KPMG

Tax Flash News

8 July 2025

KPMG. Make the Difference.

Mauritius company not a tax resident of India given its control and management not situated 'wholly' in India - Capital gains on share transfer not taxable

Executive summary

In the case of *Essar Communications Limited*[1], the Delhi Bench of Income-tax Appellate Tribunal (the Tribunal) rejected the Revenue's allegation that the taxpayer, a Mauritius-based holding company, was a tax resident of India under the Income tax Act, 1961 (the Act). Noting that the taxpayer held a valid Tax Residency Certificate (TRC), its directors were not Indian residents, and all significant business decisions were made by the Board of Directors (BoD) in meetings held in Mauritius, the Tribunal concluded that the control and management of its affairs was not situated wholly in India.

Accordingly, capital gains arising from the transfer of shares of Indian company were not taxable in India under the India–Mauritius Tax Treaty (the treaty).

The Tribunal rejected the Revenue's claims that the taxpayer was a sham entity and observed that the Revenue produced no evidence to substantiate its claim of tax avoidance or lack of substance in the taxpayer.

---

[1] *Essar Communications Limited* v. *ACIT (*ITA No. 340/ DEL/ 2022); *Essar Com Limited* v. *ACIT* (ITA No. 339/ DEL/2022)

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

Facts of the case[2]

The taxpayer was an investment holding company incorporated in Mauritius. Its shares were held by another Mauritius company, Essar Communications (Mauritius) Limited (ECML).

The taxpayer held a valid TRC issued by the Mauritius Revenue Authorities (MRA) and a Category 1 Global Business Licence (GBL) during the relevant year[3].

The taxpayer had a wholly owned subsidiary in India – Essar Telecom Investments Ltd. (ETIL) which held shares in Vodafone Essar Ltd. (VEL), India.

The taxpayer's investments in ETIL were funded by capital infused by its parent company (ECML), which had borrowed funds from a consortium of banks (the lenders). VEL shares held by ETIL were pledged as security for the purposes of this loan.

The lenders, in order to have greater enforceability over the pledged VEL shares, wanted the taxpayer to have direct pledge on the VEL shares. An application for approval was filed with the RBI, however, the same was rejected. As a result, ETIL was liquidated, and the taxpayer became one of the direct shareholders of VEL.

During the relevant year, the taxpayer sold shares held by it in VEL and the sale proceeds were distributed by the taxpayer to its holding company (ECML) which utilised the funds to repay the loan.

Asserting that it was a tax resident of Mauritius and was entitled to treaty benefits, the taxpayer claimed that capital gains arising on sale of the shares were not taxable in India under the treaty[4].

However, the Revenue denied the treaty benefit, arguing that (a) the taxpayer was a resident in India under the Act as well as under the treaty; and (b) the taxpayer was a sham entity, with no substance, incorporated only to take tax benefit under the treaty.

Relevant provisions

As per the provisions of the Act as relevant for the year under consideration[5], a foreign company can be a resident of India in any previous year if, during that year, the control and management of its affairs is situated wholly in India.

[2] Since the issues involved are same in both the appeals, we have covered relevant facts relating to Essar Communications Limited only in this note.

[3] FY 2011-12 (i.e. prior to amendments made in the India-Mauritius tax treaty w.e.f. 1 April 2017)

[4] Article 13(4)

[5] Section 6(3) as applicable for FY 2011-12

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

Prior to the 2017 amendment, Article 13(4) of the treaty provided that gains derived from alienation of any property (other than those specifically mentioned)[6] by a Mauritius tax resident shall be taxable only in Mauritius.

For a person to be eligible to avail treaty benefits, residential status as per the treaty needs to be determined. Where a company is treated as resident in the source country as well as in the residence country as per the domestic tax laws of the respective countries (i.e. dual residency), Article 4(3) of the treaty provides that a company shall be deemed to be a resident of the country in which its place of effective management (PoEM) is situated (the tie-breaker rule).

Revenue's contentions

TRC not a conclusive evidence of tax residency

The CBDT Circular No. 789 and the Supreme Court's judgment in the case of *Azadi Bachao*[7] dealt with FIIs and SEBI-registered investment funds, and it was a policy decision of the Government to extend the treaty benefit to these sets of investors based on the TRC. Such a policy decision was not taken for direct or indirect transfer of shares constituting a business investment (as in the instant case).

