

Sc Lowy P.I. (Lux) S.A.R.L.,Luxembourg vs Assistant Commissioner Of Income Tax ... on 30 December, 2024

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI
BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
and
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.3568/DEL/2023
Assessment Year : 2021-22

SC Lowy P.I. (LUX) S.A.R.L.,
Luxembourg
C/o Walker Chandlok & Co. LLP,
16th Floor, Tower III,
One International Centre, S.B. Marg,
Prabhadevi West,
Mumbai - 400 013.
(PAN: AAACS7141Q)

vs. ACIT,
International Taxation,
Circle 3(1)(2),
Delhi.

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Sr. Advocate
REVENUE BY : Shri Vijay B Vasanta, CIT DR

Date of Hearing : 01.10.2024
Date of Order : 30.12.2024

ORDER

PER S. RIFAUR RAHMAN, AM :

1. This appeal has been filed by the assessee against the final assessment order dated 19.10.2023 passed u/s 143(3) r.w.s.144C (13) of the Income Tax Act, 1961 (hereinafter called 'the Act') subsequent to the directions of the Ld. Dispute Resolution Panel (DRP)/TPO vide order dated 13.09.2023 for Assessment Year 2021-22.

2. Brief facts of the case are, assessee filed its return of income for AY 2021-22 on 31.01.2022 declaring income of Rs.10,63,65,830/-. The case was selected for complete scrutiny under CASS due to large refund claimed by the non-resident.

Accordingly, notice under section 143(2) and 142(1) of the Act along with questionnaire were issued and served on the assessee. In response, assessee filed its responses to various notices issued during the assessment proceedings.

3. The background of the assessee is, it is incorporated on 06.03.2015 as Limited Liability Company under the laws of Luxembourg. It is a Category II - Foreign Portfolio Investor registered with the

Securities and Exchange Board of India (SEBI). Assessee is a subsidiary of SC Lowy Primary Investments Limited and it invests in securities. It has invested in SCCL Property Sorel., Italy (it is a subsidiary of assessee company), bonds issued by the Indian company and pass through certificates issued by securitization trusts. AO observed that assessee has offered the interest income of Rs.3,38,39,127/- for tax in India chargeable to tax @ 10%, claiming benefit under Article 11 of India-Luxembourg DTAA. The assessee has claimed business income amounting to Rs.2,37,57,762/- and capital gain of Rs.37,46,96,834/- to be exempt from tax under Article 7 and Article 13(6) of the DTAA respectively.

4. During assessment proceedings, assessee was asked to differentiate between commercial activities of both the parent company and subsidiary company and the commercial rationale of the existence of the assessee company in the Luxembourg.

No. It was also asked to provide copies of Tax return filed in the country of residence and copies of audited financial statements of the company from the date of incorporation in the Luxembourg. In response, assessee has submitted its Articles of Association, Tax Residency Certificate issued by Luxembourg, certificate of registration with SEBI, details of investments made in India and income earned in India during the year under consideration and income tax return filed in the Luxembourg for the period 2015 to 2019 in support of its claim of availing benefit of the India-Luxembourg DTAA. After considering the detailed submissions made by the assessee, the AO noticed the corporate structure, which is reproduced on page 12 of the assessment order which is as under :-

5. After considering the corporate structure and analyzing various information submitted by the assessee, AO denied the DTAA benefits to the assessee and came to the conclusion by observing as under :-

The scheme of arrangement employed by the assessee is a tax avoidance through treaty shopping mechanism.

The assessee company is just a conduit and the real owner is the shareholders/investors who are tax residents of different countries (herein Cayman Islands). The TRC is not sufficient to establish the tax residency if the substance establishes otherwise.

The assessee company is also not a beneficial owner of income as control and dominion of fund is not with the company.

There is no commercial rationale of establishment of assessee company in Luxembourg as the commercial outcomes would be identical irrespective of location of funds."

