does not, at the threshold, fall within the scope of treaty protection contemplated under the tax treaty. It is, however, important to note that the Supreme Court has not ruled on this issue.
5. **Tax sovereignty:** The court underscored India’s sovereign right to tax, emphasizing that treaty interpretation must not unduly constrain the source country’s legitimate taxing powers. These observations reflect the court’s broader concern with protecting the Indian tax base and aligning treaty policy with economic realities. It also raises an important question on treaty interpretation as to whether tax treaties should be interpreted using a static approach (based on the law as it existed at the time the treaty was concluded) or an ambulatory approach (based on the law as it exists at the time the treaty is applied) in

²Tiger Global International II Holdings, [2020] 116 taxmann.com 878 (AAR – New Delhi).

³Tiger Global III Holdings v. Authority for Advance Rulings, (2024) SCC OnLine Del 5987.

⁴Bijal Ajinkya, Viraj Doshi, and Aanchal Jain, “Indian Tax Ruling Reinforcing Treaty Protection Is a Big Win for Foreign Investors,” *Tax Notes Int’l*, Nov. 4, 2024, p. 797.

light of domestic override of international instruments.

Analysis and Impact

What Issue Does the Decision Address?

The question before the court was limited to whether the AAR was justified in rejecting the application based on maintainability by treating the arrangement as *prima facie* one of tax avoidance. The court answered this in the affirmative. The court's observations were therefore confined to determining the existence of a *prima facie* case, not to adjudicate taxability. A *prima facie* assessment is inherently preliminary and cannot be equated with a conclusive finding on facts. Legally, the taxpayer retains the right to establish commercial substance during assessment proceedings.

The court's preliminary view was anchored in specific factual elements, including:

- Flipkart Singapore shares being the sole investment;
- U.S. representatives participating in key board meetings;
- U.S. residents acting as authorized bank signatories for high-value transactions despite not being directors; and
- the U.S.-resident founder being declared the beneficial owner under corporate law filings in the global business license application.

Even though the ruling is rendered to ascertain whether there is a *prima facie* case of tax avoidance, the court's reliance on fact-specific indicators suggests that similar control patterns or management interlinkages could materially increase exposure to adverse tax consequences. The tax authorities are likely to rely on the observations of the Supreme Court to deny treaty benefits going forward.

Treaty Benefits and Taxation in the Resident State

The Indian Supreme Court's observation that "for the treaty to be applicable, the assessee must prove that the transaction is taxable in its State of residence" has sent the tax fraternity into a frenzy. It raises a fundamental question: Is actual taxation

in the residence state *sine qua non* for treaty eligibility?

The tax treaty⁵ applies to persons who are residents of either country. Article 4 defines a resident as a person who is "liable to taxation" in that country because of domicile, residence, place of management, or other similar criteria. However, the expression "liable to taxation" itself is not defined in the tax treaty. Under article 3(2), when a term is undefined, its meaning is to be derived from the domestic law of the relevant country, unless the context otherwise requires. The Income Tax Act, 1961,⁶ also lays down that interpretation of any term not defined under a tax treaty would be in accordance with the ITA.

In this context, the ITA defines the term "liable to tax" to cover situations in which an income tax liability exists under laws of a country and includes persons who have subsequently been exempted from it. Thus, even if the income of a taxpayer is exempt in the residence jurisdiction, the taxpayer ought to still fulfil the threshold of being liable to tax.

In *Azadi Bachao Andolan*⁷ as well, the Supreme Court held that merely because an exemption had been granted regarding taxability of a particular source of income, it cannot be postulated that the entity is not liable to tax.

Hence, the interpretation of the term liable to tax must be assessed in the context of the specific tax treaty concerned based on the domestic tax laws under the country of residence of the taxpayer.

Notably, under article 141 of the Indian Constitution, only the *ratio decidendi* of a Supreme Court judgment is binding. The broad observation of linking treaty eligibility to actual taxation may arguably constitute *obiter dicta*, which carry persuasive but not binding value and resultingly not the *ratio decidendi*. That said, although *obiter dicta* do not possess binding precedential value, they carry considerable persuasive value, more so when emanating from the Supreme Court. Such observations are likely

⁵ Article 1 of the tax treaty.

⁶ Explanation 4 to section 90 of the ITA.

