



Tax Flash News



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Supreme Court applies GAAR to pre-2017 tax avoidance arrangement, denies capital gains exemption for indirect transfer under the India - Mauritius tax treaty

Executive summary



In a landmark ruling, the Supreme Court in the case of *Tiger Global*¹ has held that capital gains arising to a Mauritian tax resident from the transfer of equity shares on or after 1 April 2017, pursuant to an impermissible tax avoidance arrangement, are taxable in India under the Income tax Act, 1961 ('the Act') read with the India–Mauritius tax treaty ('the Treaty'). The Court clarified that in such cases, the General Anti Avoidance Rules ('GAAR') override the Treaty provisions—even where the shares of the foreign company were originally acquired before 1 April 2017.

The Court further held that following the introduction of GAAR and the statutory treaty override mechanism, a Tax Residency Certificate ('TRC') does not bar the tax authorities from examining whether the arrangement is tax avoidant. Consequently, CBDT² circulars and earlier judicial precedents relied upon by the taxpayers were found inapplicable in the facts and circumstances of the case, as they related to the pre-GAAR era and could not supersede later statutory amendments.

¹ *The Authority for Advance Rulings (Income-tax) and others v. Tiger Global International II Holdings* (Civil Appeal No. 262 of 2026 - Arising out of SLP (C) No. 2640 of 2025)

² The Central Board of Direct Taxes

On GAAR grandfathering, the Court ruled that for impermissible tax avoidance arrangements, the cut-off date of 1 April 2017 applies to the date of transfer—not to the date of investment. The Court also noted that, in the alternative, Judicial Anti Avoidance Rules ('JAAR'), grounded in the doctrine of substance over form, could be invoked.

Facts of the case



The taxpayers, Mauritius-based companies, were carrying on investment activities under Category I Global Business Licences ('GBL-I') issued by the Mauritius Financial Services Commission ('FSC'). The taxpayers held valid TRC issued by the Mauritius Revenue Authority.

The taxpayers collectively held significant shareholdings in a Singapore company ('Singapore Co'), which invested in multiple companies in India. The value of Singapore Co's shares was derived substantially from its Indian investments i.e., assets located in India.

During the year under consideration i.e., FY 2018-19, the taxpayers sold the shares held in Singapore Co to a Luxembourg-based company.

The taxpayers sought advance rulings from the Authority for Advance Ruling ('AAR') on whether the capital gains arising from share transfer would be taxable in India under the Act, read with the Treaty. As per the indirect transfer provisions under the Act,³ the income arising from transfer of Singapore Co was taxable in India. However, considering the capital gains tax exemption under Article 13(4) of the Treaty, the taxpayers claimed that the capital gains arising from transfer of Singapore Co shares were not taxable in India.

The AAR concluded that the transaction was *prima facie* designed for tax avoidance and accordingly, rejected the application. The taxpayer filed writ petition before the Delhi High Court against the advance ruling. The High Court quashed the ruling and held that the transaction was not designed for avoidance of tax and capital gains from the transfer of shares acquired prior to 1 April 2017 stood grandfathered under the Treaty. (refer our earlier flash news for detailed discussion - [The Delhi High Court upholds Mauritius treaty benefit to PE Fund, quashes AAR ruling](#))

Aggrieved by the High Court decision, the Revenue filed appeal before the Supreme Court.

³ Section 9(1) read with Explanation 4 and 5

Supreme Court's decision



The Supreme Court ruled in favour of the Revenue holding that the GAAR provisions become applicable in the instant case as the impugned transactions are impermissible tax-avoidance arrangements, and accordingly, the capital gains arising from the share transfers effected after the cut-off date, i.e., 1 April 2017 are taxable in India under the Act read with the applicable provisions of the Treaty.

Some of the key findings of the Supreme Court leading to the above conclusion are as follows:

Residential status and relevance of TRC

The Act only speaks of the TRC as an 'eligibility' condition – not 'sufficient evidence' of residency, which is a slightly higher threshold. The TRC is not binding on any statutory authority or court unless the authority or the court enquires into it and comes to its own independent conclusion. The TRC relied upon by the taxpayer is non-decisive, ambiguous and ambulatory, merely recording futuristic assertions without any independent verification.

It is a settled principle of international taxation that every nation has a sovereign right to impose tax on

the global income of its residents and on income arising within its territory, and nothing in the judgments relied upon by the taxpayers precludes the Revenue scrutiny in cases of sham or fraudulent transactions; ultimately, each matter must be determined on its own facts.

Relevance of Circular No. 789 and supporting judgments in post-GAAR regime

Insertion of GAAR provisions and its treaty override have completely changed the statutory framework. Circulars issued earlier, though binding on the Revenue at the time of their issuance, operate only within the legal regime in which they were issued and cannot override subsequent statutory amendments. The circulars and the earlier judgments dealing with the circulars, having since been superseded by statutory amendments, will not come to the aid of the taxpayers.

Passive investment activity vs. active arrangement-based structuring

The Court referred to the Shome Committee Report on GAAR. It noted its recommendations on limiting grandfathering to investments and not to an arrangement. Grandfathering an existing arrangement may inadvertently keep its future tax

avoidance schemes out of examination under GAAR since the structure itself would receive indefinite protection.

Applicability of GAAR provisions to tax-avoidance arrangements

While pre-2017 investments were grandfathered, arrangements that continued to yield tax benefits beyond 1 April 2017 remained within the ambit of GAAR provisions, preventing abuse of the grandfathering provisions.

The prescription of the cut-off date of investment under Rule 10U(1)(d) stands diluted by Rule 10U(2), if any tax benefit is obtained based on such arrangement. The duration of the arrangement is irrelevant.

In the instant case, the Court held that there is clear and convincing prima facie evidence to demonstrate that the arrangement was designed with the sole intent of evading tax, and the taxpayers have failed to furnish sufficient material to rebut this presumption.⁴

In the alternative, JAAR provisions grounded in the doctrine of substance over form, can be invoked to pierce the structure and deny Treaty benefits where the transaction lacks genuine commercial substance.

Taxability of capital gains under the Treaty

The Court concluded that in case of capital gains arising from transfer shares under an impermissible tax-avoidance arrangement the exemption under Article 13(4) of the Treaty would not be available.

Separate judgment by Justice J.B. Pardiwala

Justice Pardiwala expressly stated that he agreed with the reasoning and conclusions of the main judgment and added separate observations focusing on the concept of tax sovereignty.

Nations assert tax sovereignty through unilateral actions, showing it has no inherent limits and can be used to align foreign partners with national interests. While bilateral treaties offer stability, their interpretation must evolve with dynamic global trade instead of remaining bound to outdated intentions.

Tax evasion and abuse—especially when hidden through laundering or round tripping—undermine national strength, making strict enforcement essential to preserve tax sovereignty.

He also outlined the safeguards for entering international tax treaties, including limitation of benefits clauses, GAAR override provisions, protection of source-based taxation rights, inclusion

⁴ Section 96(2)

of renegotiation and exit clauses, avoidance of Most Favoured Nation ('MFN') clauses, clear definition of permanent establishment, and alignment with domestic laws and constitutional principles.

Our comments



This decision has far-reaching consequences and the treaty eligibility for investments made prior to 1 April 2017 will have to be revisited. Also, the distinction between 'passive investment activity' and 'active arrangement-based structuring' drawn by the Supreme Court in the context of GAAR grandfathering would need to be evaluated in the facts and circumstances of each case.



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