Contemporary International Tax Policy Developments

An Overview

Analysis of Recent International Tax Rulings & Decisions

Aseem Chawla
ASC Legal, Solicitors and Advocates
aseem@aseemchawla.com

August 16, 2020
New Delhi

Table Of Contents

- Residency
  - Under Foreign Exchange Management Act, 1999 ('**FEMA**')
  - Under Income Tax Act, 1961 ('**Act**')
  - Points for Consideration
- OECD Multilateral Instrument ('**MLI**') for Tax Treaties
  - Overview
  - Broad Architecture of MLI
  - Application of the MLI
- Prevention of Treaty Abuse
  - Purpose of Covered Tax Agreement
  - Principal Purpose Test
- Recent International Tax Rulings & Decisions
  - Bid Services Division (Mauritius) Ltd.
  - Volkswagen Finance Pvt. Ltd.
  - Sofina S.A.
  - Becton Dickinson (Mauritius) Ltd.
  - Tiger Global International II Holdings

Residency

Residency under FEMA

"Person Resident in India"

Person residing in India for more than 182 days during the preceding financial year

Person who has gone or stays outside India for any of the following purpose ceased to become Resident of India from the day of departure

- **For or on taking up employment outside India, or**
- **For carrying out business or vacation outside India, or**
- **For any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.**

"Person Resident outside India means a person who is not resident in India

Residency under FEMA (Contd..)

"Person Resident in India"

Person residing in India for more than 182 days during the preceding financial year

Person who comes to India or stays in India for any of the purposes other than the following can not become Resident of India :

- **For or on taking up employment in India, or**
- **For carrying out business in India, or**
- **For any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period.**

"Person Resident outside India" means a person who is not resident in India

Residency under FEMA (Contd..)

- FEMA lays emphasis on '*residing*' instead of '*Stay*' which indicates permanency i.e. physical presence is not a deciding factor for Residency but the intention to stay is important.

- A student going abroad for education will be treated as going outside India for uncertain period irrespective specified duration of course. Therefore, he will be treated as Non-Resident -RBI AP(DIR) Circular No.45 dated 8-12-2003.

- Unlike Income tax, wherein residential status of a person is determined only on the basis of physical stay in India, under FEMA, it is the intention of 'leaving India' or 'coming to India' determines the residential status.

- However, definition does refer to physical stay in India for 182 days in preceding Financial Year.

- Under FEMA– "*Intention*" prevails over "*Physical Stay*"

Residency under FEMA (Contd..)

Overseas Citizen of India (**OCI**) is an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under section 7A of the Citizenship Act, 1955.

Person of Indian Origin' (PIO) is a citizen of any country (other than Bangladesh or Pakistan) and

i) holding Indian passport at any point of time; or

ii) he /his parent / his grandparent was a citizen of India; or

iii) the person of foreign origin who is a spouse of an Indian citizen or a person referred above.

Not Permanently Resident

For limited purpose, the Current Account Rules under FEMA, refer to person 'Not Permanently Resident' mean a person who has come to India for employment of a specified duration or for a specific job or assignment not exceeding 3 years.

Residency under FEMA (Contd..)

Case Study 1 : Mr. X has left India and stayed in UK to look after his mother while she was ailing and his intention to stay abroad is for an uncertain period. His stay in UK was more than 182 days. Whether he will be considered as Non-Resident for a limited purpose of holding assets in U.K of his late mother?

In R.P. Verma (Retd) Major vs Union Of India the Honorable High Court in its judgment has decided that Mr. X had not gone to U.K. on immigration visa therefor the intention to stay outside India is not for uncertain period hence cannot be treated as NRI.

Case Study 2 : ABC Ltd a Company incorporated in India deputed its Employees outside Indian for more than 182 days. Employees received salaries and perks from Indian Company for rendering their services abroad. What will be the residential status of employees?

In British Gas India Pvt. Ltd: It was held that the employees will be treated as Non-resident and salary credited in India would not be taxable in India.

Residency under FEMA (Contd..)

Case Study 3 : Person (NRI) came to India from Saudi Arabia after a gap of few years for exploring job opportunity in India and stayed in India for more than 182 days. Determine his residential status?

In case NRI returns to stay in India for an 'uncertain period' he will become a person resident in India. In order to ascertain intention, what is required to be seen is the conduct of the person and the surrounding circumstances. The type of visa granted should clearly indicate the intention to stay in India for an uncertain period to determine his residential status under FEMA.

In Basant Kumar Sharma v. Government of India (2013) 120 SCL 122 Delhi High Court, It was held that he intends to stay in India for uncertain period and will be treated as PRI.

Residency under Income Tax Act

Resident and Ordinarily Resident (ROR)

- Income received/ deemed to be received, accrues/ arises or deemed to accrue/ arise both in and outside India

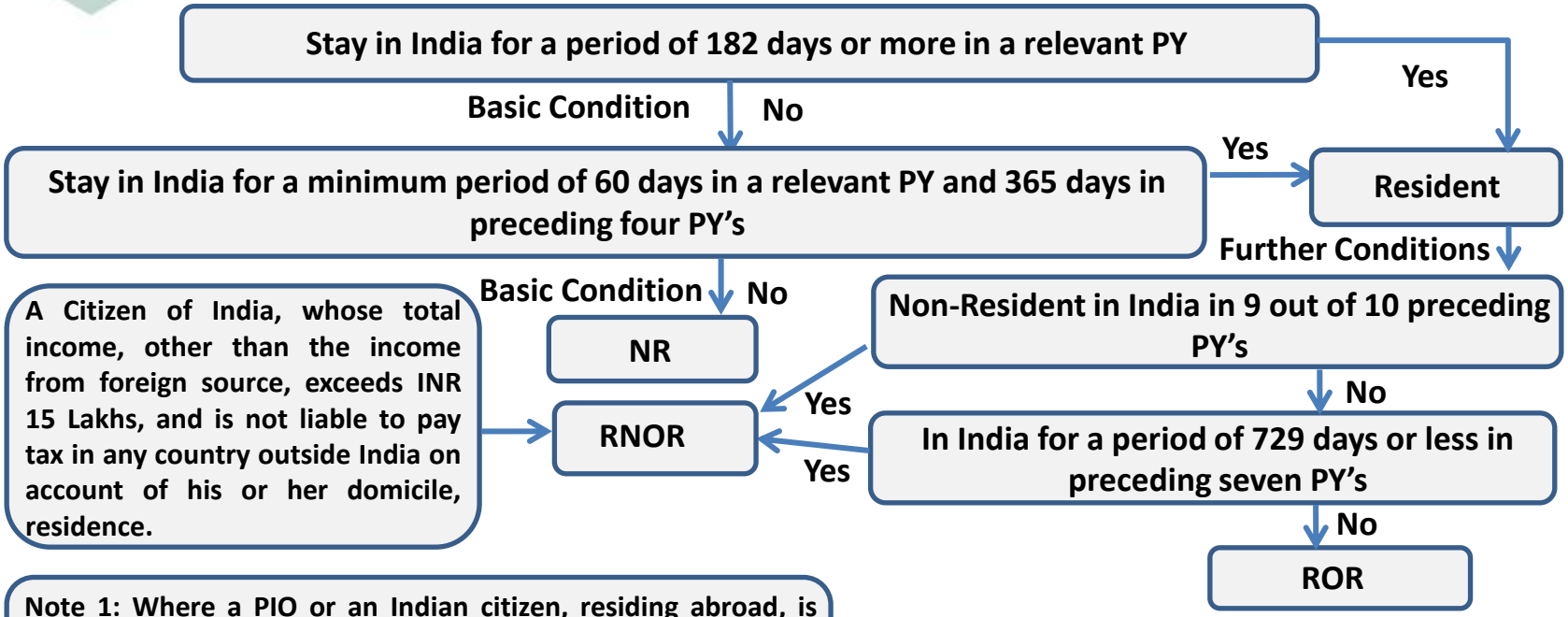
Resident but Not Ordinarily Resident (RNOR)

- Income received/ deemed to be received, accrues/ arises or deemed to accrue/ arise in India;
- Income accrues/arises or deemed to accrue/ arise outside India provided the same is derived from a business controlled in or a profession set up in India.

Non-Resident (NR)

- Income received/ deemed to be received, accrues/arises or deemed to accrue/ arise in India

Residency under Income Tax Act (Contd..)



Note 1: Where a PIO or an Indian citizen, residing abroad, is visiting India and having total income, other than the income from foreign sources, equal to or less than INR 15 Lakhs, the period of 60 days stands substituted with 182 days.

Note 2: Where a PIO or an Indian citizen, residing abroad, is visiting India and having total income, other than the income from foreign sources, exceeding INR 15 Lakhs, the period of 60 days stands substituted with 120 days.

Note 3: Where an Indian citizen leaves India for employment abroad, the period of 60 days stands substituted with 182 days.

Note 4: Income from foreign sources has been defined to mean income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Points for Consideration

- Under FEMA, a person's residence is from a particular date, whereas, under Income Tax Act, the residential status is for a full year. Under Income Tax Act, a person is either resident or non-resident for the entire financial year i.e. one cannot be resident for part of the year and non-resident for rest of the year.

- The determination of residential status under the Income Tax Act is based on number of days spent in India. Purpose and intention of stay in India have no relevance, whereas, under FEMA, the purpose and intention of stay in India is relevant. Number of days stay is only one of the factors which can help to determine the status of residence under FEMA.

- Under FEMA, a person is considered as a resident of India for a particular Financial Year if he has been in India in the preceding Financial Year for more than 182 days, whereas, under Income Tax Act, a person is considered as a resident of India for a particular Financial Year if he has been in India for 182 days or more during that Financial Year.

The OECD Multilateral Instrument ('MLI')

Overview

- Under the Organisation for Economic Co-operation and Development ('**OECD**')/ G20 Inclusive Framework on Base Erosion and Profit Sharing ('**BEPS**'), more than 125 Countries are collaborating to put an end to tax avoidance strategies that exploits gaps and mismatches in tax rules to avoid paying tax.

