

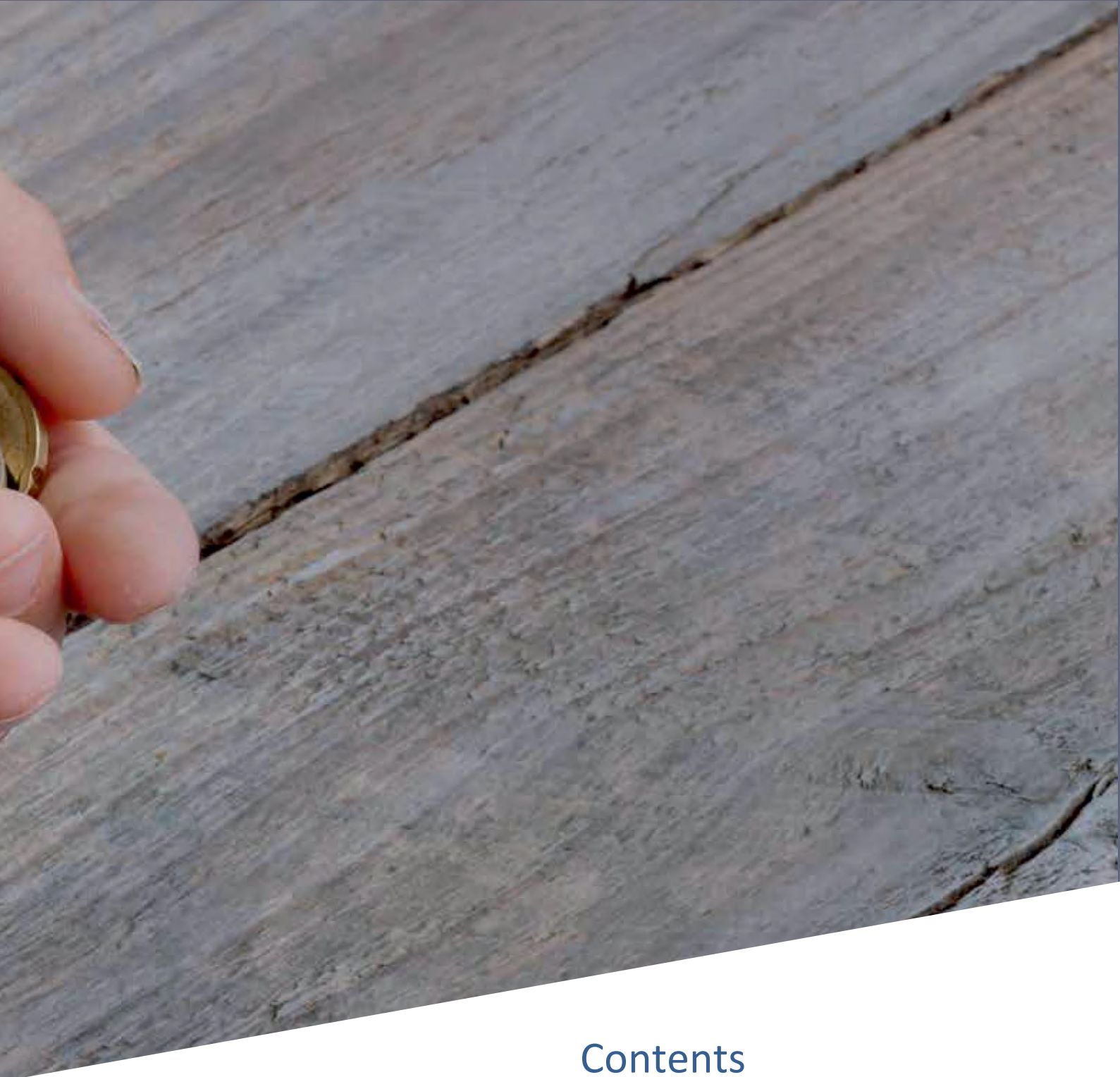
TAXATION TIMES

November 2020



Taxation Times is a monthly newsletter published by UJA specifically with an intent and object to simplify and provide clarity on certain provisions of the Income Tax Act, discuss the implications of various amendments and circulars notified time and again, understand the judicial precedents as decided by various courts and interpret these.

The Taxation Times is an initiative to keep you abreast with the latest development in the realm of the Direct Taxes in India.



