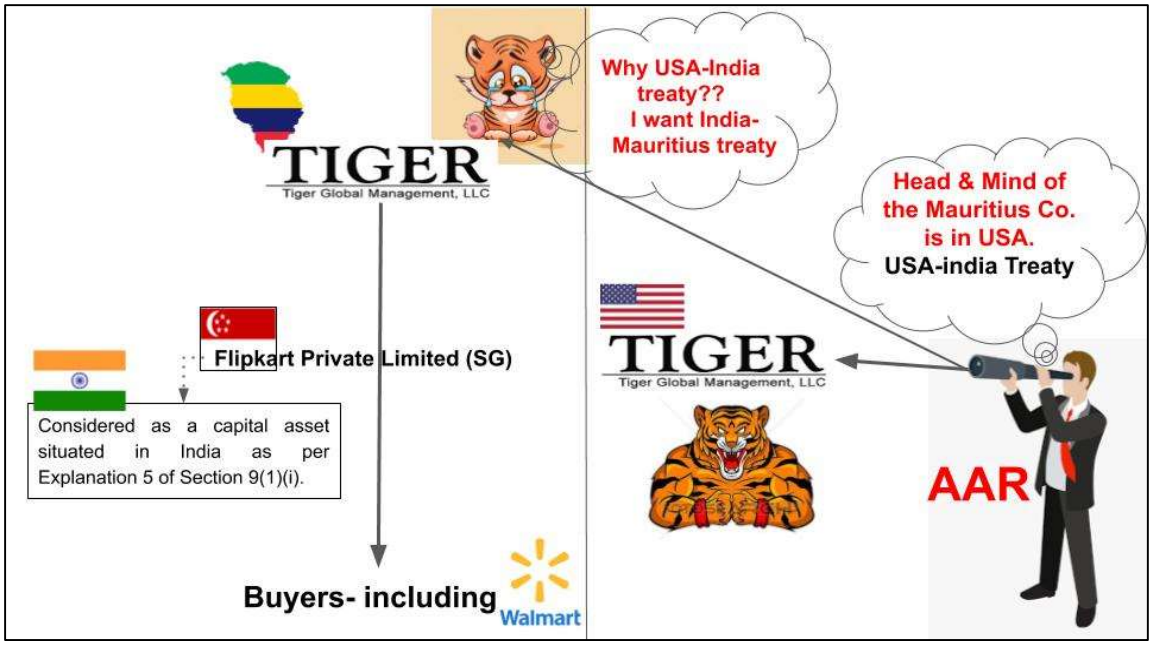
SATURDAY INTERNATIONAL TAX GYAN !!!

Tiger Global International II, III and IV Holdings, Mauritius

Benefit of India-Mauritius treaty won't be available as after the lifting corporate veil it was seen that POEM was in USA and not Mauritius



Facts:

- Tiger Global International II, III, IV- The applicants ("Mauritius cos") held shares of Flipkart Private Limited, a private company limited by shares incorporated under the laws of Singapore (for short "Singapore Co").

- The applicants have submitted that Singapore Co, in turn, had invested in multiple companies in India and the value of the shares of Singapore Co was derived substantially from assets located in India. Therefore, the Singapore company can be considered as a capital asset situated in India as per Explanation 5 of Section 9(1)(i).

- On 18.08.2018 all three applicants transferred certain shares of Singapore Co. to Fit Holdings S.A.R.L. (Buyer), a company incorporated under the laws of Luxembourg. These transfers were undertaken as part of a broader transaction involving the majority acquisition of Singapore Co. by Walmart Inc., a company incorporated in the United States of America.

- The Applicants had approached the Indian tax authorities under section 197 of the Act on 02.08.2018 seeking certification of Nil withholding prior to consummation of the transfer.

Assessee's contention:

- Gains arising to the Applicants from the sale of Singapore Co. to Fit Holdings S.A.R.L. (a company incorporated in Luxembourg) is an Indian Capital Asset. As per Article 13 of the India-Mauritius Treaty, such capital assets would only be taxable in Mauritius.

- As valid TRC is available of Mauritius Cos., the shareholding structure of these companies will not be relevant for the purpose of taxation of transactions.

Revenue's contention:

- The benefit of the India-Mauritius treaty can only be given to either country shares. However, as the shares which have been sold are shares of Singapore Co, India-Mauritius Treaty will not be applicable.

- Treaty has to be applied in "good faith" and therefore when as per the documents available on record it can be proven that the sole benefit to enter the transaction through Mauritius is to gain treaty benefit, corporate vile needs to be pierced and treaty benefit to be denied. Tiger global USA is the ultimate beneficiary and therefore as per India-USA DTAA (Article xx), such transactions will be taxed in India as per domestic tax provisions.

Ruling:

- The Supreme Court in Vodafone case had held that the treaty and furnishing of tax residency certificate (TRC), as read with Circular no 789 dated 13 April 2000 would not put off the Revenue Authorities from denying treaty benefits in suitable cases.

- Though the taxpayers have submitted that their control and management was with the Board of Directors in Mauritius, what is material is not the routine control of the affairs of the taxpayers but their overall control. The control and management of taxpayers does not mean the day-to-day affairs of their business but would mean the head and brain of the Companies, which seems to be with Tiger Global USA.

- Authorized signatories for applicants, though being not on the Board of Directors of the taxpayers, were the key personnel of the Group and were managing and controlling the affairs of the entire organization structure. The funds of the taxpayers were ultimately controlled representative of parent co. and the taxpayer had only limited control over their fund.

- Hence, taxpayers head and brain and consequently their control and management were situated in the USA and not Mauritius.

- The entire arrangement made by the taxpayers was with an intention to claim benefit under India – Mauritius DTAA, which was not intended by the lawmakers, and such an arrangement was nothing but an arrangement for avoidance of tax in India.

- Even if the Singapore Company derived its value from the assets located in India, the fact remains that what the taxpayers had transferred was shares of Singapore Company and not that of an Indian company. The objective of India-Mauritius DTAA was to allow exemption of capital gains on transfer of shares of Indian company only and any such exemption on transfer of shares of the company not resident in India, was never intended by the legislator.

Our comments:

- As we know now the courts, authorities are travelling beyond the boundaries of conventional law and interpreting the law with changing transactions and scenarios.
- Similarly, in this case the corporate veil was lifted and the actual beneficiary was identified, and accordingly the benefit of DTAA between India - Mauritius was denied treaty shopping was banished. Thus, it could open up a pandora box for all the indirect transfers.
- It is also important to note that AAR has ruled against the judgement of Hon'ble Supreme court in the case of Azadi Bachao Andolan and Hon'ble Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA, by lifting the veil and denying DTAA benefits even where TRC was available with the taxpayer. It can be said that the applicant has an edge over revenue when the matter goes to the appellate stage.
- More substance (Board meetings, book-keeping, important decision making) would be required to be created for companies in tax friendly jurisdiction. A mere TRC may/may not suffice in the post MLI world.

Section	**195, 197, 9(1)(i)**
DTAA/Country	**Mauritius, Singapore, USA**
Court	**Authority of Advance ruling**
Date of decision	**26.03.2020**

Note: Case law name in Red- in favour of the Revenue, Green- In favour of the Assessee, Orange = Partial.

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Thank you