Further, the *Azadi Bachao* decision dealt with the prior legal regime prevailing in Mauritius (namely, Mauritius Offshore Business Activity Act, 1992) and did not deal with the Finance Services Act, 2007 (as applicable in instant case) which introduced the concept of GBL.

The Supreme Court in *Vodafone case*[8] had no occasion to examine the treaty from a transactional standpoint and thus, its observations were only an *obiter dictum* and not a binding ratio. Rather, the judgment reiterated the importance of doctrine of 'substance over form', piercing the corporate veil, beneficial ownership, etc.

The control and management test constitutes a key component in applying the doctrine of 'substance over form'.

Issuance of a TRC, while relevant, does not preclude the examination of control and management to determine the genuineness of the residency claim and to address potential treaty abuse.

Tax residency in India

Despite a valid TRC, the Indian Revenue Authorities can examine the residential status for the purposes of the treaty by applying the Mauritius tax law[9].

[6] Immovable property, business property, ships and aircrafts as mentioned in paragraphs 1, 2 and 3 of Article 13 of the treaty

[7] *UOI* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC)

[8] *Vodafone International Holdings B.V.* v. *UOI* [2012] 341 ITR 1 (SC)

[9] Relying on an extract from Klaus Vogel commentary on Article 4, Paragraph 25 (3rd Edition)

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

As per Mauritius tax law, a company incorporated in Mauritius would be treated as non-resident if it is centrally managed and controlled outside Mauritius[10] . As the taxpayer's control and management was situated wholly in India (as discussed below), it was a resident of India and not of Mauritius.

The PoEM resides where the central control and management is exercised. Thus, if the tie-breaker rule was to be applied in the instant case, the taxpayer was a resident of India as per the treaty as well.

Control and management in India

The taxpayer was effectively controlled from India. The Essar Group operated under centralised control by its Indian promoters, with the BoD acting under their instructions. Key decisions were made in India. Loan documents tied control to specific family members, and financials identified Indian promoters as Key Managerial Personnel (KMP).

Sham entity lacking commercial substance

The taxpayer lacked genuine business activity or operations in Mauritius. It existed merely as a holding entity for the promoter family's investments. It had no infrastructure or significant staff and incurred only minimal expenses like audit and professional fees.

Use of colourable device to avoid tax

Frequent restructuring of VEL's shareholding was done to shift the situs of shares to Mauritius. Sale proceeds were diverted to repay loans benefiting the Essar Group, not for the taxpayer's own business – a complete round tripping through loan and share monetisation.

The Group's colourable structure was revealed in the Paradise Papers. No real foreign investment was made—just circular fund flows. Board minutes showed inconsistencies, lacked key deliberations, and failed to document decisions on major transactions.

Taxpayer's contentions

TRC a conclusive evidence of tax residency

Relying on the decisions in the case of *Azadi Bachao* and *Vodafone*, and the CBDT Circular no. 789, the taxpayer contended that TRC issued by the MRA was

[10] Section 73A of the Mauritius Income Tax Act, 1995

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

conclusive evidence of taxpayer's residential status and eligibility for treaty benefits[11].

The proposed amendment by the Finance Bill, 2013 (which provided that the TRC was not sufficient for claiming the treaty benefit) never got enacted. The Finance Ministry also clarified[12] that the TRC will be accepted as sufficient evidence of tax residency and the Revenue will not question or go behind the TRC.

Tax residency in Mauritius

Being incorporated in Mauritius and holding valid TRC for the relevant year, the taxpayer was a tax resident of Mauritius under the Mauritius tax law[13].

The Indian Revenue Authorities had no jurisdiction to go beyond TRC and determine the tax residency under the Mauritius tax law, which can only be done by the MRA.

Not a tax resident of India

Residential status of a company was required to be determined for each year, based on the relevant facts pertaining to that year[14]. Reference made by the Revenue to events and documents pertaining to earlier years to determine tax residency for the year under consideration was bad in law.

In the case of a foreign company, even if a part of control and management was situated outside India, it cannot be considered as a resident of India[15].