⁷ *Union of India v. Azadi Bachao Andolan*, 263 ITR 706 (SC) (2003).

to exert a substantial influence on the trajectory of future litigation.

Indirect Transfers and Treaty Benefit Eligibility

The court observed that the scope of the capital gains tax article under the tax treaty necessarily postulates the alienator to hold the assets under question (for example movable property by a permanent establishment, immovable property, etc.), which is not the case with an indirect transfer. For example, article 13(1) requires immovable property to be situated in India; article 13(2) requires movable property forming part of the business property of a PE or fixed base of a Mauritian resident to be situated in India and so on. Based on this, the court observed that “an indirect sale of shares would not, at the threshold, fall within the treaty protection contemplated under Article 13.”

The court’s observation has set a cat among the pigeons: Does this effectively mean that indirect transfers do not enjoy treaty protection under the residuary clause of article 13? Notably, both the taxpayer and the tax authorities had contended that taxation of indirect transfers falls within the residuary clause of article 13 (capital gains).

But the devil is in the details: To ascertain the court’s observations, reliance must be placed on the observations in the subsequent portions of the ruling and a specific observation ought not to be interpreted in isolation. In the concluding paragraphs,⁸ the court observes that “once it is factually found that the unlisted equity shares, on the sale of which the assessee derived capital gains, were transferred pursuant to an arrangement impermissible under law, the assessee is not entitled to claim exemption under Article 13(4) of the DTAA.” If one were to dissect this observation, the court hooks on to the impermissibility of an arrangement under law to disallow the exemption claim under article 13(4) of the tax treaty. It also leads one to interpret that in an alternate scenario — in which the capital gains were earned under a legally permissible arrangement, the entitlement to the article 13(4) exemption of the tax treaty ought to be available.

⁸ Paragraph 50.

Notably, when indirect transfer provisions were introduced in the domestic law in 2012 as well, it was clarified in the Budget speech that the amendments would not override India’s tax treaties. In this backdrop, a clarifying position from the Central Board of Direct Taxes would provide much-needed certainty.

‘Arrangement’ and ‘Investment’ Under the GAAR

The GAAR was expressly made inapplicable to income arising from “investments” made before April 1, 2017, with a specific carveout that if any tax benefit resulted from an “arrangement” that existed before April 1, 2017, the GAAR provisions would still apply.

The Shome committee report⁹ provided observations and recommendations regarding grandfathering of investments and arrangements. It observed that grandfathering an arrangement altogether may inadvertently keep future tax avoidance schemes of existing structures out of the GAAR net and hence should extend to only an “investment” and not an “arrangement.” Under section 102 of the ITA, the term “arrangement” is defined widely to cover “any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding.”

Given the absence of an objective litmus test to identify an investment vis-à-vis an arrangement, coupled with an expansive statutory definition of the term arrangement, significant interpretational ambiguity arises in delineating the scope of grandfathering, whereby any investment made by a taxpayer may, at the threshold, fall within the realm of an arrangement. This interpretation may effectively render the provision providing for grandfathering of otiose investment thereby creating uncertainty as to whether, and to what extent, existing structures may remain insulated from the future application of the GAAR.

⁹ Expert Committee on GAAR, “Final Report on General Anti Avoidance Rules (GAAR) in Income-Tax Act, 1961” (Sept. 30, 2012).. The Shome committee was an expert committee formed to review and analyze the provisions of the GAAR before implementation. The committee was headed by Parthasarathi Shome, a member of *Tax Notes International’s* Council of Eminent Persons.

The Effective Dilution of Grandfathering

The judgment elevates commercial substance to a threshold condition and is no longer a checklist of good-to-have indicators given the devaluation of TRC. The court does not articulate clear or objective parameters for its determination. In effect, a TRC no longer carries determinative weight, and failure to demonstrate real substance may result in outright denial of treaty benefits.

The ruling appears to dilute the grandfathering protection under the tax treaty for investments made before April 1, 2017 (grandfathered investments), by holding that GAAR is applicable to grandfathered investments as well. The government's press release dated May 10, 2016,¹⁰ issued alongside the treaty amendment granting India taxation rights over shares alienated on or after April 1, 2017, expressly protects capital gains arising from shares acquired before that date. The judgment does not meaningfully engage with this stated policy assurance, thereby creating uncertainty around the continued robustness of grandfathering relief.