6. Since the AO denied the DTAA benefit to the assessee, in the consequence the income earned by the assessee are treated as under :-

Particulars	Amount	Treatment in returned income	Treatme
Business income from JMFARC 2,37,57,762 Metallics Securitization Trust recharacterized as interest income		Not taxable in absence of permanent establishment in India (Article 7 of India - Luxembourg DTAA)	Treaty and tax income
Capital gains on sale of 37,36,96,834		Not taxable in India as per Article 13(6) of	Treaty and tax
debentures and bonds		India - Luxembourg DTAA	section + surch
Interest income from Touchstone Trust Scheme II investment fund	3,38,39,127	Offered to tax @ 10% under Article 10 of the DTAA	Treaty and tax surchar section Act
Interest income from India RE 2019 Trust	4,85,09,059	Offered to tax @ 20% as per Section 115AD of the Act	Taxed @ surchar section Act.

7. Aggrieved with the above order, assessee preferred objections before the ld. DRP and ld. DRP sustained the additions made by the AO including denial of DTAA benefits. Subsequently, AO has passed the final assessment order.

8. Aggrieved with the above order, assessee is in appeal before us raising following grounds of appeal :-

"1. The Learned AO has erred in law and in facts in denying the benefit of Double Taxation Avoidance Agreement between the Government of the Republic of India and the Government of the Grand Duchy of Luxembourg ("DTAA"). The Learned AO has erred in law and in facts in completing the assessment under the provisions of the Income Tax Act, 1961 ("Act") on the basis of incorrect assumptions of facts and alleging that (a) The Appellant is not the beneficial owner of income as control and dominion of fund is not with the company. (b) The Appellant is a pass-through entity in Luxembourg and has not paid any tax in Luxembourg on income earned from India. (c) There is no commercial rationale of establishment of Appellant in Luxembourg. (d) The Learned AO has erred in law in concluding that scheme of

arrangement employed by the Appellant is a tax avoidance through treaty shopping mechanism.

2. The Learned AO has erred in law and in facts in not accepting the Appellant's contention of a valid TRC to be conclusive evidence for determining tax residency in India as per Circular No. 789 dated

13 April 2000.

3. The Learned AO has erred law and in facts in taxing the business income received from investment in pass through certificates of securitization trust amounting to INR 2,37,57,762/- , as interest income denying treaty benefits under Article 7 of India-Luxembourg DTAA.

4. The Learned AO has erred in law and in facts in taxing the short-term capital gain from sale of investment in securities amounting to INR 37,46,96,834/- at 30% plus surcharge plus cess as per Section 115AD of the Act and denying treaty benefit under Article 13(6) of India-Luxembourg DTAA.

5. The Learned AO has erred in law and in facts in taxing the interest income from investment in units of investment fund amounting to INR 3,38,39,127/- at 40% plus surcharge plus cess as per Section 115UB of the Act and denying treaty benefits under Article 10 of India-Luxembourg DTAA.

6. Interest income from investment in pass through certificates taxed at 40% as per Section 115TCA instead of 20% as per Section 115AD of the Act. The Learned AO has erred in law and facts taxing the interest income from investment in pass through certificates of India RE Trust amounting to INR 4,85,09,059/- at 40% plus surcharge plus cess as per Section 115TCA of the Act instead of 20% as per Section 115AD of the Act.

7. Without prejudice to Ground 2 above, Interest income from investment fund taxed at 40% instead of 20%, Without prejudice to above, the Learned AO has erred in law and facts taxing interest income from investment in units of investment fund, Touchstone Trust Scheme II, amounting to INR 3,38,39,127/- at 40% plus surcharge plus cess as per Section 115UB of the Act instead of plus surcharge plus cess as per Section 115A of the Act."

9. At the time of hearing, Id. AR for the assessee submitted that the primary issue involved in this appeal is denial of DTAA benefits to the assessee and adjudication of this primary issue will address the other issues raised by the assessee as a consequence. He submitted that the assessee was incorporated on 6th March, 2015 as a limited liability company ("LLC") under the laws of Luxembourg; is Category II - Foreign Portfolio Investor registered with the Securities and Exchange Board of India ("SEBI"); has invested in bonds issued by Indian company(ies) and pass through certificates issued by securitization trusts. He further submitted that during the course of assessment, the assessee placed on record Articles of Association, Tax Residency Certificate, Certificate of registration with SEBI, and income-tax returns filed in Luxembourg for the years 2015 to 2019. Id. AR submitted that the assessing officer has denied the benefit of DTAA by observing in the para 13.10 of the assessment order.