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Towards the end of 2020, the year which brought around such massive changes in all walks of life it will also be remembered as the year of pandemic. Government has also considered the difficulties and extended relevant due dates for the purpose of ease. Hopefully this will provide the time required for filing of returns.

Coming to taxation, there are some interesting happenings that have taken place around direct taxes and this month's taxation times will give you a fair picture of the same.

This month's Taxation Times brings the following to the table:

- How to not avoid Billions in Taxes and get caught.
- Recent Decisions by the Tribunal and the High Court.
- A Did You Know Series to state the news running around Direct Taxes.
- Circulars, Notifications, Press Releases in the last month and the upcoming compliances for November 2020.

We hope that you find this edition of the Taxation Times useful.

Do you have any inputs to make the forthcoming issues of the Taxation Times more useful & relevant? Please share your feedback on info@uja.in.

We look forward to hearing from you!

Best Regards,
UJA Tax Team

How to Not Avoid Billions in Taxes and Get Caught

- 1. TOPIC:** Where real control of Mauritius companies (Tiger Global International Holdings) was with US resident who was beneficial owner of group structure and appellants derived no capital gains by alienation of shares of any Indian company, rather gains arose on sale of a Singapore Company's share, value of which was derived substantially from assets located in India, whether such arrangement was for avoidance of tax in India?

2. Facts of the case:

2.1 Tiger Global International II Holdings, Tiger Global International III Holdings and Tiger Global International IV Holdings, are private companies limited by shares incorporated under the laws of Mauritius. They were set up with the primary objective of undertaking investment activities with the intention of earning long term capital appreciation and investment income. The applicants are regulated by the Financial Services Commission in Mauritius and have been granted a Category 1 Global Business License and are tax resident of Mauritius under the laws of Mauritius and under the provisions of the Agreement between India and Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Foreign Countries. The applicants held shares of Flipkart Private Limited, a private company limited by shares incorporated under the laws of Singapore. The total number of shares of Singapore Co acquired by the applicants was as per table below:

S.No	Applicant	Number of shares acquired	Period/Date of acquisition
1	Tiger Global International II Holdings, Mauritius	23,670,710	October, 2011 to April, 2015
2	Tiger Global International III Holdings, Mauritius	2,282,825	23 rd June 2014
3	Tiger Global International IV Holdings, Mauritius	105,928	24 th April 2012



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2.2 The Singapore Co (Flipkart), 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.

(Some of the companies in which investments were made in India by The Singapore Co (Flipkart))

LLPIN /CIN/Form INC -1 Ref No	Company/LLP Name	State	Incorporation Date	Company Name Status
U74110KA2015FTC111824	FLIPKART ADVANZ PRIVATE LIMITED	Karnataka	20/06/2015	Allocated
U72900KA2013PTC068427	FLIPKART DIGITAL SERVICE PRIVATE LIMITED		04/04/2013	Reserved
U72900KA2013PTC068427	FLIPKART DIGITAL SERVICE PRIVATE LIMITED		04/04/2013	Reserved
U74110KA2019FTC128476	FLIPKART FARMERMART PRIVATE LIMITED	Karnataka	04/10/2019	Allocated
R39328430	FLIPKART FINANCE PRIVATE LIMITED		-	Reserved
U51909KA2011PTC060489	FLIPKART INDIA PRIVATE LIMITED	Karnataka	19/09/2011	Allocated
U51109KA2012PTC066107	FLIPKART INTERNET PRIVATE LIMITED	Karnataka	01/10/2012	Allocated
U74900KA2011PTC061609	FLIPKART LOGISTICS PRIVATE LIMITED	Karnataka	13/12/2011	Allocated
U72200KA2008PTC048012	FLIPKART ONLINE SERVICES PRIVATE LIMITED	Karnataka	14/10/2008	Allocated

2.3 On 18-8-2018 all the three companies transferred certain shares of Singapore Co (Flipkart). to Fit Holdings S.A.R.L. (Buyer), a company incorporated under the laws of Luxembourg. The details of shares transferred by the applicants and the gross consideration received are as under:

S.No	Applicants	Number of shares sold	Gross consideration received
1	Tiger Global International II Holdings, Mauritius	14,754,087	USD 1,893,510,103.82 equivalent to INR Rs.13122,02,50,194/-
2	Tiger Global International III Holdings, Mauritius	1,422,897	USD 181,782,633.10 equivalent to INR Rs.1259,75,36,473.83
3	Tiger Global International IV Holdings, Mauritius	66,026	USD 8,435,171.44 equivalent to INR Rs. 58,45,57,380.79

These transfers were undertaken as part of a broader transaction involving the majority acquisition of Singapore Co. (Flipkart) by Walmart Inc., a company incorporated in the United States of America, from several shareholders.