- Multilateral Instrument ('**MLI**') is an outcome of BEPS Action Plan ('**AP**') 15 of the OECD/ G20 Inclusive Framework, which covers solutions for governments to cover loopholes in international tax treaties by transposing results from the BEPS project into bilateral tax treaties worldwide.

- MLI allows governments to modify application of its network of bilateral tax treaties in a synchronised manner without renegotiating each of these treaties bilaterally.

- MLI is designed to swiftly implement the tax treaty related measures arising from the G20/ OECD BEPS Project.

Overview (Contd..)

- MLI includes several minimum standards that jurisdictions signing up to the MLI are required to implement.

- MLI supports all previously agreed BEPS approaches by allowing jurisdictions to select from alternative options by filing reservations.

- Broadly the MLI is structured under four categories: Hybrid Mismatches, Treaty Abuse, Dispute Resolution and Avoidance of Permanent Establishment ('**PE**') Status.

- MLI provides significant flexibility to signatories. For example, a country can decide which tax treaties will be covered by MLI and which will be outside its purview. Moreover, each country can also opt out of a provision of the MLI (entirely or partly), provided it is not a minimum standard. Even in respect of certain minimum standards, MLI has offered options.

Broad Architecture of MLI

Part I : Scope and Interpretation of Terms

<u>Article 1:</u> Scope of the Convention

Article 1 provides the scope of the MLI. It modifies all the Covered Tax Agreements [‘**CTA**’] (i.e. notified tax treaties).

<u>Article 2:</u> Interpretation of the Terms

Article 2 defines the following terms:

- **CTA** : It refers to an existing tax treaty with respect to which each party to the tax treaty has made a notification for application of the MLI.
- **Party** : It means a state or a jurisdiction for which the MLI is in force or a jurisdiction which has signed the MLI and for which the MLI is in force.
- **Contracting Jurisdiction** : It means a party to a CTA.
- **Signatory** : It means a state or jurisdiction which has signed the MLI, but for which the MLI is not yet in force.

Broad Architecture of MLI (Contd..)

Part II : Hybrid Mismatches

<u>Article 3:</u> Transparent Entities

Article 3 is based on the new Article 1(2) of the OCED model convention and addresses income earned through transparent entities. It *inter alia* provides that income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either contracting jurisdiction, shall be considered as an income of a resident of the jurisdiction.

<u>Article 4:</u> Dual Resident Entities

Article 4 is based on Article 4(3) of the OECD model convention and provides that the issue of dual residency for non-individuals is to be addressed by mutual agreement between competent authorities. In absence of such agreement the tax treaty benefit may be denied.

Broad Architecture of MLI (Contd..)

Part II : Hybrid Mismatches (Contd..)

<u>Article 5:</u> Application of methods for elimination of double taxation

Article 5 addresses the situations arising from the exemption method followed by countries to avoid double taxation and situations where income paid on an instrument is deductible in the source country, but not subject to tax in the hands of the recipient as per the tax laws of the country of residence.

Broad Architecture of MLI (Contd..)

Part III : Treaty Abuse

Article 6: Purpose of a Covered Tax Agreement

Article 6 primarily seeks to insert a statement in the preamble of the tax treaties to the effect that the purpose of the treaty is not to create opportunities for double non-taxation or reduced taxation through tax avoidance or evasion including treaty shopping.

This being a minimum standard requirement, is mandatory and needs to be incorporated in the tax treaties either by replacing the existing preamble with the suggested text or adding such language if not already included in the tax treaties.

Article 7: Prevention of Treaty Abuse

Article 7 seeks to insert a general anti-abuse provision / LOB provision in the tax treaties. The minimum standard for avoiding treaty abuse can be implemented by adopting either of the following:

- Only Principal Purpose Test ('**PPT**') (conceptually similar to India's General Anti Avoidance Rules ('**GAAR**'))
- PPT plus either simplified or detailed Limitation of Benefits ('**LOB**') provision
- Detailed LOB supplemented by a mechanism that would deal with conduit arrangements not already dealt with in the tax treaties.

Broad Architecture of MLI (Contd..)

Part III : Treaty Abuse (Contd..)

<u>Article 8:</u> Dividend Transfer Transactions

Article 8 addresses the abuse of beneficial tax treatment given under the tax treaties for dividend income in case of minimum 25% shareholding in the company distributing dividend. It requires a minimum holding of 365 days to avail the beneficial rate provided in the tax treaties.

<u>Article 9:</u> Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property

Article 9 addresses misuse of provisions based on Article 13(4) of the OECD Model, which gives taxing rights to a source country (i.e. the country where the immovable property is situated) to tax gains on alienation of shares of a company if the shares derive more than 50% of their value directly or indirectly from immovable property situated in the source country.

It provides that the source country will get taxing right if the value threshold is met any time during the period of 365 days preceding the date of transfer. It also extends this provisions to interest in partnership or trusts.

Broad Architecture of MLI (Contd..)

Part III : Treaty Abuse (Contd..)

<u>Article 10:</u> Anti Abuse rule for PE in third jurisdictions

Article 10 addresses abuse of tax treaties in triangular situations.

<u>Article 11:</u> Application of tax agreements to restrict a party's right to tax its own residents

Article 11 seeks to avoid an argument, according to which, the tax treaty impairs rights of a country to tax its own residents. In other words, it provides for a saving clause which preserves the right of a Contracting Jurisdiction to tax its own residents subject to certain exceptions. Additionally, Article 11 also ensures that certain benefits granted to tax residents are not impacted.

Broad Architecture of MLI (Contd..)

Part IV : Permanent Establishment

<u>Article 12:</u> Artificial Avoidance of PE through Commissionaire and similar arrangements

Article 12 of the MLI seeks to amend Article 5 of the tax treaties, which defines the term PE, on the following aspects:

- Scope of agency PE to counter the commissionaire arrangement entered into by foreign enterprise in order to avoid PE in the source state;
- Creation of agency PE when the agent habitually plays principle role leading to conclusion of contracts with routine approval of the principal;
- Agent will not be considered to be an independent agent if he acts exclusively or almost exclusively on behalf of a closely related enterprise.

<u>Article 13:</u> Artificial Avoidance of PE Status through specific activity exemption

The primary objective of Article 13 of the MLI is to ensure that the benefit of Article 5(4) of the tax treaties [i.e. certain activities do not result in PE even when carried out through fixed place] is allowed only when the activities, carried on either individually or collectively, are preparatory or auxiliary in nature. It also contains an antifragmentation provision to prevent breaking of activities in order to benefit from the preparatory or auxiliary exemption.

Broad Architecture of MLI (Contd..)

Part IV : Permanent Establishment (Contd..)

Article 14: Splitting-up of Contracts

Article 14 addresses avoidance of PE by splitting the contracts between related enterprises to circumvent the threshold of creation of PE.

Article 15: Person closely related to an enterprise

Article 15 defines the term 'person closely related', which is relevant in the context of Articles 12, 13 and 14.

Broad Architecture of MLI (Contd..)

Part V : Improving Dispute Resolution

Article 16: Mutual Agreement Procedure

Some of the salient features of Article 16 are:

- The taxpayer can approach competent authority of either of the contracting jurisdiction (under the existing provision of Article 25 of the OECD model convention the taxpayer can only approach the competent authority of the country of which he is resident / national).
- The taxpayer needs to present his case to the competent authority within three years of the first notification of the action resulting in taxation, not in accordance with the provisions of the tax treaty (Article 25 of the OECD model convention contains similar provision)
- The agreement reached among competent authorities shall be implemented irrespective of the time limits in the domestic laws (Article 25 of the OECD model convention contains similar provision).

Article 17: Corresponding Adjustment

Article 17 is based on Article 9(2) of the OECD model convention and requires compensatory or corresponding adjustment if there is double taxation arising out of transfer pricing adjustments.

Broad Architecture of MLI (Contd..)

Part VI : Arbitration

<u>Article 18 to 26:</u> Arbitration

Articles 18 to 26 deal with mandatory arbitration and issues such as appointment of arbitrators, confidentiality of arbitration proceedings, and resolution of a case prior to the conclusion of arbitration, type of arbitration process, etc.

Part VII : Final Provisions

<u>Article 27 to 39:</u> Final Provisions

Part VII deals with procedural provisions such as signature, ratification, reservations, notifications, date of entry into force, date of effect, etc. to make the MLI provisions operational.

Application of the MLI

- Each party to the MLI must notify tax treaties to which the MLI provisions would apply. MLI provisions would apply to a tax treaty only if both parties to the tax treaty notify it as CTA.

- For a specific bilateral tax treaty, MLI would have effect after both parties to a CTA have deposited their ratification instruments with the OECD Secretariat.

- MLI would modify application of all CTAs at least to the extent of implementation of following minimum standards viz:
  - Counter treaty abuse (through Article 6 - Purpose of CTA and Article 7 - Prevention of Treaty Abuse)
  - Improve dispute resolution (through Article 16 – Mutual Agreement Procedure)

- Flexibility to implement BEPS tax treaty measures in various ways:
  - Choices to apply optional and alternative provisions
  - Reservations to opt out of provisions or parts of provisions that are not minimum standards (either for all CTAs, or a select CTAs)

Prevention of Treaty Abuse

Purpose of Covered Tax Agreement

Text of the Preamble:

'Intending to conclude a convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third states)' **(not optional)**

AND

'Desiring to further develop their economic relationship and to enhance their co-operation in tax matters' **(optional)**

Purpose of Covered Tax Agreement (Contd..)

- The Article 6 of the MLI being a minimum standard requirement, is mandatory and needs to be incorporated in the tax treaties either by replacing the existing preamble with the suggested text or adding such language if not already included in the tax treaties.

- India is silent on its position on Article 6. Therefore, in the absence of India notifying any treaty provisions/ preamble language, the MLI's Preamble Text will not replace the existing preamble language in India's CTAs but will only be added to the existing preamble text, irrespective of whether or not the other Treaty Partners notify India's treaty for this purpose.