Accordingly, the assessing officer subjected to tax income earned in India as per the provisions of the Act.

10. At the time of hearing, Ld AR submitted the detailed submissions and the same are reproduced as under:

1. Appellant is tax resident of Luxembourg and entitled to benefit of DTAA:

As per the provisions of the DTAA, a person resident in Luxembourg is eligible to claim benefit thereof.

Relevant extracts of DTAA are reproduced below:

"ARTICLE 1: This Agreement shall apply to persons who are residents of one or both of the Contracting States."

"ARTICLE 3(1) For the purposes of this Agreement, unless the context otherwise requires:

(d) The term "person" includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States;"

"ARTICLE 4(1) For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."

Section 2(29A) of the Act defines 'liable to tax' as below:

"liable to tax", in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country."

The Appellant is subject to corporate income tax in Luxembourg as per Article 159 of the Luxembourg Income tax Law. Reproduced hereinbelow is relevant extract thereof from the Luxembourg- Corporate Taxation, Country tax Guide from IBFD:

"1.1.4 Taxable persons Generally, entities that have separate capital and that have income that cannot immediately be taxed in the hands of the beneficial owners are

subject to the corporate income tax (article 159(1) of the LIR). General and limited partnerships are normally not subject to corporate income tax; the partners are taxed according to their share in the partnership's income.

The Corporate Income Tax Law differentiates between fully taxable residents (article 159 of the LIR) and non-residents subject to limited taxation (articles 156 and 160 of the LIR).

Entities which are subject to corporate income tax include (article 159 of the LIR):

(1) capital companies (les sociétés de capitaux), such as:

- public limited liability companies (sociétés anonymes, SAs);
- private limited liability companies (sociétés à responsabilité limitée, SARLs);
- partnerships limited by shares (sociétés en commandite par actions, SCAs); and
- European Companies (SEs).

.....

1.1.5 Definition of residence According to article 159 of the Corporate Income Tax Law, an entity is treated as a resident of Luxembourg if it has:

- its legal seat in Luxembourg (siège statutaire) according to the articles of association; or
- its central administration (administration centrale, i.e., the centre from which the activities of the Assessee are directed) is located in Luxembourg."

It is submitted that the appellant is liable to tax in Luxembourg and is a tax resident of Luxembourg considering that the Appellant is:

incorporated under the laws of Luxembourg as a SARL a board managed company with its legal seat and registered office in Luxembourg liable to tax in Luxembourg on worldwide income not a fiscally transparent entity holding valid tax residency certificate (@ pg 23 of the paper book) filing tax returns in Luxembourg and has paid corporate tax, municipal business tax and net worth tax in Luxembourg In that view of the matter, benefit of the DTAA cannot be denied to the Appellant.

The appellant placed reliance upon the decision of the Hon'ble Delhi High Court in the case of Tiger Global International III Holdings [W.P.(C) 6764/2020] wherein the Hon'ble Court, relying upon the CBDT Circular no. 789 of 2020 dated 13th April,

2000, decision of the Hon'ble Supreme Court in the case of Union of India vs. Azadi Bachao Andolan (263) ITR 706 and other judicial precedents held that validity and sanctity of TRC issued by competent authority cannot be questioned unless in case of fraud, sham transactions where the entity has no vestige of economic substance or the transaction is alleged to be aimed at camouflaging an illegality.

The relevant extracts of the decision are reproduced below:

"194. The position which emerges from the aforesaid discussion is that the Revenue would be justified in doubting the bona fides of a transaction if it be found to be an outright sham, designed to subserve an illegal motive or intended to achieve an illegal objective. Treaty shopping is not liable to be frowned upon unless it be established on facts as being motivated by an intent to evade tax and contrary to the underlying and stated objectives of the Contracting States. So also would be the case where parties adopt colourable devices and interpose entities to perpetrate tax fraud, abuse normative legal or organizational norms and entities are found to have been established without any economic or commercial considerations. It is only in cases where it be duly established or where no other conclusion can be possibly harboured but of the entity being found to be a conduit or a device lacking in commercial expediency and designed to perpetuate fraud that the Revenue would be justified in doubting the character of the transaction. Ultimately, the determinative would be a finding on facts that the entity is a mere artifice lacking any commercial substance.