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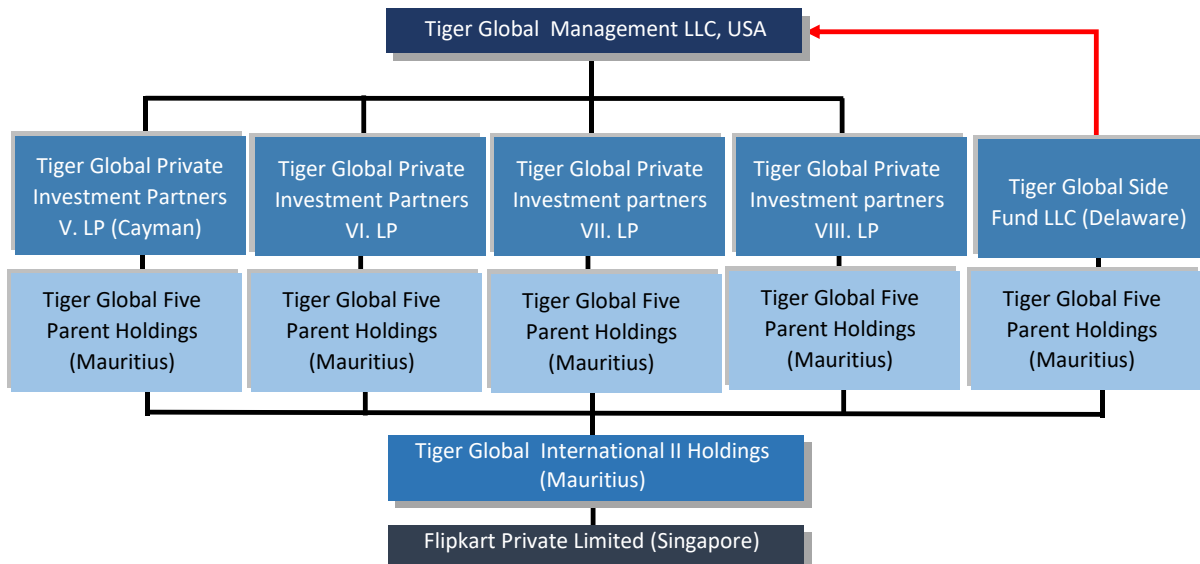
3. The big question that arises is “whether transaction / issue designed prima facie for avoidance of tax?”

According to the facts of the case, Tiger Global had transferred shares of Singapore Company (Flipkart) which owned a company based in India and, therefore, the Singapore based company (Flipkart) derived its value from assets located in India. As per the provisions of the Act, direct or indirect transfer of assets located in India was liable to tax and, therefore, capital gains was exigible on transfer of shares of Singapore Company (Flipkart). However, Tiger Global, which are tax resident of Mauritius, had claimed benefit of beneficial provision of DTAA between India and Mauritius.

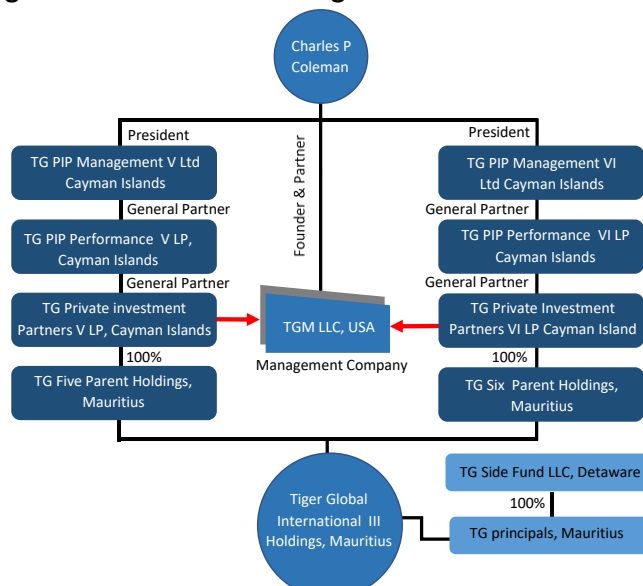
Some key points to be taken into consideration are:

a. Ownership Structure & Control: The companies were set up in Mauritius for making investment in India and other markets. These companies were not acting independently but only as a conduit for the real beneficial owners based out of USA. The structure of the shareholding arrangements of the applicants are depicted in the following chart:

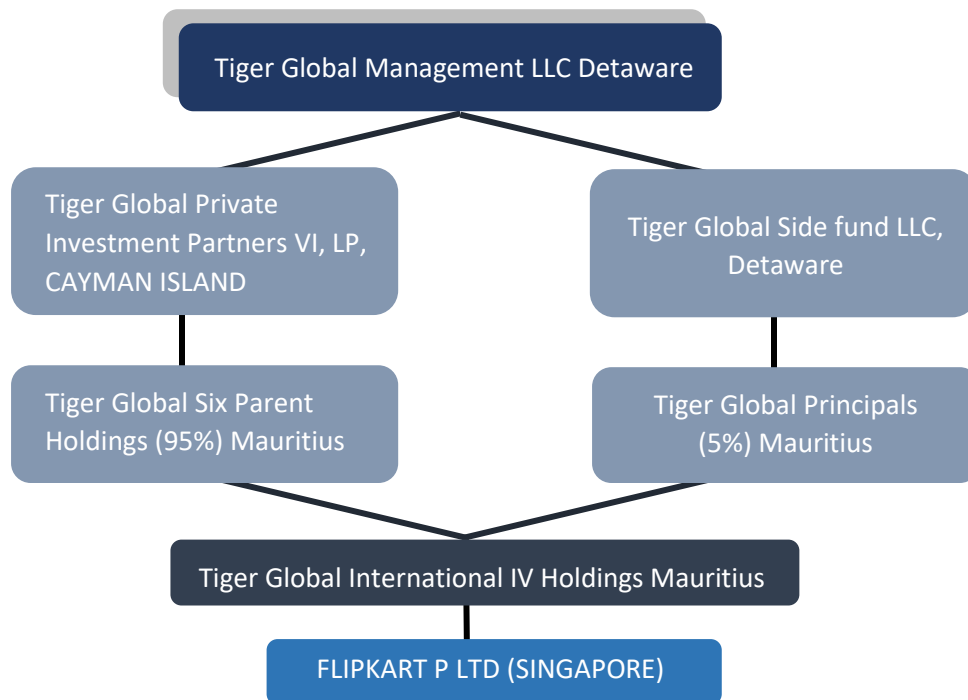
Organizational structure of Tiger Global International II Holdings



Organizational structure of Tiger Global International III Holdings



Organizational structure of Tiger Global International IV Holdings



b. Decision making: Mr. Steven Boyd, non-resident USA Director (who was also General Counsel of Tiger Global Management LLC) had attended all the Board meetings in which crucial decisions were taken and that the Mauritius Directors were in effect mere spectators or took advice from Mr. Steven Boyd. The Directors based in Mauritius were mere puppets and not independent.

c. Beneficial ownership: According to the documents of Tiger Global International III Holdings with Mauritius Financial services commission for the purpose of obtaining Category 1 Global Business License, it clearly specified that the beneficial owner of the company is Mr. Charles P Coleman. It is pertinent to note that Mr. Charles P Coleman is the founder and partner of Tiger Global Management LLS, USA.

d. Financial Control: The authority to operate the bank accounts for transactions above USD 250,000 lies with Mr. Charles P. Coleman, countersigned by one of the Mauritius based directors. It is found that Mr. Charles P. Coleman is not on the Board of Directors of the Mauritius based Tiger Global Companies. Without being on board of directors, he yields maximum authority in controlling the funds of the applicants company.

4. Events that occurred:

The Taxpayers, (Tiger Global International Holdings) Mauritian Companies, transferred the shares of a Singapore Company (Flipkart) which derived substantial value from assets in India. Prior to consummation of the transfer of shares of Singapore Company (Flipkart), the Taxpayers made an application to Indian Tax Authority to obtain a nil tax withholding certificate. The Taxpayers, post rejection of their application to obtain a nil tax withholding certificate from the Tax Authority, filed an application before the AAR to determine whether such transfer is taxable in India.