- The addition of this provision will make a significant impact on interpretation of the '***object and purpose***' of tax treaties. However, the additional content in the optional preamble provided in the MLI on economic relationships and enhancement of co-operation will not be added to India's CTAs.

Principal Purpose Test

- Article 7(1) of the MLI states that '*Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement*'.

- PPT has been introduced as a default test which provides that no benefit under the CTA shall be granted if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

- Thus, in order to trigger a denial of treaty benefit under the PPT, obtaining the benefit need not be the sole or dominant principal purpose of the transaction or arrangement. It would suffice even if one of its principal purposes was to obtain such benefit.

Principal Purpose Test (Contd..)

- However, most importantly, there is a carve out for granting such treaty benefits if availing such benefits was is in accordance with the object and purpose of the relevant provisions of the CTA.

- Most of India's treaties have anti-abuse tests which limit treaty benefits for specific items of income. Further, the PPT under the MLI in some cases could potentially be broader in ambit than the GAAR under the Income Tax Act, 1961 ('**Act**') as the latter gets triggered only if the '***main purpose***' of the arrangement is to obtain a tax benefit.

- Further, in order for GAAR to get triggered, one of the other tainted elements also needs to be satisfied, i.e., **creation of rights or obligations that are not at arm's length, abuse of the Act, lack of commercial substance, or lack of bona fides**. Therefore, it may be unlikely for GAAR to get triggered if the PPT is met, except in situations where the PPT is avoided on the ground that the benefit was in accordance with the object and purpose of the treaty provision. GAAR may still get triggered in such situations as it does not provide for such a carve out.

Recent International Tax Rulings & Decisions

Bid Services Division (Mauritius) Ltd.

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Facts:

- M/s Bid Services Division (Mauritius) Ltd. ('**BSDM/ Applicant**'), is a Mauritius-based private company, incorporated on August 23, 2005. BSDM holds a valid Tax Residency Certificate ('**TRC**') issued by the Mauritius Revenue Authority ('**MRA**').
- The Applicant is wholly-owned subsidiary of Bidvest Service Division (Proprietary) Limited ('**BSDPL**'), incorporated in South Africa. The ultimate holding company is Bidvest Group Limited ('**Bidvest**'), incorporated in South Africa. The effective control and management of the Applicant is situated in Mauritius.
- Airport Authority of India ('**AAI**') selected the Applicant in consortium with GVK Airport Holdings Private Limited ('**GAHPL**') and ACSA Global Limited ('**AGL**') as joint venture ('**JV**') partners of Mumbai International Airport Private Limited ('**MIAL'**), a company incorporated in India for undertaking development, operation and maintenance activities ('**OMDA**'). Shareholders and OMDA agreement was entered between AAI, MIAL and the consortium on April 4, 2006.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Facts (Contd..):

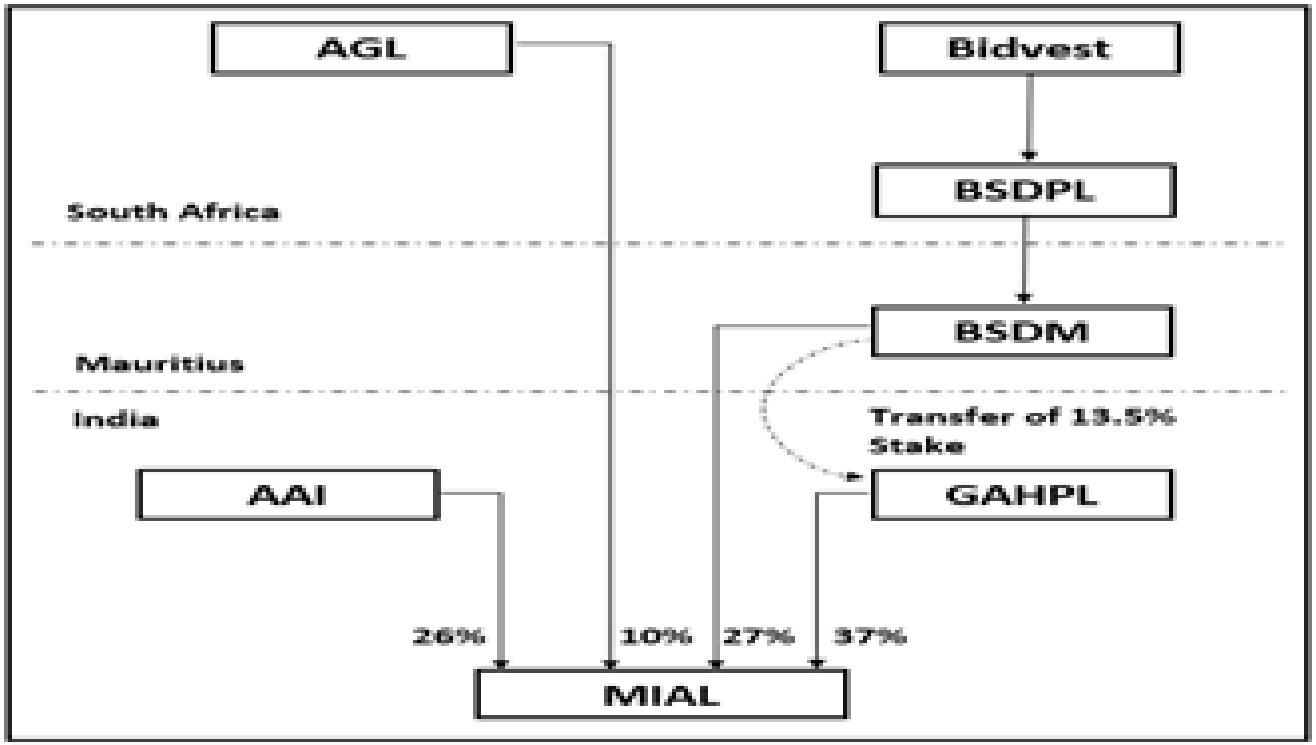
- The shareholders agreement, executed between BSDM, AAI, GAHPL, AGL and MIAL, governed their *inter-se* relationships in their capacity as the shareholders of MIAL. Under the said agreement, BSDM agreed to subscribe and acquire 27% of the total issued and paid up capital share capital of MIAL. Initially, AAI held 26%, GAHPL 37%, BSDM 27%, AGL 10% in MIAL.

- Thereafter, in the Financial Year 2011-12, BSDM sold 13.5% of its shareholding in MIAL to GAHPL at a sales consideration amounting to USD 231,000,000, thereby, reducing its shareholding in MIAL to 13.50% and raising GAHPL's shareholding in MIAL to 50.50%. AAI and AGL continued to hold 26% and 10% shareholding, respectively, in MIAL.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Pictorial Chart depicting the share transfer transaction:



Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Relevant Issue for Determination before the Hon'ble AAR:

- Whether the capital gains arising from the sale of shares of MIAL held by BSDM to GAHPL would be liable to tax in India having regard to the provisions of Article 13(4) of the India-Mauritius Tax Treaty.

Arguments Advanced by the Tax Authorities:

- The Income Tax Authority ('**ITA**') submitted that the AAI had issued an 'Invitation to Register an Expression of interest' ('**ITREOI**') on February 17, 2004 and in response to AAI's ITREOI, the GVK Industries Limited ('**GVK**') - SA Airport Operators ('**SA**') consortium filed its Expression of Interest ('**EOI**') on July 20, 2004. The consortium was led by GVK as a lead member, partnered by SA. SA is a Joint Venture of three entities namely, M/s Airports Company South Africa Limited, M/s Old Mutual Life Assurance (South Africa) Limited and Bidvest.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Arguments Advanced by the Tax Authorities (Contd..):

- That the initial GVK-SA consortium did not include BSDM as one of the members during the entire bidding process i.e. issue of ITREOI by AAI but was brought in just before filing of the Technical and Financial Bid. Further, it was incorporated just two weeks prior to the submission of binding bid by GVK-SA Consortium.

- The ITA also submitted that even if the Bidvest Group wanted a Special Purpose Vehicle ('**SPV**') to undertake the Project, Mumbai or South Africa would have been the optimal choice and Mauritius was chosen merely for the purposes of availing treaty relief. The Applicant in Mauritius lacked commercial substance and bona-fide business purpose and was set up as a device to avoid Indian taxes.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA, further, argued that Bidvest has full power to take decisions as to the utilization of the income received or receivable by BSDM and the same is also evident from the fact that two of the four directors of BSDM are directors of the holding companies of BSDM namely, Bidvest and BSDPL and are citizens of South Africa and that the other two directors of BSDM are nominal directors without any real power and are citizens of Mauritius whose appointment was only a necessary requirement as per the Companies Act, 2001 of the Republic of Mauritius.

- The ITA, relying upon the decision of the Apex Court in the case of **Vodafone International Holdings B.V.,** contented that the ITA can invoke the '***substance over form***' principle or '***piercing the corporate veil***' test in the application of a judicial Anti-Avoidance Rule if it can establish that a transaction is a '***sham or tax avoidant***'.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Contentions of the Applicant (Taxpayer):

- BSDM argued that since it is incorporated in Mauritius and holds a valid TRC issued by the MRA, hence it shall be regarded as a tax resident of Mauritius under the provisions of Article 4 of the India-Mauritius Tax Treaty and shall be entitled to be governed by the beneficial provisions of Article 13(4) of the India-Mauritius Tax Treaty which states that capital gains arising to a resident of Mauritius from the sale of shares of an Indian Company will be chargeable to tax in Mauritius.