195. Proceeding then to the issues which were raised with respect to the TRC, we deem it apposite to note that both Azadi Bachao Andolan as well as Vodafone had come to be rendered prior to a statutory regime with respect to residency having been put in place. The observations appearing in those two decisions would thus have to be appreciated bearing the mind that provisions for obtaining a TRC were yet to be codified. However, we also cannot lose sight of the stand taken by the Revenue itself and which came to be expressed in the various circulars that came to be issued from time to time. Circular No. 789 of 2000 clearly held out that a TRC issued by Mauritian authorities would constitute sufficient evidence for determining fiscal residence and beneficial ownership. This circular further clarified that such a certificate would suffice even in respect of capital gains on sale of shares.

196. Then came the Finance Bill of 2013 which sought to introduce a provision which provided that a TRC would not be sufficient to claim benefits under a treaty. This proposed amendment was ultimately abandoned. The proposed amendment itself was sought to be explained away with the Press Release of 01 March 2013 in unequivocal terms explaining that proposed sub-section (5) was not intended to enable authorities to question the validity of such a certificate when produced. It was thus announced that TRCs' would be duly accepted and that the tax authorities would not go behind that certification and question resident status.

197. The position of a TRC and the extent to which it would be conclusive was succinctly explained by the Bombay High Court in Bid Services Division (Mauritius) Ltd. v. Authority for Advance Rulings (Income-tax) and Others⁶⁵ when it held: -

"45. No doubt mere holding of a tax residency certificate cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the apex court cited above have clearly upheld the conclusivity of the tax residency certificate absent fraud or illegal activities. Nowhere in the impugned Ruling the existence of tax residency certificate has been denied. In fact, in paragraph 2 of the impugned Ruling, the authority has itself set out the existence of a valid tax residency certificate in the name of the petitioner. Further, except bald allegations, no material has been placed on record to demonstrate or establish that the petitioner was a device to avoid tax or that there was fraud or any illegal activity. There is hardly any discussion in the impugned Ruling on the applicability of the said Circular Nos. 682, 789 or the Press Releases by the Central Board of Direct Taxes/Ministry of Finance discussed above.

50. The said press release expressly provides for grandfathering of capital gains exemption provided under the erstwhile Mauritius Double Taxation Avoidance Agreement. The protocol provides for source based taxation of capital gains arising from alienation of shares acquired with effect from April 1, 2017 in a company resident in India, viz., from financial year 2017- 18. Investments made before April 1, 2017 have been grandfathered and will not be subject to capital gains taxation in India.

51. The authority appears to have clearly missed the clear import of this Circular as the entire sale by the petitioner was prior to April 1, 2017. The arguments of the Revenue with respect to shell company/conduit can only be considered for investments with effect from April 1, 2017 and not case at hand.

52. Therefore, to say that in the joint venture (JV), the petitioner is a shell company without any tangible employees, space, assets, etc., incorporated only a few days before bidding or that it has no management experts or financial advisors on its payroll, thereby the petitioner having no economic or commercial rationale would not be relevant as the concept of limitation of benefits in cases of shell company/conduit would become applicable to investments with effect from April 1, 2017 only.

53. Therefore, for the authority to hold that if the petitioner was not interposed, the Bidvest group in accordance with the Indo-SA Double Taxation Avoidance Agreement would have to pay capital gains on the sale of shares as the same is taxable in India is misplaced as not relevant as the investment is by the petitioner. As noted above, the petitioner has been incorporated in Mauritius, holds a tax residency certificate which is sufficient proof of its residence in Mauritius, which as noted

above, cannot be enquired into unless there is a fraud or illegal activity, which in this case, has neither been alleged nor demonstrated. Even if as observed by the authority that the entire value creation activities are happening in India leading to rise in share valuations, in our view absence of any element of fraud or illegality that cannot be a reason to hold the petitioner's investment as a device to evade tax. The suggestions/findings with respect to shell company/conduit, in our view, would apply only in accordance with article 27A of the Mauritius Double Taxation Avoidance Agreement which is applicable for investment with effect from April 1, 2017 and not prior to that, and therefore, the same would have to be reconsidered in that light.