The organization structure of the applicant is depicted by the charts above. The Tiger Global Holding Mauritian Companies are part of Tiger Global Management LLC USA and have been held through its affiliates through web of entities based in Cayman Islands and Mauritius. Though the holding-subsidary structure might not be a conclusive proof for tax avoidance, the purpose for which the subsidiaries were set up does indicate the real intention behind the structure. From the materials brought on record, the fact that they were set up for making investment in order to derive benefit under the DTAA between Mauritius and India is an inescapable conclusion.

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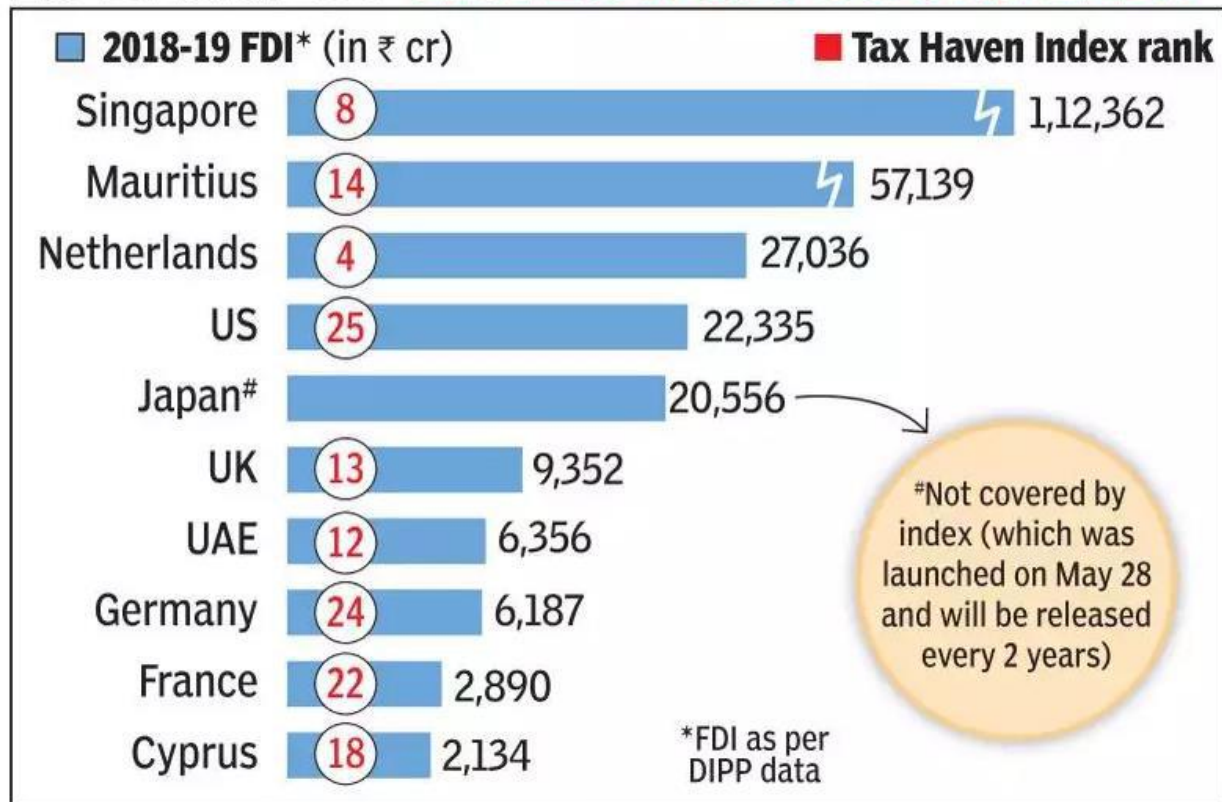
Had the TGM USA directly held the shares in Flipkart it would have been liable to pay tax on gain on sale of those shares as per the provision of Indo-US DTAA.

5. Conclusion:

In concluding the proceedings, AAR rules that investment of a Mauritius company in a Singapore company deriving substantial value from assets in India is prima facie designed for avoidance of tax not eligible for treaty benefits and rejects the application filed by Mauritius Company.

The conclusion of AAR that, prima facie, the case is one of tax avoidance is based on assessment of the facts of the case, on its inference that control and management of the Taxpayers was located outside Mauritius and that the Taxpayers were see-through entities whose ultimate owner and beneficiary was a US resident.

10 BIGGEST INVESTING COUNTRIES





Recent Case Laws

In a recent decision, the Hon'ble Madras High Court has held that when the taxpayer has made cash payments for the purpose of acquiring rights to screen movies in theatres to various parties, such payments were to be disallowed under s. 40A(3) r.w.r 6DD despite the fact that the payees were identifiable.