- In this regard, BSDM relied on the Central Board of Direct Taxes ('**CBDT**') Circular No. 682 dated March 30, 1994 and Circular No. 789 dated April 13, 2000.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Contentions of the Applicant (Taxpayer) (Contd..):

- BSDM, in order to justify the scope and validity of CBDT's Circular No. 789 dated April 13, 2000, relied upon the Hon'ble Supreme Court's decision in the case of **Union of India vs Azadi Bachao Andolan, 263 ITR 706** wherein the Apex Court had upheld the validity of Circular No. 789 dated April 13, 2000 and had held that the provisions made in the tax treaties shall prevail over the provisions contained in the Act, to the extent they are beneficial to the taxpayer.
- The Applicant, equally relied upon the Apex Court's verdict in the case of **Vodafone International Holdings B.V.** wherein the Apex Court had observed that in the absence of Limitation of Benefit ('**LOB**') clause in the India-Mauritius Tax Treaty and in view of the presence of CBDT's Circular No. 789 dated April 13, 2000 and TRC, the benefits of the Tax Treaty shall be granted at the time of sale/ disinvestment/ exit from Foreign Direct Investment in India.
- The Applicant contented that the capital gains arising on account of sale of shares of MIAL to GAHPL would not constitute income chargeable to tax in India in view of provisions of Article 13(4) of the India-Mauritius Tax Treaty.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Contentions of the Applicant (Taxpayer) (Contd..):

- With respect to the ITA's argument that Mumbai or South Africa would have ben an idea destination, the Applicant submitted that Mauritius is an ideal destination for investments in Asian markets and it is common global practice to route investments into the Asian markets through Mauritius.

- With respect to the argument of the ITA that BSDM was incorporated just two weeks prior to the submission of binding bid by GVK-SA Consortium, BSDM submitted that it had made investments in MIAL for the purpose of modernisation of the Mumbai Airport and investments were made over a period of 7 years based on periodic calls made by MIAL. BSDM had sold the shares after holding them for a period of over 5 (five) years and continues to carry on operations pursuant to partial divestment of 13.5% of the shares (out of 27%).

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Hon'ble AAR Ruling:

- The Hon'ble AAR considered the arrangement as mere routing of funds of Bidvest group to Mauritius. It considered BSDM as a shell company incorporated just few days prior to transaction of investment in MIAL without any tangible assets, employees, office space etc.

- The Hon'ble AAR, in order to understand the role of BSDM in MIAL, noted that it served as a conduit for routing funds for South African based holding companies. The shares of MIAL though were bought in the name of BSDM but the beneficial owners were the holding companies in South Africa. BSDM kept on noting and endorsing decisions of the holding companies in the Board meetings without any contribution or discussion about the decision-making process.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble AAR applied the doctrine of '*substance over form*' and relied upon the decision of the Apex Court in the case of **Vodafone International Holdings B.V.** wherein the Apex Court had laid down various tests to determine whether a transaction is used principally as a colourable device or not and among various tests laid down, one such test was the '***Business Purpose Test***' and in connection with the same the Apex Court had held that if there is an abuse of organisation form without legal business purpose which results in tax avoidance, then the ITA may disregard the form and impose tax on actual controlling non-resident entity.
- The Hon'ble AAR observed that once it is established that the Mauritian company is interposed as a device, it is open to the ITA to discard the device and take into consideration the real transaction between the parties and held that BSDM is not entitled to claim the benefit under the provisions of Article 13(4) of Indo-Mauritius Tax Treaty.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Key Takeaways:

- The Hon'ble AAR ignored considering the fact that BSDM had made investments over a period of 7 years based on periodic calls made by MIAL and BSDM had sold the shares after holding them for a period of over 5 years and it still continues to carry on operations pursuant to partial divestment of 13.5% of the shares (out of 27%).
- What weighed with the Hon'ble AAR was the fact that just 10 days prior to the filing of the Technical and Financial Bid, BSDM was brought in the Consortium and was in fact incorporated just a few days prior to the transaction of investment in MIAL.
- The Hon'ble High Court of Bombay in the case of **CIT vs JSH (Mauritius) Limited, 84 taxmann.com 37,** had allowed the benefits of the provisions of Article 13(4) of the India-Mauritius Tax Treaty considering that the Applicant had held the shares for a period of 13 years before selling them which thereby go on to prove that the Applicant is not a '***Fly By Night or Shell Company***'.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Key Takeaways:

- GAAR has been in effect from April 1, 2017 and the India-Mauritius Treaty was also amended, giving India the right to tax capital gains on the alienation of shares in an Indian Company acquired on or after April 1, 2017. This is a grandfathering provision and the provisions of GAAR are not applicable to investments made prior to April 1, 2017.

- However, the Hon'ble AAR, despite the transaction of sale of shares of MIAL by BSDM to GAHPL falling within the pre-GAAR period, has applied the Commercial/ Business Substance Test to the said transaction which is a clear reminder that a case to case analysis needs to be done before allowing the benefit under the India-Mauritius Tax Treaty.

Bid Services Division (Mauritius) Ltd. (Contd..)

Bid Services Division (Mauritius) Ltd., In re,
[2020] 114 taxmann.com 434 (AAR – Mumbai)

Key Takeaways:

- Considering, due importance is given by both the Hon'ble AAR and the ITA to the timing of the initial investment made by BSDM in MIAL, it can be inferred from the instant ruling that the date of incorporation of the Mauritius Entity and the date of initial investment made by the Mauritius Entity are perhaps of some relative importance.

- Significant the elapsed period between these two dates, apart from other considerations, better the chances of being eligible to claim the benefits of the Tax Treaty.

Volkswagen Finance Pvt. Ltd.

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Facts:

- Volkswagen Finance Pvt. Ltd. ('**Appellant**') and Audi India (a division of Volkswagen Group Sales India Ltd) jointly planned an event in Dubai for launch of Audi A-8L facelift model.
- While the event was held in Dubai, the purpose of the event was the launch of a new model of Audi car, Audi A-8L facelift model for the Indian market. Further, the Appellant had also flown in about 150 people mostly prospective buyers and some journalists to the launch ceremony.
- Kim Productions Inc., a company incorporated in the USA, agreed to facilitate the appearance of Mr. Nicholas Cage ('**celebrity**') for three consecutive hours. In exchange, the taxpayer paid consideration of USD 440,000 and other incidental costs.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Facts (Contd..):

- The Appellant and Audi India, as a part of the arrangement, received full rights of the launch event capturing the celebrity's presence across all platforms for below-the-line publicity on internet, in press releases, news reports, social media, in Audi Magazine, etc. for a period of 6 months from the date of launch event, and for an unlimited period of time only for internal usage within the Volkswagen Group.

- The Appellant claimed that since the event took place in Dubai, UAE and the celebrity made his appearance at the event in Dubai, appearance fee was not taxable in India (as the fee did not accrue or arise in India or deem to accrue or arise in India). Accordingly, the Appellant did not withhold tax from the payment in relation to the celebrity appearance fee.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Facts (Contd..):

- The Learned Assessing Officer ('**Ld. AO**') held that the payment was taxable in India as royalty under Section 9(1)(vi) of the Act as well as under Article 12 of the India-USA Tax Treaty. Accordingly, the Appellant was required to withhold tax.

- On appeal, the Hon'ble Commissioner of Income-tax Appeals ['**CIT(A)**'], confirmed the action of the Ld. AO and also held that the whole purpose of organizing an India-centric event at Dubai was to avoid '***attraction of clause regarding income accruing or arising in India***'.

- Aggrieved by the order passed by the Hon'ble CIT(A), the Appellant filed an appeal before the Hon'ble Income Tax Appellate Tribunal ('**Tribunal**').

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Relevant Issue for Determination before the Tribunal:

- Whether the Appellant was required to withhold tax from the payment of USD 4,40,000, in respect of an appearance made by the celebrity at Dubai in a product launch event for promoting business of the Appellant in India.

Hon'ble Tribunal Decision:

- The Hon'ble Tribunal held that the issue involved in the case was whether the income accrued or arose in India or was deemed to accrue or arise in India under Section 5 read with Section 9(1)(i) of the Act.
- The Hon'ble Tribunal observed that a plain reading of the provisions of Section 5(2)(b) of the Act shows that the event resulting in accrual of income must take place in India. However, given the broader scheme of the Act, an income which, directly or indirectly, accrues or arises to a non-resident, through or from any Business Connection in India, is also chargeable to tax in India.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- While holding that the term '***business connection***' under the Act is inclusive and not an exhaustive definition, the Hon'ble Tribunal referred to the landmark judicial precedent of the Hon'ble Supreme Court in the case of **CIT vs R. D. Aggarwal & Co. 56 ITR 20,** for its interpretation. In the said case, it was held that '***a relation, to be a 'Business Connection', must be real and intimate, and through or from which income must accrue or arise, whether directly or indirectly, to the non-resident***'.