54. True that there may have been abuse of tax treaty laws and Contracting States have taken corrective measures to prevent abusive transactions by amending the bilateral conventions, however, as noted above, the amendments to the Mauritius Double Taxation Avoidance Agreement for plugging such transactions have been made effective from April 1, 2017, unless there is a fraud or any illegal activity involved. In fact, as noted above, the investments prior to April 1, 2017 have been grandfathered and are not subject to capital gains taxation in India. The Press Release dated August 29, 2016 quoted above also takes care of the transition period from April 1, 2017 to March 31, 2019 where the tax rate has been limited to 50 per cent. of domestic tax rate in India. That taxation in India at full domestic rate is stated to take place from financial year 2019-20 onwards, subject to other conditions.

55. Although the observations of the authority in paragraph 62 with respect to the claim of treaty shopping as well as the doctrine of substance over form in paragraph 63 cannot be faulted with, however, it needs to be emphasized that the limitation of benefits (LOB) clause has been made effective for investments only from April 1, 2017. As noted above, even the Press Release dated August 29, 2016 confirms that investments made before April 1, 2017 will not be subject to capital gains taxation in India. That being the position these observations of the authority appear to be misplaced."

198. The Punjab & Haryana High Court in Serco BPO took a narrower and stricter view when it held that once the TRC is found to have been duly issued by the Mauritian authorities, it would be impermissible for the Indian tax authorities to question the same since any other view would be destructive of the faith reposed by the Contracting States in the authorities of the respective States quite apart from being contrary to the position taken by the Union itself in Circular No. 789. We would, however, be inclined to affirm and follow the legal position as enunciated in Bid Services and which appears to have made adequate provision for situations where fraud or illegal activities be alleged. In any case, as would be evident from our conclusions on the legal issues which were canvassed, our decision does not rest on the mere fact that the petitioners hold a valid TRC.

199. The significance and the salutary purpose underlying the issuance of a TRC cannot be overemphasized. Its importance stands duly acknowledged by the Union Government itself as is manifest from a reading of Circular 789 of 2000. Of equal import is the withdrawal of the

amendments which were proposed to be introduced in Section 90 and were ultimately shelved. It becomes important to note that a TRC once found to have been issued by the competent authority must be accorded due weightage and its sanctity duly acknowledged. The TRC represents the first level of certification of the holder being a bona fide business entity domiciled in the Contracting State. The issuance of a TRC constitutes a mechanism adopted by the Contracting States themselves so as to dispel any speculation with respect to the fiscal residence of an entity. It therefore can neither be cursorily ignored nor would the Revenue be justified in doubting the presumption of validity which stands attached to that certificate bearing in mind the position taken by the Union itself of it constituting sufficient evidence of lawful and bona fide residence. Taking any other view would clearly be destructive of what Serco BPO aptly described as resulting in an erosion of faith and the trust reposed by the parties to the convention in each other.

200. Regard must also be had to the fact that when Vodafone was rendered, the DTAA was yet to incorporate provisions regulating entitlement of benefits. The TRC concept came to be adopted subsequently followed by the incorporation of a specific LOB clause in the Treaty itself. The observations appearing in Vodafone are thus liable to be appreciated bearing in mind the crucial amendments which have subsequently come to be included in the DTAA. Even otherwise the observations appearing in Vodafone in the context of piercing of the corporate veil and the extent to which the Revenue could enquire and investigate despite a TRC were confined to cases of tax fraud, sham transactions, where the entity has no vestige of economic substance or the transaction is alleged to be aimed at camouflaging an illegality. These charges if raised would have to meet an extremely high and exacting standard of proof, since expressions such as fraud or sham though loosely used in common parlance, have a specific connotation in law. The Revenue would thus have to base such an allegation on cogent and convincing evidence as opposed to a mere conjecture, doubt or a perceived need to investigate and enquire. Such an allegation would have to be established at the outset itself before the Revenue being recognised as entitled to discard the presumption of validity which would spring into existence once a TRC is produced and the LOB conditions shown to be fulfilled."

....