Fact of the Case:

The taxpayer¹ had made cash payments to various parties to acquire rights to screen movies in theatres. The Ld. Assessing Officer ('AO') stated that cash payments exceeded INR 20,000/- and ran into several lakhs of rupees and accordingly disallowed the expenses under s. 40A(3). Thereafter, the taxpayer preferred an appeal before the Hon'ble Commissioner of Income Tax (Appeals) ('CIT(A)') & subsequently before the Hon'ble Tribunal who dismissed the appeal of the taxpayer.

Aggrieved, the taxpayer has filed an appeal before the Hon'ble High Court.

Issue:

Was the Tribunal justified in upholding that the cash payments made by the taxpayer were in violation of s. 40A(3) and therefore the disallowance made by the AO is justified.

Decision:

1. During the proceedings before the High Court, the Counsel for the taxpayer contended that the parties to whom cash payments were made were identifiable & also letters were produced from these parties along with their PAN's stating that the payments were actually received by them. Hence, the genuineness of the payments could not be doubted particularly when 75% of the payments were effected through banking channels. In this regard, attention was invited to the

decision in the case of Attar Singh Gurmukh Singh etc², wherein it was held that s. 40A(3) must be read along with Rule 6DD of the Income Tax Rules.

The Ld. Counsel also pointed out that these details were in fact disclosed in the Audit Report filed by the taxpayer. CBDT Circular No. 220 dtd. 31.5.1997 prescribing the limits & circumstances when the income tax officers could relax the requirement of making excess payment was also relied upon. Further, in Chrome Leather Co. (P) Ltd³, it was held that the conditions mentioned in the circular are illustrative and exhaustive & once the identity of the payee is known, the AO can verify if the payments were genuine.

Again, reliance was placed on the decision of SA Builders Ltd.⁴ to explain what is business expediency.

- The Sr. Counsel for the Revenue submitted that the payments made by the taxpayer in cash are not covered under the exceptions in Rule 6DD. Further, though the taxpayer had disclosed the relevant information in the audit report, the relevant columns in the income tax return had not been filled in. Also, there was no unavoidable reason which necessitated payments by cash in excess of INR 20,000/-. Also, commercial expediency depends on facts & circumstances of each case. Several decisions were relied upon to support this contention.
- In terms of s. 40A(3), when a taxpayer incurs any expenditure in excess of INR 20,000/- in cash such expenditure incurred shall be disallowed while computing income from business & profession. However, certain exceptions have been laid down under Rule 6DD wherein if payments are made in excess of INR 20,000/- and the case of the taxpayer falls under any clauses mentioned in Rule 6DD, in such cases, no disallowance shall be made.

¹ Vaduganathan Talkies V/s Income Tax Officer, Non – Corporate Ward 20(5) – High Court of Madras

² Attar Singh Gurmukh Singh Etc V/s Income Tax Officer (1991) 191 ITR 667

³ CIT V/s Chrome Leather Co. (P) Ltd (1999) 235 ITR 708

⁴ S.A Builders Ltd V/s CIT (A) [2007]288 ITR 1 (SC)

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4. The taxpayer has made periodical payments in cash & as per the explanations offered by the taxpayer there were no compelling circumstances to effect any cash payments. The offices of both the taxpayer & the payee were situated in Chennai & there is no lack of banking facilities available in Chennai nor other circumstances by virtue of which the taxpayer was forced to make cash payments. Considering the facts of the case, the concept of business expediency or commercial expediency can hardly be canvassed for the taxpayer as the taxpayer has regularly been making cash payments.
5. In the light of the facts of the case & the arguments presented, the case of the taxpayer was dismissed & contention of the Revenue accepted.

In a recent decision, the Hon'ble High Court remanded the matter back to the Tribunal to verify if the amalgamated company had satisfied conditions prescribed in s. 72A(2) of the Income Tax Act 1961 to enable carry forward & set off of losses of the amalgamating company.

Facts :

The taxpayer⁵ is engaged in the business of manufacturing of ready made garments. The taxpayer filed a 'NIL' return of income for AY 2008 – 2009 after set off losses of the amalgamating company. The Ld. Assessing Officer ('AO') disallowed the claim of set off of losses of the amalgamated company under s. 72A of the Income Tax Act 1961 ('ITA') contending that the effective date of amalgamation was 6th February 2010 i.e the date on which the scheme of amalgamation was approved. On the other hand, the taxpayer contended that the effective date of amalgamation was 31st March 2008.