- Accordingly, the Hon'ble Tribunal held that the business connection is not only a tangible thing like people or businesses, but, a relationship too, as long as such a relationship, real or intimate, results, directly or indirectly, in an income accruing or arising to the non-resident.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal noted that there was a connection between the event in Dubai and the Appellant's business in India on account of the following:
  - The Audi A-8L facelift launch event was India-centric;
  - The event was for the purpose of promoting business in India which generates enquiry of potential customers in India who in turn would like to purchase Audi cars in India and finance the same from the Appellant. It was for this reason that the taxpayer was a part of this event.
  - While the event physically took place in Dubai, UAE, the benefits of the event (by way of below-the-line publicity on internet, press releases, news reports, social media of Audi 8L facelift in India) accrued to the taxpayer and Audi India.
  - The entire expenses of the launch event were treated as business expenses and the Appellant claimed a deduction of the same under the provisions of Section 37(1) of the Act.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal held that all the benefits accrued to the Appellant in India, and it was on account of these benefits that the international celebrity was paid for his participation in the Dubai Audi A-8L facelift event.
- The Hon'ble Tribunal also held that the Business Connection in India is intangible (as it is a relationship rather than an object) but it is significant Business Connection which has resulted in income accruing and arising to the non-resident. The income thus, based on facts, accrued and arose by reason of Business Connection in India.
- Further, the Hon'ble Tribunal observed that business models are changing but post internet and post the social media revolution, business models have changed so drastically that the very fundamental rules of conducting business have changed.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal noted that considering the peculiar facts of the case under consideration, past judicial precedents dealing with the concept of business connection were in the context of primitive trade, commerce and services and were not relevant in the context under consideration.
- The Hon'ble Tribunal also noted that the issue under consideration was a new issue and was required to be dealt with on first principles. Hence, it did not deal with the past judicial precedents relating to business connection.
- The Hon'ble Tribunal also rejected the contention of the Appellant that the case of the Ld. AO was confined to taxing the payment made by the Appellant to the celebrity as royalties under the Act and that it was not open for the Hon'ble Tribunal to go beyond the case made out by the Ld. AO and tax the payment made as business income.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal relying on the judicial precedent set by the Hon'ble Guwahati High Court in the case of **Jeypore Timber & Venture Mills Pvt. Ltd. vs CIT, 137 ITR 415**, observed that it was duty bound to adjudicate the issue raised and it should not result in any enhancement of assessment or it should not be decided without affording due opportunity to the Appellant.
- Further, the Hon'ble Tribunal also noted that the Appellant had itself raised the issue of taxability under Section 5 read with Section 9(1)(i) of the Act and it had adjudicated upon the same. Further, it did not result in an enhancement as the Appellant was not saddled with a new withholding tax liability.
- The Hon'ble Tribunal also rejected the argument of the Appellant that the provisions of Section 115BBA of the Act provides for taxation of an entertainer being non-resident with respect to income received or receivable from his performance in India, and hence performance outside India is outside the ambit of taxation in India.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal held that the provisions of Section 115BBA of the Act deals with mode and rate of taxation in hands of non-resident entertainer and hence, if an income is not covered under the said provisions, then the same was taxable at normal tax rates.
- The Hon'ble Tribunal also rejected the contention of the Appellant that since the event was held outside India, the income was not taxable as per Article 18 (***dealing with income of entertainers***) and under Article 23(1) (***dealing with taxation of Other Income***) of the India-USA Tax Treaty.
- The Hon'ble Tribunal held that the article 23(3) of the Inia-USA tax Treaty is a *non obstante clause* and it allows the country in which the income arises, to tax such income if the law provides so.
- The Hon'ble Tribunal concluded that the income embedded in payment to the international celebrity, for participation in Dubai A-8L launch event, was taxable in India and accordingly, the Appellant had the liability to withhold taxes in India.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Key Takeaways:

- At the very outset, the ITA in the present case had alleged that the payment by the Appellant to a celebrity is taxable as royalty under the provision of Section 9(1)(vi) of the Act and therefore, the Appellant was liable to withhold taxes.
- Further, it is a well settled position that under section 5(2)(b) read with section 9(1)(i) of the Act, income in case of a non-resident taxpayer is deemed to accrue or arise in India provided that the recipient of income has a Business Connection in India.
- However, such principle is not applicable when taxing income(s) in the nature of interest, royalty and fee for technical service where income payable by an Indian resident to a non-resident is said to accrue or arise in India (unless the same is in relation to business carried on by the payer outside India or earning of income outside India).
- In case of business income, the established rule for bringing such income to tax in India is the recipient's Business Connection in India.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Key Takeaways:

- The Hon'ble Tribunal remarked that taxing the payment as business income and not as royalty would not saddle the Appellant with a new withholding tax liability. Though, the statement is correct since the payment which has been taxed remains the same, irrespective of treating the payment as royalty or business income but the Appellant will surely be burdened with the additional levy of tax as royalties are subject to withholding tax in India at the rate of 10 % under the Act which is much lower than the prescribed tax rate(s) for business income.

- Further, in the instant case, Hon'ble Tribunal should have considered as to whether the celebrity, a non-resident who made an appearance outside India, constituted a '***Business Connection***'. However, the Hon'ble Tribunal seems to have instead analysed as to whether the Dubai Event had a '***Business Connection***', based on the relationship between the Dubai Event and the Indian entities that organised it, focusing on how the Dubai Event was targeting the Indian market.

Volkswagen Finance Pvt. Ltd. (Contd..)

Volkswagen Finance Pvt. Ltd. vs ITO
[2020] 115 taxmann.com 386 (Mumbai - Tribunal)

Key Takeaways:

- The Hon'ble Tribunal has taxed the said payment as business income by extensively relying upon the landmark decision of the Hon'ble Supreme Court in the case of **R. D. Aggarwal & Co.** However, the Hon'ble Tribunal failed to notice that the Hon'ble Supreme Court in the said case had dismissed the appeal of the ITA on the basis that the non-resident did not have a Business Connection in India.

- The Apex Court in the aforesaid case noted that Business Connection is something which predicates on an '***element of continuity***' between the business of the non-resident and the activity in the taxable territory. A stray or an isolated transaction is normally not to be regarded as '***Business Connection***'.

- Further, the aforesaid observation of the Apex Court also stresses on the fact that a Business Connection must be established from the perspective of recipient of income.

Sofina S.A.

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Facts:

- Sofina S.A. ('**Appellant**') is a Tax Resident of Belgium and during the year ended on March 31, 2015, relevant to Assessment Year ('**AY**') 2015-16, had sold its entire 11.34 % interest held in Accelyst Pte Ltd. Singapore ('**Singapore Company**'), which in turn was holding 99.99 % of shares in M/s Accelyst Solutions Pvt. Ltd. ('**Indian Company**'), to M/s Jasper Infotech Pvt. Ltd. ('**Jasper**').
- The Appellant filed its return of income in India declaring 'Nil' income and claimed refund of taxes withheld by Jasper.
- The ITA, by invoking the Explanation 5 to Section 9(1)(i) of the Act, alleged that the shares of the Singapore Company are deemed to be situated in India, as it derives its value substantially from its investments in Indian Company.
- The ITA also argued that the right to tax the transaction of transfer of shares under consideration was allocated to India under the provisions of Article 13(5) of the India-Belgium Tax Treaty.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

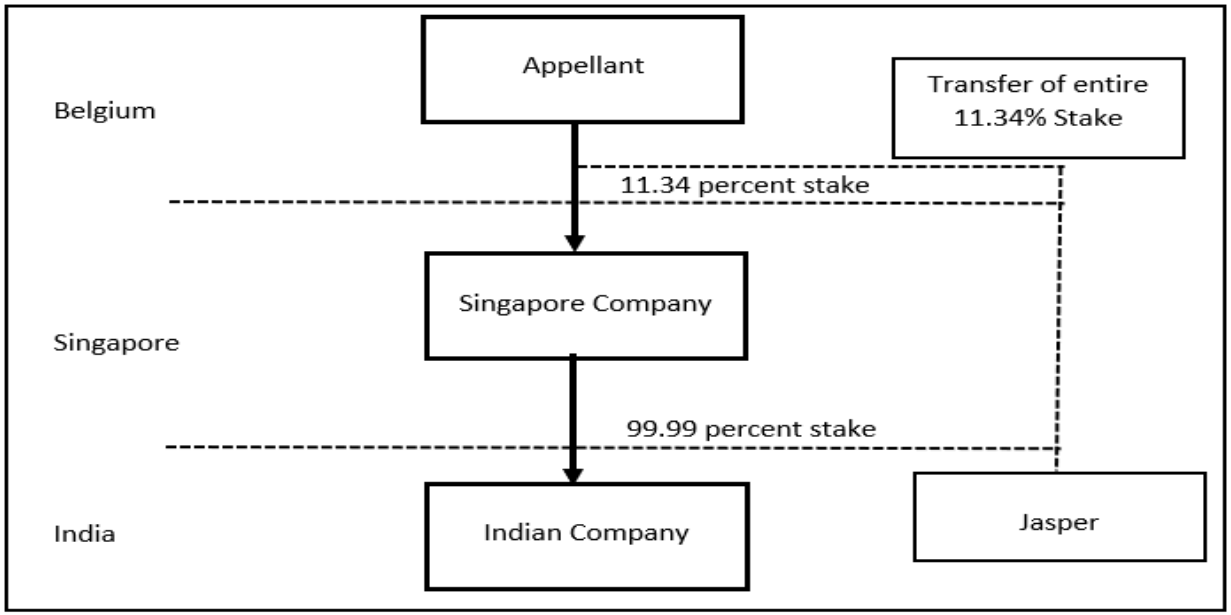
Facts (Contd..):

- The Appellant contented that the gains from the alienation of shares of Singapore Company were taxable in the country of residence of alienator i.e. Belgium in view of the provisions of Article 13(6) of the India-Belgium Tax Treaty.
- However, the ITA did not concur with the submissions of the Appellant and consequently, held that gains exigible to tax in India in view of the provisions of Article 13(5) of the India-Belgium Tax Treaty & Explanation 5 to Section 9(1)(i) of the Act.
- Further, the Dispute Resolution Panel has also upheld the ITA's assessment order passed under section 143(3) read with Section 144C(1) of the Act.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Pictorial Chart depicting the share transfer transaction:



Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Relevant Issue for Determination before the Tribunal:

- Whether such gains arising from the transfer of shares held in Singapore Company is exigible to tax in India, in view of the provisions of Article 13(5) of the DTAA & Explanation 5 to Section 9(1)(i) of the Act, or whether such gains are chargeable to tax in Belgium by virtue of the India-Belgium Tax Treaty.

Contentions of the Appellant (Taxpayer):

- The Appellant contended the ITA deemed the shares of Singapore Company to be situated in India by virtue of Explanation 5 to Section 9(1)(i) of the Act, despite there being no corresponding provision in the India-Belgium Tax Treaty. Further, the deeming provision of Explanation 5 has been erroneously extended to conclude that the Singapore Company is deemed to be a company resident in India.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Contentions of the Appellant (Taxpayer) (Contd..):

- The Appellant had further submitted that a unilateral amendment brought in the domestic law cannot override the provisions of a Tax Treaty and relied upon the decision of the Hon'ble High Court of Delhi in the case of **Director of Income Tax vs New Skies Satellite BV, 68 taxmann.com 8**.