Control and management of the taxpayer was not situated wholly in India during the relevant year. Board resolutions, director profiles, and meeting minutes showed that all key decisions were made at board meetings in Mauritius by a qualified BoD, with no Indian residents, except one lender-appointed nominee. Execution of agreements/ documents in India did not equate to control; it was done under the authority delegated by the BoD.

[11] *Azadi Bachao Andolan* (supra); *Vodafone International* (supra); *Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd*. v. *ACIT* [2023] 452 ITR 111 (Del); *Bid Services Division (Mauritius) Ltd.* v. *AAR* [2023] 148 taxmann.com 215 (Bombay)

[12] *Vide* press release dated 1 March 2013

[13] Section 73 of the Mauritius Income Tax Act, 1995

[14] *Wallace Brothers & Co. Ltd* v. *CIT* [1945] 13 ITR 39 (FC); *Sri Raja K.V. Narsimha Rao Bahadur* v. *CIT* [1950] 18 ITR 181 (Madras); Girdharlal Ghelabhai v. CIT [1964] 53 ITR 23 (Guj)

[15] *Narottam Pereira Ltd.* v. *CIT* [1953] 23 ITR 454 (Bombay); *CIT* v. *Nandlal Gandalal* [1960] 40 ITR 1 (SC); *Radha Rani Holdings (P.) Ltd.* v. *ADIT* [2007] 110 TTJ 920 (Delhi Tribunal); *CIT* v. *Bank of China* [1985] 154 ITR 617 (Cal)

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

There is a clear legal distinction between shareholder control and management control. Actual control was in Mauritius, where all board meetings occurred. The Revenue provided no evidence showing promoter family members made decisions outside their roles as directors. The MRA also confirmed that the TRC was issued based on control and management being in Mauritius, not merely based on incorporation.

The treaty's tie-breaker rule applies only in dual residency cases. Since the taxpayer was solely resident in Mauritius, the rule was not applicable in the instant case. Even if dual residency were assumed, the PoEM was not in India.

Commercial rationale and legitimacy of structure

Essar Group had operations in Mauritius since 1992, with sector-specific holding companies and stock exchange listings. The taxpayer was not a shell company—it maintained a physical office, filed tax returns, paid taxes, and acquired commercial property in Mauritius. Its structure aligned with global business practices.

Use of SPVs and investment companies is a common practice and accepted by the courts[16]. The taxpayer infused capital into ETIL to acquire VEL shares. Sale proceeds were returned to repay ECML's loan. Intra-group support is a standard practice in multinational groups to optimise shareholder value. ETIL's liquidation was driven by commercial reasons, specifically to meet loan conditions and regulatory restrictions in India. Revenue cannot override legitimate decisions of the BoD or deny treaty benefits based on its own view of business rationale[17].

The Limitation of Benefit (LOB) clause was introduced in the amended treaty w.e.f. 1 April 2017. The Supreme Court[18] has held that in the absence of LOB clause in the treaty during the relevant year, treaty benefit cannot be denied. Even if LOB clause is tested for the relevant year, the taxpayer had incurred sufficient expenditure in Mauritius, satisfying the prescribed conditions under the clause.

[16] *Vodafone International (supra)*; *Sanofi Pasteur Holdings SA* v. *Department of Revenue, Ministry of Finance* [2013] 354 ITR 316 (AP); *Bid Services Division (Mauritius) (supra)*

[17] *Vodafone International (supra)*, *Becton Dickinson (Mauritius) Ltd,* In re [2021] 434 ITR 180 (AAR); *E Trade Mauritius Limited*, In re [2010] 324 ITR 1 (AAR)

[18] *Vodafone International (supra)* and *Azadi Bachao (supra)*

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

Tribunal's Decision

The taxpayer was tax resident of Mauritius, holding valid TRC and not having control and management situated wholly in India. Taxpayer was entitled to treaty benefits and accordingly, capital gains arising from sale of VEL shares were not taxable in India under the treaty. Key observations of the Tribunal include:

TRC and treaty entitlement

Relying on Circular No. 789 and Supreme Court rulings in *Azadi Bachao* and *Vodafone*, the Tribunal held that the TRC issued by the MRA was sufficient evidence to entitle taxpayer to avail treaty benefits.

Control and management

Residential status must be ascertained for each relevant year based on the facts pertaining to that year. The Revenue determined the residential status of the taxpayer based on events and documents pertaining to earlier years, which was contrary to the provisions of the Act.