The taxpayer preferred an appeal before the Commissioner of Income Tax (Appeal) ('CIT(A)') who in turn accepted the contention of the taxpayer.

The revenue thereupon preferred an appeal before the Hon'ble Tribunal. The Tribunal inter alia held that the amalgamation takes place from the appointed day as mentioned in the scheme of amalgamation i.e. 31st March 2008. The finding of the AO that the scheme of amalgamation is a device to avoid taxes is without any basis & therefore the claim of the taxpayer for set off is allowed.

Aggrieved, the revenue has preferred an appeal before the Hon'ble High Court.

Issue :

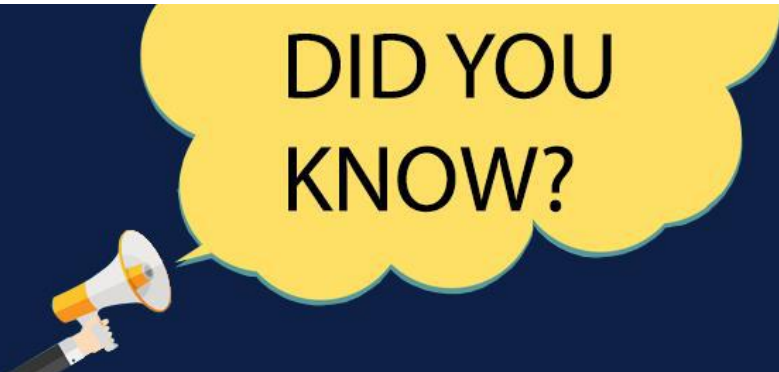
Was the Tribunal justified in allowing the claim of the taxpayer to set off the losses of the amalgamating company under s. 72A of the ITA.

Decision :

1. The Ld. Counsel for the Revenue submitted that in order to claim the benefit of s. 72A of the ITA, conditions prescribed in s. 72A(2)(b)(ii) have to be satisfied. The taxpayer failed to satisfy the prescribed conditions therein and also the conditions mentioned in Rule 9C were not complied and Form No. 62 was not filed. It is urged that the object of amalgamation was merely to evade the payment of taxes & not for business purpose. Further, it was also held that neither the CIT(A) nor the Tribunal had verified if conditions prescribed in Rule 9C were satisfied which is a mandatory requirement. Attention was invited to the decision of CIT V/s Sadashiva Sugars Ltd⁶.
2. The Ld. Counsel for the taxpayer on the other hand submitted that the CIT(A) & Tribunal have accepted the date of amalgamation to be 31st March 2008. In this regard, information was furnished to the National Stock Exchange Ltd & Bombay Stock Exchange Ltd on 12th March 2008. The Court had approved the scheme of amalgamation on 31st March 2008. The amalgamated company also satisfied provisions of s. 72A(2)(b)(iii) were also satisfied. Reliance was placed on Engineering Inds Ltd, Marshall Sons & Co. (India) Ltd. Orissa Mining Corporation Ltd.
3. Attention was drawn to s. 72A(1)(2) & (3). s. 72A(2) starts with a *non – obstante* clause. In other words, it shall have the effect notwithstanding other provisions of the Act. Thus, compliance with conditions mentioned in s. 72A(2) of the ITA is mandatory. However, in the present situation, The Tribunal has not adverted to the aforesaid aspect & also not satisfied itself if the taxpayer has complied with the conditions prescribed with the conditions prescribed under s. 72A(2). Hence, the aforesaid aspect requires factual adjudication & is remitted to the Tribunal to decide the issue afresh.

⁵ CIT V/s Indus Fila Limited [2020] 120 taxmann. Com (Karnataka)

⁶ CIT V/s Sadashiva Sugars Ltd (2017) 80 taxmann.com 352 (Kar)



DID YOU KNOW?

News About Taxation You Need to Know Right Now!

- Income Tax Return Filing Deadline extended till 31st of December, 2020.
- The Central Board of Direct Taxes has deployed two-third staff for the faceless assessments.
- Non-filing of the income tax returns on time for AY 2020-21 can attract a penalty of INR 10,000.
- Revenue Department unearths INR 8,200-crore tax evasion, illiquid options trading scam on BSE.
- The new form 26AS captures all the high value transactions and large investments along with the TDS.