"M. The issuance of a TRC by the competent authority must be considered to be sacrosanct and due weightage must be accorded to the same as it constitutes certification of the TRC holding entity being a bona fide entity having beneficial ownership domiciled in a Contracting State to pursue a legitimate business purpose in a Contracting State. The Revenue would thus not be justified in doubting the presumption of validity attached to the TRC as it would inevitably result in an erosion of faith and trust reposed by Contracting States in each other.

N. The circumstances under which the Revenue could pierce the corporate veil of a TRC holding entity is restricted to extremely narrow circumstances of tax fraud, sham transactions, camouflaging of illegal activities and the complete absence of economic substance and the establishment of those charges would have to meet stringent and onerous standards of proof and the Revenue being required to base

such conclusions on cogent and convincing evidence and not suspicion alone. It is only when the Revenue is able to meet such a threshold that it can disregard the presumption of validity which would be attracted the moment the TRC is produced and LOB conditions are fulfilled."

Principal purpose test:

The DTAA has been modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting signed by India and Luxembourg on 7th June, 2017 (the 'MLI'). The provisions of MLI applicable to DTAA take effect in India for "taxes levied with respect to taxable periods beginning on or after 1 st April, 2020, i.e., before assessment year 2021-22 and hence applicable for the year under reference.

The following para 1 of Article 6 of MLI is included in the preamble of the DTAA (refer pg 206 of the paper book):

"ARTICLE 6 OF THE MLI-PURPOSE OF A COVERED TAX AGREEMENT Intending to eliminate double taxation with respect to the taxes covered by this Agreement without creating opportunities for non-taxation or reduced taxation through tax evasion on avoidance (including through treaty- shopping arrangements aimed at obtaining reliefs provides in this Agreement for the indirect benefit of residents of third jurisdictions),"

The amended preamble of the DTAA reads as below:

"The Government of the Republic of India and the Government of the Grand Duchy of Luxembourg, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital and with a view to promoting economic cooperation between the two countries, intending to eliminate double taxation with respect to the taxes covered by this Agreement 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 Agreement for the indirect benefit of residents of third jurisdictions), have agreed as follows:" [Emphasis added] Article 29 on Limitation of Benefits has been amended and the following paragraph 1 of Article 7 of the MLI has replaced paragraphs 2 and 3 of Article 29 of the DTAA to the following effect:

"Notwithstanding any provisions of the Agreement, a benefit under the 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 Agreement." [Emphasis added] It is the submission of the Appellant that it cannot be said that incorporation of the Appellant in Luxembourg was with one of the principal purpose to obtain benefit of the DTAA that would otherwise not have been available, for the following reasons:

- the Appellant was incorporated in Luxembourg in the year 2015 (much before the MLI was conceived);
- the Appellant was incorporated in Luxembourg as an investment holding company and invested mainly in distressed assets;
- the Appellant was set-up to expand investment activities in other countries such as Europe, UK, India, and Italy;
- the Appellant is a step-down subsidiary of SC Lowy Offshore Fund incorporated in Cayman Islands as a special purpose vehicle for pooling of funds from various investors;
- the Appellant is registered with SEBI as Category II - Foreign Portfolio Investor and has made investment in India only in financial year 2018-19 in securitization trust / securities issued by companies in India;
- from perusal of the geographical concentration of investments made by the Appellant, it would be evident that 86% of investments is in jurisdictions other than India;
- the Appellant has filed tax returns and paid tax in Luxembourg on its worldwide income, i.e., income earned from investments made in India as also income from other investments in different jurisdictions;
- the Appellant is, both, the legal and beneficial owner of the investments made, having made investments in various securities on its own account using funds raised by issue of capital and share warrants;
- the Appellant has incurred substantial operational expenditure relating to investments in Luxembourg in the nature of consulting fees, legal and litigation fees, other professional fees apart from other administrative expenses such as rent paid for office premises, bank account charges, accounting fees, etc.;
- the Appellant continues to exist till date in Luxembourg and continues to hold substantial investments.