- The Appellant also submitted that one of the preconditions for the applicability of Article 13(5) of the India-Belgium Tax Treaty is that the company whose shares are transferred should be a resident of one of the contracting states. As the Singapore Company is admittedly not a resident of India or Belgium, Article 13(5) of the India-Belgium Tax Treaty is not applicable.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Contentions of the Appellant (Taxpayer) (Contd..):

- Further, the '***see through***' approach is not provided in Article 13(5) of the India-Belgium Tax Treaty and reliance was placed on Hon'ble High Court of Andhra Pradesh decision in the case of **Sanofi Pasteur Holding SA vs Department of Revenue, Ministry of Finance, 30 taxmann.com 222**, wherein the context of similarly worded provisions of the India-France Tax Treaty, it was observed that if shares of a holding company are transferred, such transfer cannot be regarded as transfer of shares of its subsidiary.

- The Appellant submitted that as per the residuary provision of Article 13(6) of the India-Belgium Tax Treaty, such gains would be taxable in the contracting state in which the alienator of the shares (here the Appellant) is a resident, i.e. Belgium.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Arguments Advanced by the Tax Authorities:

- The ITA argued that since the phrase '***forming part of a participation***' employed in Article 13(5) of the DTAA has not been defined in the Tax Treaty, therefore, one can with the aid of Article 3(1) of the Tax Treaty interpret the same by borrowing meaning given to the said term in the Indian Income tax Laws, by referring to the provisions of Section 2(18), Section 2(22)(e) and Section 2(32) of the Act and as such the term '*participation*' can be construed as the interest that one company enjoyed by way of share in another company.
- The ITA submitted that the decision of the Hon'ble High Court of Andhra Pradesh in the case of **Sanofi Pasteur Holding SA** is distinguishable on facts and the ITA has not accepted this decision and has preferred a Special Leave Petition before the Hon'ble Supreme Court, which is pending disposal on merits.
- Further, the shares of the Singapore Company derived its value substantially from the assets of its wholly owned subsidiary, being the Indian Company and hence, the transfer of shares of Singapore Company by the Appellant be regarded as indirect transfer of shares of the Indian Company.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Hon'ble Tribunal Decision:

- The Hon'ble Tribunal noted that one of the conditions for the applicability of Article 13(5) of the India-Belgium Tax Treaty is that the company whose shares are transferred should be a resident of the contracting state. As the Singapore Company is not a resident of India or Belgium, hence, Article 13(5) of the India-Belgium Tax Treaty is not applicable. Further, as per Article 13(6) of the India-Belgium Tax Treaty, such gains would be taxable only in Belgium and not in India.
- Further, as per the provisions of indirect transfer of shares in Explanation 5 to Section 9(1)(i) of the Act, a '***see through***' approach is incorporated. Unlike Article 13(4) of the India-Belgium Tax Treaty, which envisages a '***see through***' approach (however, limited only for immovable property), Article 13(5) of the India-Belgium tax treaty, in the absence of the words '***directly or indirectly***', does not provide for a '*see through*' approach. Therefore, the transfer of shares of the Singapore Company cannot be regarded as transfer of shares of the Indian Company. Such view is supported by the Hon'ble High Court of Andhra Pradesh in the case of **Sanofi Pasteur Holding SA**.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Hon'ble Tribunal Decision (Contd..):

- The Hon'ble Tribunal also noted that In the absence of corresponding provisions in the India-Belgium Tax Treaty, the deeming Explanation 5 to section 9(1)(i) of the Act cannot be read into the tax treaty. A unilateral amendment in a domestic law cannot be allowed to override the provisions of the Tax Treaty.

- The Hon'ble Tribunal also observed that if a term is not defined in the Tax Treaty, the meaning of the same can be borrowed from the domestic law, only if the same is defined in the same context as that of the Tax Treaty and not otherwise.

- The Hon'ble Tribunal held that the term '***participation***' used in Section 2(18), Section 2(22)(e) and Section 2(32) of the Act are in context of participation in '***profits of the company***' and not in context to the '***shareholding of a company***', and therefore, the said interpretative exercise being resorted by the ITA defies the fundamental requirement contemplated in Article 3(1) of the India-Belgium tax treaty.

Sofina S.A. (Contd..)

Sofina S.A. vs ACIT, (2020) 116 taxmann.com 706 (Mum. – Trib)

Key Takeaways:

- The ruling emphasises that '***see through***' approach unless specifically provided cannot be read into the provisions of the Tax Treaty.
- The Hon'ble Supreme Court of India in the very noteworthy decision in ***Azadi Bachao Andolan vs Union of India, 263 ITR 706***, had held that the provisions made in the tax treaties shall prevail over the general provisions contained in the Act, to the extent they are beneficial to the taxpayer.
- Further, the Hon'ble Supreme Court of India in the case of ***Vodafone International Holdings B.V. vs Union of India, 341 ITR 1***, had held that it is important for both the ITA and the courts to look at the legal nature of the transaction in its entirety and holistically. The '***look through approach***' is permissible only in situations where it can be established on the basis of facts and circumstances that the transaction is sham or abusive in nature.

Becton Dickinson (Mauritius) Ltd.

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Facts:

- Becton Dickinson (Mauritius) Ltd. ('**Becton/ Applicant**') is Mauritius based investment holding company. Becton holds a valid TRC issued by the MRA and a Category 1 Global Business License ('**GBL - 1**').
- Becton is part of BD group which is engaged in the business of development, manufacture, and sale of medical devices instrument systems and reagents used by healthcare institutions, life sciences researchers, etc.
- Becton holds 100% equity share capital of Becton Dickinson India Pvt. Ltd. ('**BD India**'), an Indian Company which manufactures and trades in a broad range of medical supplies, devices, laboratory equipment and diagnostic products.
- Becton Dickinson ('**BD**') group undertook a worldwide group restructuring, wherein Becton sold its entire stake constituting 100% share capital in BD India to another non-resident group company Becton Dickinson Holdings Pte Ltd, Singapore ('**BD Singapore**').

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Facts (Contd..):

- The shares were to be transferred at fair market value ('**FMV**') prevailing at the time of proposed sale and the consideration for acquisition of shares of BD India was to be discharged in the form of shares of BD Singapore. Further, the entire transaction was to happen outside India.

Relevant Issue for Determination before the Hon'ble AAR:

- Whether the capital gains on the sale of shares of BD India by Becton to BD Singapore would be liable to tax in India under the provisions of Article 13 of the India-Mauritius Tax Treaty.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities:

- The ITA argued that the capital gains should be taxable in India since the transaction was *prima facie* designed for tax avoidance.
- The ITA argued that the Applicant had mislead the Hon'ble AAR by stating that it received shares of BD Singapore as consideration from the sale of shares of BD India, whereas the financial statements of the Applicant recognised a profit of approximately USD 50 Million.
- The ITA argued that the decision for transfer of shares was taken by the ultimate holding company based in the United States of America namely, Becton Dickinson and Company ('**BDX**') and not by the board of directors of the Applicant.
- The ITA argued that a tax avoidance scheme was devised to make profit in a low tax jurisdiction and transfer the same to the holding company.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA contented that the Applicant had not provided any explanation in its financial statements with respect to the waiver of an earlier loan granted to BDX at the rate of 1.028 % and grant of a fresh loan at the rate of 1 % to BDX.
- The ITA contented that the shifting of profits made it clear that the Applicant is not considered as a separate and independent entity by BDX and is merely a conduit company and the Applicant is thus not the beneficial owner of shares of BD India or the sale consideration received from BD Singapore.
- The ITA also noted that while the agreement for transfer of shares stated the date as March 31, 2012 but as per the financial statements of the Applicant, the shares were transferred on March 28, 2012. The ITA accordingly contended that either the agreement or financials were made up and raised doubts on the credibility of the process.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA argued that the transaction was an '***impermissible avoidance arrangement***', it created rights and obligations which are not ordinarily created between persons dealing at arm's length, results in misuse and abuse of the provisions of the Tax Treaty and Act, lacks commercial substance and is not ordinarily employed for bona fide purposes.

- The ITA contented that the Applicant did not have a place of effective management in Mauritius since had no employees or office in Mauritius.

- The ITA also contended that even though the Applicant may be the legal holder of shares of BD India, its board was open to dictation by BDX and the Applicant was only a named owner i.e. a benami and not the beneficial owner of the shares of BD India.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA, relying upon the decision of the Apex Court in the case of **Vodafone International Holdings B.V.,** contented that the ITA can invoke the '***substance over form***' principle or '***piercing the corporate veil***' test in the application of a judicial Anti-Avoidance Rule if it can establish that a transaction is a '***sham or tax avoidant***'.

- The ITA contented that the tests such as Fiscal Nullity Test, Commercial/ Business Test, Colourable Device Test, Treaty Shopping or Treaty Abuse Doctrine, etc. all are satisfied in the present case and placed its reliance on the decision of the Hon'ble AAR in the case of **'AB' Mauritius, In re, AAR No. 1128 of 2011**.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer):

- The Applicant argued that since it is incorporated in Mauritius and holds a valid TRC issued by the MRA, hence it shall be regarded as a tax resident of Mauritius under the provisions of Article 4 of the India-Mauritius Tax Treaty and shall be entitled to be governed by the beneficial provisions of Article 13(4) of the India-Mauritius Tax Treaty which states that capital gains arising to a resident of Mauritius from the sale of shares of an Indian Company will be chargeable to tax in Mauritius.
- In this regard, the Applicant relied on the CBDT Circular No. 682 dated March 30, 1994 and Circular No. 789 dated April 13, 2000.
- BSDM, in order to justify the scope and validity of CBDT's Circular No. 789 dated April 13, 2000, relied upon the Hon'ble Supreme Court's decision in the case of **Azadi Bachao Andolan,** wherein the Apex Court had upheld the validity of Circular No. 789 and had held that the provisions made in the tax treaties shall prevail over the provisions contained in the Act, to the extent they are beneficial to the taxpayer.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer) (Contd..):

- The Applicant further argued that it did not have any pace of business or activity in India and hence, there was no PE in India and accordingly, the capital gains arising on the sale of shares of BD India be governed by the provisions of India-Mauritius Tax Treaty and be chargeable to tax in Mauritius and not in India.