A company incorporated outside India can be treated as a resident in India only when the control and management was situated 'wholly' in India - even partial control outside India negates residency in India.

The taxpayer's control and management was not situated wholly in India. In fact, the whole of central control and management was situated in Mauritius as board meetings during the relevant year had taken place in Mauritius.

Business decisions, including the sale of VEL shares, were made by the BoD in Mauritius. The BoD, composed of non-Indian residents, retained full control. The financial statements for the relevant year mentioned the taxpayer's directors as KMPs.

Making of a decision is different from the execution of the decision, and Indian personnel executed agreements/ documents under delegated authority, not as decision-makers.

References to the promoter family in loan agreements or familial ties did not prove Indian control as there was a difference between management control and shareholder control. The Revenue provided no conclusive evidence showing key decisions were made by the promoter family in India, and the Mauritius BoD had no role to play in decision making.

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The tie-breaker rule under the treaty was not applicable in the instant case as the Revenue had not been able to prove that the taxpayer was also a tax resident of India under the Act, by virtue of control and management in India. Neither the Revenue had brought any material on record to show that the taxpayer was not a tax resident of Mauritius.

The residential status of the taxpayer under the Mauritius tax law can be determined only by the MRA and the Revenue is not empowered to administer the same and determine the rights and obligations under foreign law.

Commercial substance

The taxpayer maintained statutory books and board records at its registered office in Mauritius. It operated from leased premises and, in 2012, acquired a commercial property generating rental income. It filed regular tax returns verified by the MRA. No connection was established between the taxpayer and the 'Paradise Papers.'

In the absence of a LOB clause in the applicable treaty, treaty benefits cannot be denied based on alleged treaty shopping or commercial substance claims.

Colourable device

Use of SPVs, inter-company loans, and offshore structures is legitimate and widely accepted. ETIL's liquidation followed RBI's refusal to allow pledging of VEL shares and was driven by lender requirements. The situs of shares remained in India; no artificial shifting occurred. No material evidence brought on record by the Revenue to establish that there is round-tripping of money or any other illegal activities.

The VEL share sale met the test laid down by the Supreme Court in *Vodafone case*:

- Investment held for more than four years
- VEL had substantial operations in India
- VEL generated taxable revenues in India
- Exit driven by commercial necessity (loan repayment and valuation opportunity)
- VEL continued operations post-sale

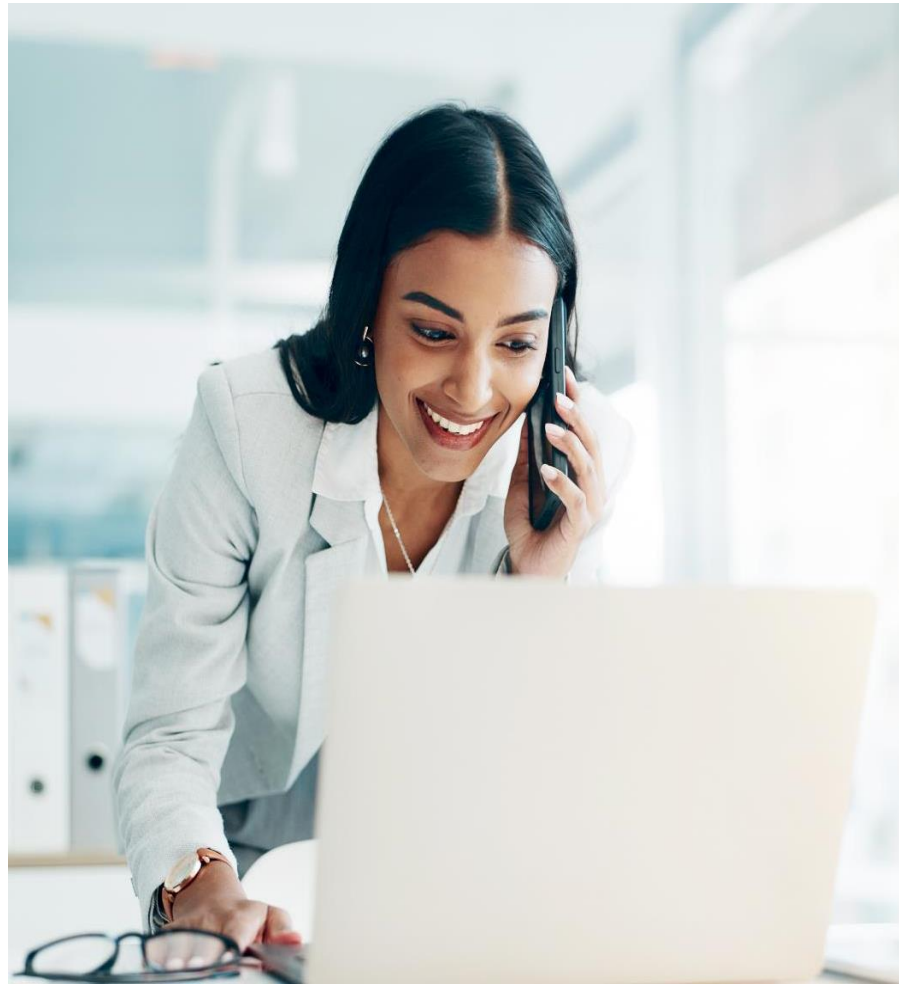
The 'look at' approach confirmed that the taxpayer was a genuine Mauritian entity with valid TRC and commercial intent. The Revenue produced no evidence of tax evasion, sham transactions, or lack of substance.