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Due dates for Compliance under Income tax

- Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of September, 2020*
- Due date for issue of TDS Certificate for tax deducted under Section 194-IB in the month of September, 2020*
- Due date for issue of TDS Certificate for tax deducted under Section 194M in the month of September, 2020*

7th
Nov 2020

- Due date for deposit of tax deducted/collected for the month of September, 2020. However, all sum deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without production of an Income-tax Challan

14th
Nov 2020

15th
Nov 2020

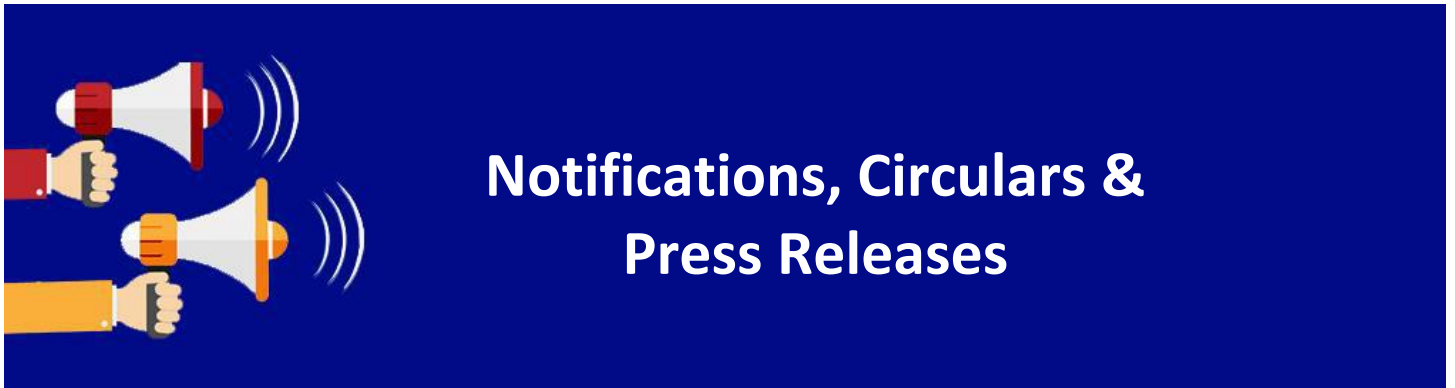
- Quarterly TDS certificate (in respect of tax deducted for payments other than salary) for the quarter ending September 30, 2020*

- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in the month of October, 2020*
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IB in the month of October, 2020*
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194M in the month of October, 2020**

30
Nov 2020

* Note: The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 has extended due dates for compliance falling during the period from 20-03-2020 to 31-12-2020. Readers are requested to please check the relevant documents from below links:

[https://www.incometaxindia.gov.in/Lists/Latest%20News/Attachments/419/taxation other laws relaxation amed certain provisions act 2020.pdf](https://www.incometaxindia.gov.in/Lists/Latest%20News/Attachments/419/taxation%20other%20laws%20relaxation%20amed%20certain%20provisions%20act%202020.pdf)

**Notification :**

1. The CBDT notified explanations regarding the consideration of international transactions at an arm's length price.

https://www.incometaxindia.gov.in/communications/notification/notification_83_2020.pdf

2. Amendments were introduced to income tax rules in relation to section 115BAC & 115BAD and the determination of depreciation under section 115BAA to 115BAD, of the Income Tax Act, 1961.

https://www.incometaxindia.gov.in/communications/notification/notification_82_2020.pdf

3. Government extends the due date for the Vivad se Vishwas Scheme

https://www.incometaxindia.gov.in/communications/notification/notification_85_2020.pdf

Circulars :

1. CBDT clarifies that limitation period of 15 days to pay amount under Vivad se Vishwas is not applicable.

https://www.incometaxindia.gov.in/communications/circular/circular_18_2020.pdf

Press Releases :

1. Extension of due dates for furnishing the Income Tax Returns and Audit Reports was made.

<https://www.incometaxindia.gov.in/pages/press-releases.aspx>

Disclaimer

The contents of this document are general & purely informative in nature. The intent of this document is not to provide any advice or address any concerns in particular. We take every precaution to ensure the contents of this document are accurate & correct. However, we suggest to take professional advice before acting on the information contained in this document and do not accept any responsibility or liability for any loss caused for relying on the contents of this document.

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