- The Applicant contended that it had made investments in shares of BD India from the year 1996 to 1999 with the prior approval of Foreign Investment Promotion Board ('**FIPB**') and it had held the shares for 15 years before selling the shares to BD Singapore.

- Further, the sale was made in order to give effect to the BD Group Alignment and Restructuring, and the said sale was approved by FIPB vide its letter dated March 26, 2012.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer) (Contd..) :

- With respect to the allegation of ITA that the Applicant had mislead the Hon'ble AAR with respect to the consideration it received from the sale of shares as it had also booked a profit, the Applicant submitted that the profit as appearing in its books was nothing but the difference between the FMV of shares of BD Singapore and book value of investments at cost.

- Further, with respect to non-disclosure of loans by BDX in its books, the Applicant submitted that it had filed Form 10K with the ITA and the same is used for filing consolidated financial statements and not standalone financials of the company and therefore, any *inter se* transactions between BDX and its subsidiaries would get eliminated.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer) (Contd..):

- As regards the allegation of the ITA that the notes to the financial statements of the Applicant suggested that the decision to transfer the shares was taken by BDX, the Applicant submitted that the Note 16 of the Auditors in the financial statements was merely a summary of the meetings held by the Board of Directors and it merely reported that BD Singapore will be incorporated and the shares of BD India will be transferred to it. Further, the note nowhere mentioned that the Applicant was instructed by BDX to transfer the shares to BD Singapore.

- Further, the Applicant placed reliance on the Apex Court's decision in the case of **Vodafone International Holdings B.V.** and submitted that the restriction on the autonomy of the subsidiary's executive directors by virtue of a parent company exercising shareholder's influence on its subsidiaries is the inevitable consequence of any worldwide legal entity group structure.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer) (Contd..):

- As regards the variance in the date of transfer of shares, the Applicant submitted that correct date of transfer of shares is March 30, 2012 since the dematerialised shares of BD India were transferred on the said date.

- The Applicant also relied upon the decision of the Hon'ble AAR in the case of **Dow Agro Sciences Agricultural Products Ltd, In re, AAR No. 1123 of 2011** wherein it was held that the transfer of shares of an Indian Company by a Mauritius Entity to its group concern in a scheme of group re-organisation is not taxable in India.

- Further, the Applicant also submitted that it is an established principle that a subsidiary would depend on its parent company for funding and placed its reliance upon the Hon'ble AAR ruling in the case of **E Trade Mauritius, In re, 324 ITR 1**.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Hon'ble AAR Ruling:

- The Hon'ble AAR did not accept the ITA's contention that the Applicant was a benami shareholder, a name lender and the actual owner of the shares of Indian entity was some other entity. Accordingly, it has been held that the transaction was not designed, prima facie, for avoidance of tax.

- The Hon'ble AAR relied on the decision of **E-trade Mauritius Limited** wherein it was held that in case shares of an Indian company were purchased by the Applicant with funds received from its parent company by way of capital contributions and loans, it cannot be said that beneficial owner of shares was the parent company. Further, the Hon'ble AAR held that even if the entire sale consideration goes back to the parent holding company, it will not dilute the separate legal identity of the applicant.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble AAR observed that the Applicant was the legal owner of the shares and had entered into transaction of sale of shares backed by the board's resolution and received the sale consideration. Therefore, capital gain had arisen in the hands of the Applicant only.

- The Hon'ble AAR noted that the investment in BD India was held for a period over 15 years during which the business operations in India was carried on and which continued even after the exit. There was continuous generation of taxable revenue in India and thus the applicant fulfils the prescribed conditions.

- The AAR relied upon the decision of the Hon'ble High Court of Bombay in the case of **JSH (Mauritius) Limited** and concluded that the Applicant cannot be treated as a fly by night operator.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble AAR, while placing its reliance on the decision of the Apex Court in the case of **Vodafone International Holdings B.V.,** noted that where the Court is satisfied that the transaction satisfies all the parameters of '***participation in investment***' then in such a case the Court need not go into the questions such as de facto control vs. legal control, legal rights vs. practical rights, etc.
- In view of the CBDT Circular No. 789 dated April 13, 2000 and the Apex Court's decision in the noteworthy case of **Azadi Bachao Andolan**, the Hon'ble AAR observed that when the intent and activities of the Applicant are found to be in order, the CBDT Circular is sufficient to support the case of the Applicant. Therefore, the benefit under the India-Mauritius Tax Treaty shall be available to the Applicant, in the spirit of Circular No. 789, and on the principle ***Pacta Sunt Servanda*** i.e. the tax treaty should be honored in good faith.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble noted that in the present case, the amended India-Mauritius Tax Treaty is not applicable as the transaction of sale of shares took place much earlier in the year 2012, in the Month of March. The pre-amended Article 13 of the India-Mauritius Tax Treaty stipulated that any gain arising on sale of shares is liable to tax only in the State in which the person alienating the share is resident.

- Further, in the instant case the Applicant is a resident of Mauritius and accordingly the capital gain arising on transfer of shares of Indian entity is liable to tax in Mauritius only. Accordingly, by virtue of Article 13(4) of India-Mauritius Tax Treaty, the transaction of sale of shares of an Indian company is not taxable in India.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Key Takeaways:

- Investment through the Mauritius route and the tax litigation surrounding the same has always been in limelight.

- In the instant case, the Hon'ble AAR has given a lot of significance to the fact that the Applicant had held the shares in BD India for about 15 years.

- Further, the Hon'ble AAR, relying upon the noteworthy decision of the Apex Court in the case of **Vodafone International Holdings B.V.,** also stressed when the Applicant satisfies all the parameters of '***participation in investment***' then in such a case there is no need to go into the questions such as de facto control vs. legal control, legal rights vs. practical rights, etc.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Key Takeaways:

- Further, in India, the GAAR have been in effect from April 01, 2017 and the India-Mauritius Treaty was also amended, giving India the right to tax capital gains on the alienation of shares in an Indian Company acquired on or after April 01, 2017. This is a grandfathering provision and the provisions of GAAR are not applicable to investments made prior to April 01, 2017.
- In the pre-GAAR regime, Non-resident entities, backed by the Apex Court's approval in **Azadi Bachao Andolan,** were quite allured by the efficacy of setting up and operating fund structures in Mauritius in order to invest in India but the Indian judiciary at several occasions have dealt with the business purpose test and evaluated the '***substance over form***' test with respect to Mauritius transactions.

Becton Dickinson (Mauritius) Ltd. (Contd..)

Becton Dickinson (Mauritius) Ltd., In re, (2019) 110 taxmann.com 291 (AAR – New Delhi)

Key Takeaways:

- It is worthwhile to note that the Hon'ble High Court of Bombay in the case of **Indostar Capital vs ACIT, 415 ITR 513,** had also observed that despite the existence of a Tax Treaty, availability of a valid TRC issued by the Mauritius revenue Authority and the CBDT Circular No. 789 dated April 13, 2000 clarifying that such certificate as long as in operation would be a valid consideration for granting the benefit under the Tax Treaty, the Apex Court through a series of judicial decisions has not shut down the case of the ITA totally when it comes to a fraudulent or fictitious transaction.

- Further, with the ITA arguing that the transaction of sale of shares of BD India was an '***impermissible avoidance arrangement***', a concept which is defined under section 96 of the Act and applicable with effect from April 1, 2017 under the GAAR suggests that a case to case analysis will be done and availability of a valid TRC won't be hailed as a gold standard.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Facts:

- The Applicant(s) are three Mauritius based private entities named Tiger Global International II Holdings, Tiger Global International III Holdings and Tiger Global International IV Holdings, set up with the primary objective of undertaking investment activities in order to earn investment income. They were granted a Category-1 Global Business Licence and regulated by the Financial Services Commission in Mauritius. They are tax residents of Mauritius under the laws of Mauritius and for the purposes of seeking benefits under the India- Mauritius Tax Treaty.
- The Applicants have been acquiring shares of the Flipkart Private Limited ('**Singapore Co.**') since October 2011, at different times and in turn the Singapore Co., has made investments in India.
- On August 18, 2018, the Applicants transferred its shares of the Singapore Co. to Walmart's FIT Holdings S.A.R.L ('**Luxembourg Co.**'). The said transaction was, in effect, a part of a bigger umbrella involving a multi-billion-dollar deal of Walmart acquiring majority stake in Indian e-commerce giant Flipkart from several of its shareholders including the Applicants.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Facts (Contd..):