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

Our comments

The ruling reaffirms that a valid TRC issued by the relevant revenue authority serves as a conclusive proof of tax residency.

It also underscores the importance of maintaining proper records and documentary evidence — not only to establish commercial substance, but also to demonstrate whether the control and management is situated outside India, which is a critical factor for determining the tax residency of a foreign company in India.



© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

KPMG in India addresses:

Ahmedabad
Commerce House V, 9th Floor, 902, Near Vodafone House, Corporate Road, Prahlad Nagar, Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Hyderabad
Salarpuria Knowledge City, Orwell 6th Floor, Unit-3, Survey No 83/1, Plot No 2, Raidurg, Hyderabad – 500 081.
Tel: +91 40 6111 6000

Noida
Unit No. 501, 5th Floor, Advant Navis Business Park, Tower-A, Plot# 7, Sector 142, Expressway Noida, Gautam Budh Nagar, Noida – 201 305.
Tel: +91 0120 386 8000

Bengaluru
Embassy Golf Links Business Park, Pebble Beach, 13/02, 'B' Block, 1st & 2nd Floor, Off Intermediate Ring Road, Bengaluru – 560 071
Tel: +91 80 6833 5000

Jaipur
Signature Towers, Office No. 402, Fourth Floor, S Plot No. DC-II, Lal Kothi District Shopping Center, Tonk Road, Jaipur – 302 001
Tel: +91 141 – 672 1000

Pune
9th floor, Business Plaza, Westin Hotel Campus, 36/3-B, Koregaon Park Annex, Mundhwa Road, Ghorpadi, Pune – 411 001.
Tel: +91 20 6747 7000

Chandigarh
Elante Offices, Unit No. A505, 5th Floor, Plot No.178-178A, Industrial Area Phase-1, Chandigarh – 160 002.
Tel: +91 172 664 4000

Kochi
Syama Business Centre, 49/179, 3rd Floor, NH 47, Bypass Road, Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Chennai
KRM Towers, Ground, 1st, 2nd, & 3rd Floor, No. 1, Harrington Road, Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Kolkata
Unit No. 604, 6th Floor, Tower – 1, Godrej Waterside, Sector – V, Salt Lake, Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai
Lodha Excellus, Apollo Mills Compound, 2nd Floor, N M Joshi Marg, Lower Parel, Mumbai- 400 011.
Tel: +91 22 3989 6000

Vadodara
Ocean Building, 303, 3rd Floor, Beside Center Square Mall, Opp. Vadodara Central Mall, Dr. Vikram Sarabhai Marg, Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada
PR heights, 4th Floor, NH 16 Service Rd, opp. Manipal Hospital Road, Tadepalle, Andhra Pradesh – 522 501.
Tel: +91 0864 536 2000

Gurugram
Building No.10, 8th Floor, DLF Cyber City, Phase II, Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

kpmg.com/in
Follow us on:
kpmg.com/in/socialmedia

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Lower Parel, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

© 2025 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

This document is meant for e-communication only.