The Hon'ble Delhi High Court in case of Tiger Global (supra), analyzed LOB provisions in the India - Mauritius Double Tax Treaty, with reference to the facts of that case, observing as under:

"185. As was noticed by us hereinabove, Mauritius perhaps became the preferred destination for various investors who were desirous of routing investments towards the South East Asian economies and with India post the liberalization measures adopted in 1991 becoming one of the more favored and preferred destinations. Of equal significance appears to have been of Mauritius having positioned itself as being investment friendly, freed of bureaucratic red-tapeism and having adopted various ease of business measures much before that phrase became ubiquitous with nations vying amongst themselves to earn that title. Mauritius also appears to have entered into various bilateral and multilateral trade agreements and thus constructing a framework of advantageous tax treaties enabling investors to tap the potential of various emerging economies by setting up pooling investment entities in that nation. Out of the bulk of the FDI headed towards India in 2012, as was noted in Azadi Bachao Andolan, almost fifty per cent of the same originated from Mauritius. The data and the facts noticed above lead us to the irresistible conclusion that it would be wholly incorrect to presume investments originating from that nation as being inherently dubious or disreputable. Thus, the mere fiscal residence of an entity in Mauritius would not give rise to a presumption of infamy or constrain courts to approach such investments through what are metaphorically referred to as tinted lenses.

186. We also bear in mind Azadi Bachao Andolan itself having acknowledged how nations seek to compete with others in seeking to attract capital investment by holding out the benefits that could be obtained from their treaty networks. The Supreme Court in unequivocal terms held that there was nothing inherently abhorrent in treaty shopping given the economic compulsions of nations who are desirous of attracting foreign investment. The decision in Azadi Bachao Andolan assumes significance in light of its acknowledgement and recognition of the changing world order, the breaking down of commercial frontiers and the imperatives underlying developing nations to attract capital and technological inflows. It chose to describe treaty shopping as a "necessary evil in a developing economy". The decision thus clearly appears to hold and suggest that while treaty shopping may be permissible, nations have chosen to adopt a system of checks and balances to ensure that there is no significant revenue loss or treaty abuse. It however further observed that these concerns must principally be left for the consideration of the executive and which may weigh the economic and political ramifications of such measures.

187. When doubts with respect to legality of such entities domiciled in tax friendly jurisdictions or what are commonly referred to as tax havens came to be raised in Vodafone, Radhakrishnan J. in a concurring opinion noted that the establishment of such entities in particular jurisdictions appeared to have seen an immense rise on

account of the sheer rise in the number of multinational corporations and corporate behemoths seeking to invest in markets across the globe and businesses continually striving to find new investment opportunities. This phenomenon according to the learned Judge was fueled by barriers to cross border trade disintegrating, the liberalization of financial markets and the march of developing nations seeking to alleviate the standard and quality of life of their citizenry. Not only do these sentiments find resonance in paragraphs 247 to 249 of the report, the learned Judge pertinently observes that the mere establishment of an offshore company would not justify an assumption that they are "involved in the activities of tax evasion or other criminal activities". It was held that the establishment of such entities or the creation of a holding structure straddling jurisdictions may in fact be motivated by "sound commercial and legitimate tax planning reasons.....". The opinion also took note of the OECD report titled "Harmful Tax Competition: An Emerging Global Issue" and which had taken note of the important role discharged by offshore entities and whose fiscal residence may be driven by the economic need to penetrate different markets around the world or as part of legitimate financial planning.

188. Both Azadi Bachao as well as Vodafone then proceeded to identify the contingencies where courts or tax authorities would be justified in questioning the character of the investment or the originating entity. While repelling the argument of entities in Mauritius being mere shells and of treaty shopping being unethical, the Supreme Court in Azadi Bachao Andolan held that if the Contracting States intended to deprive a particular category of entities from the benefits of the Convention, it would have been reasonably expected that a limitation of benefit provision were incorporated. The Supreme Court took note of the DTAA as it stood then in contrast to other Conventions and which provided for appropriate disqualifications. Their Lordships spoke of the significance of "disabling and disentitling conditions" being found in the DTAA itself. What clearly appears to flow from a reading of paragraphs 114 to 117 of the report is of the Court in Azadi Bachao Andolan being of the firm opinion that once a person qualifies for benefits under the Convention it would be wholly incorrect to deny it those benefits based on arguments founded on the perceived unethicallity of treaty shopping. The Azadi Bachao Andolan Court also bids us to bear in mind the need for disablement or disqualification being found in the Convention itself and thus it being an aspect best left for the consideration of the Contracting Nations as opposed to courts being called upon to invoke the principle of piercing the corporate veil. This was again emphasized when the Supreme Court held that once the DTAA were recognised as intended to override the provisions of the Act, it would be impermissible for national courts to lift the veil of incorporation.