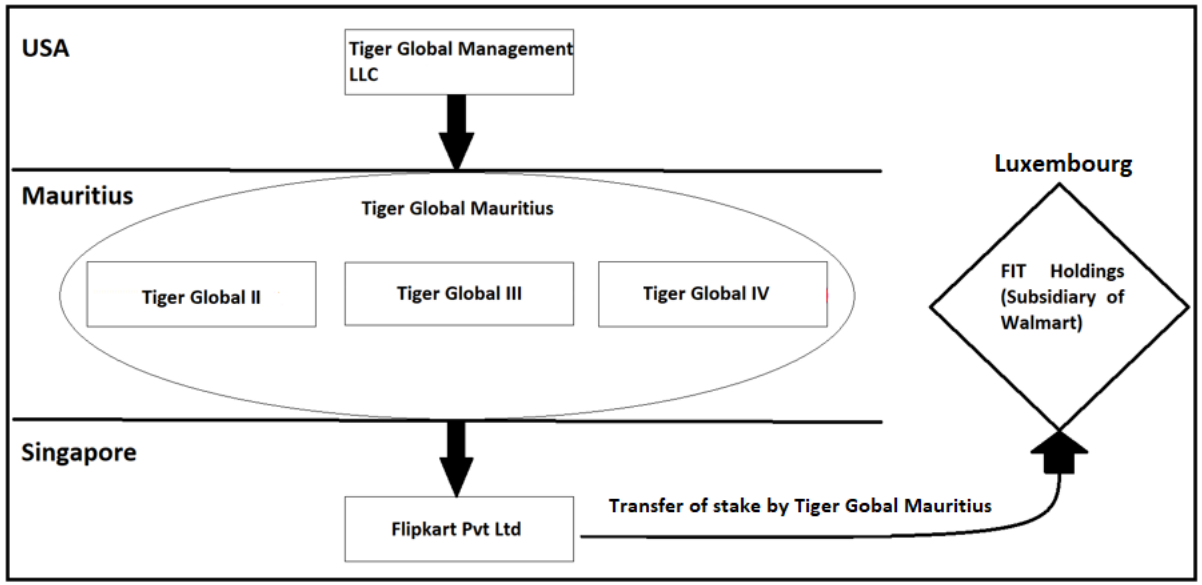
- Prior to the said transfer, on August 2, 2018, the Applicants had approached the ITA for seeking NIL Withholding Tax Certificate. Pursuant to which, the ITA passed an order under Section 197 of the Act dated August 17, 2018, prescribing the withholding rates and apprising the Applicants that they were not eligible to avail benefit under the India-Mauritius Tax Treaty on the premise that the Applicants were not independent in their decision making and the control did not lie with them.

- The Applicants approached the Hon'ble AAR on February 19, 2019 for seeking a ruling on the instant issue.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Pictorial Chart depicting the share transfer transaction:



Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Relevant Issue for Determination before the Hon'ble AAR:

- Whether the capital gains arising in the hands, upon the applicants out of the transfer of shares of Singapore Co. to Luxembourg Co. shall be taxable in India under the Act read with the Indo-Mauritian Tax Treaty.

Arguments Advanced by the Tax Authorities:

- The ITA objected on the admissibility of the application invoking all the three provisos to Section 245R (2) of the Act.
- The ITA raised the ***first objection*** and contended that the issue of chargeability of capital gains on the transfer of shares had already been decided in the order.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA argued that the proceeding can be considered to be pending on the date when the present application was filed as the certificate issued under Section 197 was valid for the financial year 2018-19 and, therefore, application was barred as per the Clause (i) of proviso to Section 245R (2) of the Act.
- The ***second objection*** of the ITA was in the relation to the bar as stipulated under Clause (ii) of proviso to Section 245R (2) of the Act, where the ITA contended that the transfer of shares involves valuation and the issue that was raised by the Applicants, involved determination of fair market value of shares held in the Singapore Co.
- The ITA raised the ***third objection*** with respect to the bar envisioned in Clause (iii) of the proviso to Section 245R of the Act. It was submitted by the ITA that the ownership structure and management control of the Applicant companies was not independent but only as a conduit for the real beneficial owners based out of USA.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Arguments Advanced by the Tax Authorities (Contd..):

- The ITA submitted that the Applicants were subsidiary companies of Tiger Global Management LLC ('**TGM US**') and its affiliates operating through the web of other entities based out of Cayman Islands and Mauritius and the ultimate control lies in the hands of its Founding Partner, CEO.
- The ITA argued that the actual decision-making lies in the hands of the executives and directors sitting in TGM US and the directors based in Mauritius were, in effect, mere spectators and puppets, and not independent in the crucial decision making.
- The ITA stated that the entire financial control and the signing authority to operate the bank accounts over Two Hundred and Fifty Thousand Dollars rest with the Founding Partner, CEO and though the Founding Partner, CEO was not even on the board of directors but he still yielded the maximum authority in controlling the funds of the Applicants' companies.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer)

- With respect to the ***first objection*** raised by the ITA, the Applicants submitted that the proceedings (NIL Withholding of Tax) under Section 197 of the Act had already been concluded as the subject amount of Tax Deducted at Source ("**TDS**") was credited prior to the filing of the present application and therefore, there was no bar to approach the Hon'ble AAR.
- With respect to the ***second objection*** raised by the ITA that the issue raised in the application involved determination of fair market value of shares held in the Singapore Co, the Applicants submitted that the question raised in the Application only concerned with the '***chargeability of tax***' and does not require this AAR to undertake a '***valuation exercise of the shares***' or to '***compute the capital gains arising from transfer of the shares***'.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Contentions of the Applicant (Taxpayer) (Contd..)

- With respect to the ***third objection*** raised by the ITA that the transaction is designed prima facie for the avoidance of Income Tax, the Applicants vehemently countered the ITA's submission that the transaction was prima facie for the avoidance of tax by submitting that the requirement under law was to prove, "*that the transaction is designed prima facie for the avoidance of income tax and not that there is a prima facie case of the transaction being designed for the avoidance of income tax*".
- The Applicants had also relied upon the case of ***Vodafone International Holdings B.V.*** to emphasize that the burden of proof was on the Tax Authorities to demonstrate tax avoidance.
- It was further countered that the mere fact that the Board of Directors of the Applicants have limited authority and signing authorisation was given to certain persons to operate the bank accounts does not *ipso facto* mean that the Applicants did not have control over its funds and functioning.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Hon'ble AAR Ruling:

- The Hon'ble AAR rebuffed the ***primary objection*** raised by the ITA in relation to the bar stipulated in Clause (i) of proviso to Section 245R (2) of the Act and held that the proceedings under Section 197 of the Act concluded on August 17, 2018 when the certificates were issued by the TDS officer and hence, it cannot be said that any proceedings were pending on the date of Application before the AAR.
- The Hon'ble AAR rejected the ***second objection*** raised by the ITA with respect to the bar of Clause (ii) and held that the exercise of valuation of shares and the computation of capital gains can be undertaken by the ITA only when the present issue of taxability of capital gain on sale of shares was decided upfront.
- With respect to the ***third objection*** raised by the ITA, AAR shrugged the contention of the Applicants stating it to be "***too simplistic to be accepted***" that the transaction was between two unrelated independent parties not being designed for avoidance of tax and noted that the entire transaction of acquisition as well as sale of shares "***as a whole***" was required to be evaluated.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble AAR ruled that the "***Head and Brain***" and consequently the control and management of the Applicants was not Mauritius but USA. It was noted that the CEO of the TGM US was having the signing authority to operate bank accounts for transactions over Two Hundred and Fifty Thousand Dollars even when the principal bank account was maintained in Mauritius.
- The AAR noted by relying on the underlying documents submitted to the Mauritius authorities that The Founding Partner, CEO was the beneficial owner of the immediate parent companies of the Applicants and with him other key personnel of the TGM US were responsible for the entire major decision making by inferring that the Applicant companies were only a "***see-through entity***".
- The Hon'ble AAR observed that the ***Circular No. 682 dated March 30, 1994*** was applicable only on the alienation of shares of an '***Indian company***', which was not the case here, as the Ruling was sought with respect to sale of shares of a '***Singapore company***'

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- Further, the AAR Ruling interpreted the legislative intent behind Pre and Post amended DTAA to deduce that, the treaty provides that, the capital gains on transfer of shares in an '***Indian company***' or a company resident in India shall be taxed in Mauritius, but because the capital gains on the sale of shares of '***Singapore Co.***' was in question, the Hon'ble AAR denied the benefit of exemption, holding that the exemption to a company not a resident in India was never intended under the India-Mauritius Tax Treaty.
- The Hon'ble AAR also observed that the Applicants did not stand out on the yardstick mentioned in the celebrated case of **Vodafone International Holdings B.V.** as to whether a given transaction is a transaction created for tax avoidance purposes or a transaction created for doing investment in India. It was noted that Singapore Co., being a Singapore registered company, in actuality, neither held any strategic investment or FDI nor generated any taxable revenue in India.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Hon'ble AAR Ruling (Contd..):

- The Hon'ble AAR reiterated that the arrangement carried out by the Applicants was with an intention to claim benefit under the India- Mauritius Tax Treaty and eventually rejected the Application by invoking Clause (iii) of proviso to Section 245R(2), which gives the AAR the power to reject application in case it is *prima facie* found to have been designed for the avoidance of income tax.

Key Takeaways:

- The Hon'ble AAR interpreted the treaty to grant exemption to the shares of Indian company and left out the foreign company deriving value from the assets in India. As per the Ruling, treaty intended to give benefits only on alienation of shares of resident companies of the contracting states.

Tiger Global International II Holdings

Tiger Global International II Holdings, In re, (2020) 116 taxmann.com 878 (AAR – New Delhi)

Key Takeaways:

- This Ruling complicates the relevance of tax treaties for indirect transfer of shares, this is due to the paucity of judicial precedents on the matter. Although, the Andhra Pradesh High Court in the case of ***Sanofi Pasteur Holding SA v. Department of Revenue, Ministry of Finance [2013] 30 taxmann.com 222 (Andhra Pradesh)*** upheld the benefits on indirect transfer under the Indo-French Double Taxation Avoidance Agreement. Similarly, in the case of ***Sofina SA v. ACIT [2020] 116 taxmann.com 706 (Mumbai - Trib.)***, treaty benefit on indirect transfer under the Indo-Belgian Double Taxation Avoidance Agreement was permitted.
- Further, a preliminary determination of tax avoidance does not do justice to the complexity of the inquiry and only results in more uncertainty for taxpayers. Once the AAR rejects a case on the basis that there is a prima facie issue of tax avoidance, the ITA takes this as a vindication of its argument that there is indeed a case of avoidance, whereas that is not what the AAR mechanism was supposed to accomplish.

***NOTE**: This presentation is for discussion and general guidance purposes, prepared on the basis of information available. It may not be used for any other purpose, or distributed to any other party, without seeking our prior written consent. No party should rely on this presentation without taking necessary prior professional advice*