Impact on Deal Making

The judgment is expected to materially alter deal structuring, documentation, and execution practices, particularly in cross-border transactions involving treaty reliance.

Documentation Requirements

Given that TRC is no longer considered sacrosanct, taxpayers will be required to ensure contemporaneous documentation, such as minutes of board meetings, details of operational expenses, details of bank and contract signatories, residency of directors, nature of activities actually conducted in the treaty jurisdiction, etc., to claim treaty benefit. The nontax reasons for undertaking a transaction should be sufficiently documented. If a tax benefit is the main reason for which a transaction is undertaken, it is likely to invite the lens of the taxman. Obtaining tax benefits should essentially be a consequence of an otherwise

commercial taxpayer decision. A regular audit undertaken by the taxpayer would provide tax certainty.

Withholding Tax Considerations From a Buyer Standpoint

Given the nature of anticipated detailed due diligence, payers are likely to adopt a conservative approach by withholding tax at full rates, even where treaty benefits are available to the payee. As a result, the payees would be required to seek refunds by filing an income tax return, affecting cash flows and transaction timelines. This shift is likely to result in greater friction for transaction closure.

Contractual Risk Allocation and Protections

Given the heightened uncertainty around treaty entitlement and GAAR exposure, transaction documents are expected to reflect enhanced contractual protections, including broader tax indemnities such as escrow or holdback mechanisms. Parties may also seek specific representations and warranties around substance, residency, and GAAR defensibility.

Renewed Focus on Tax Insurance and Diligence

The ruling is likely to trigger renewed and heightened diligence on GAAR exposure, particularly regarding grandfathered investments and exit structures. Tax insurance may become vital, and the underwriting standards are expected to tighten, with insurers demanding deeper scrutiny of commercial substance, control, residency, and contemporaneous documentation.

Income Streams Affected

The impact is not limited to capital gains under indirect transfers alone. A lower tax rate or a restriction on scope of taxation on multiple income streams such as royalty, dividend, interest, and fees for technical services would be under the radar. Entities earning income from trading in derivatives in the Indian markets and claiming benefit of the residuary clause under the article on capital gains should also revisit their relevant facts to ascertain whether there is any change in their treaty entitlement position.

¹⁰ Government of India Ministry of Finance release, "India and Mauritius Sign the Protocol for Amendment of the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains" (May 10, 2016).

Effect on Concluded and Ongoing Matters

The judgment raises critical questions regarding its spillover effect on concluded and ongoing matters, including whether completed assessments can be reopened, particularly in cases in which the GAAR was not previously invoked. Media reports indicate that the concluded assessments may not be reopened, but formal clarification from the tax authorities is awaited.

Where tax audits are ongoing or matters are pending in appeal, the tax authorities are likely to place reliance on this judgment to deny treaty benefits by applying the principles laid down by the court. Recently, in the case of *Hareon Solar Singapore Pvt Ltd*,¹¹ the Indian Income Tax Appellate Tribunal relied on the judgment of the Supreme Court and the facts of the case (such as bank signatories being outside Singapore, absence of operating expenses, absence of employees, majority of directors being outside Singapore, etc.) to deny treaty benefit on capital gains arising from the sale of grandfathered shares and

compulsorily convertible debentures by a Singapore company.

Conclusion

The Supreme Court's decision in *Tiger Global* marks a paradigm shift in India's international tax jurisprudence, decisively tilting the balance in favor of substance-based taxation, source-country rights, and antiavoidance enforcement. Long-settled notions around treaty sanctity, TRC conclusiveness and grandfathered exits have been fundamentally reexamined. While the judgment strengthens India's ability to protect its tax base, it introduces an element of uncertainty for foreign investors, particularly those operating under legacy structures. Treaty entitlement can no longer be assumed; it must be demonstrably earned through genuine commercial substance and substantive residency. For investors and advisers alike, the ruling underscores the urgent need to reevaluate existing structures, reassess exit strategies, and recalibrate risk allocation mechanisms, as India's tax regime moves decisively into a post-form, post-grandfathering, and post-TRC-centric era. The observations of the court are likely to be retested in other cases, and this is far from the last word on the subject. ■

¹¹*Hareon Solar Singapore Private Limited v. DCIT*, ITA No 2226/Del/2024.