189. In Vodafone, Kapadia CJ. propounded the tests of "abuse of organization form/legal form" and "without reasonable business purpose"

as constituting some of the circumstances relevant for disentitlement. Vodafone proceeds to observe that where the transaction be a colourable device for distribution of profits or where the interposed

entity be found to be a device or conduit, the Revenue may be entitled to apply the principles of substance over form and disregard the propounded character of the transaction. It proceeded further to acknowledge situations where the transaction be found on facts to be a complete sham, used as a camouflage for illegal activities as being some of the circumstances where a person may be denied the benefits of a treaty. The Supreme Court further cautioned the Revenue from adopting a dissecting approach or seeking to doubt the validity of a transaction based on the assumption that it was designed as a tax deferment device. The decision underlines the imperative of the "look at" doctrine being applied based on an evaluation of the transaction as a whole. Radhakrishnan J. while expounding on the extent of applicability of the lifting of the corporate veil principle pertinently observed that corporate structures would be liable to be ignored where it is misused for the accomplishment of a wrongful purpose or where it be found to be a mere façade. His Lordship observed that the aforementioned doctrine would be attracted where the transaction itself be found to be fraudulent, a sham, a circuitous device aimed at tax evasion. However, and notwithstanding these caveats, Radhakrishnan J. held that in the absence of a LOB clause coupled with the presence of Circular No. 789 of 2000 and the TRC, a Mauritian entity could not be denied benefits merely on the ground that the investment originated from that jurisdiction. His Lordship proceeded to hold that the mere establishment of a wholly owned subsidiary in Mauritius by principals having a genuine or substantially long-term investments in India "can never be considered" to have been "set up for tax evasion". Proceeding to speak of TRC, his Lordship held that the same would not prevent the Revenue from enquiring into "tax fraud", illegal or sham transactions, colourable devices or adoption of dubious methods to evade taxes. However, and significantly his Lordship stoutly rejected the contention that a Mauritian investment would be considered legitimate only if it "originates" from that nation and not investments from "third countries".

190. The precedents handed down by our Supreme Court thus in unhesitating terms appear to have acknowledged and accepted the changed world order necessitating the cross-border movement of capital and investments and those in turn resulting in the creation of trans- national corporations, the incorporation of entities in different jurisdictions and thus facilitating investments in diverse parts of our interconnected world. These entities thus sought out domiciles which had an established treaty network, were cognizant of the new realities concerned with ease of business and were enabled to overcome barriers of time and place. Capital thus sought out new avenues and found itself funding opportunities then unknown and unthought of. The forever shrinking world order saw the birth of new investment highways created by nations aligning their common economic goals aimed at fulfilling the need of their people to find upliftment and prosperity. This march cannot possibly be stalled, legally or otherwise, by skepticism or distrust except on the basis of well-established parameters.

191. While much water has flown post Azadi Bachao Andolan and the BEPS initiatives adopted by nations across the globe, the tests to doubt the legitimacy of investments have remained more or less the same. All that has occurred is of nations becoming more aware and cognizant of devices and conduits which seek to exploit the positive measures adopted by nations to derive benefits from cross border trade and investments illegitimately and contrary to the avowed objectives of those conventions and the underlying interpretative precept of good faith. These are aspects which have also been underscored by two High Courts in Serco BPO and Sanofi.

192. This would constitute an appropriate juncture to take note of the executive response by India of the ethical concerns which were raised with respect to investments emanating from Mauritius. The first seeds of doubt pertaining to capital gains arising out of alienation of shares was considered in Circular No. 682 of 1994. The Union Government clarified that any gains derived by a Mauritian resident from alienation of shares would be taxable only in that country. Many years before the introduction of sub-section (4) in Section 90 and Rule 21AB in the Income Tax Rules 1962, the Union Government clarified vide Circular No. 789 of 2000 that a TRC would constitute sufficient evidence for accepting status of residence and beneficial ownership. Of seminal import were the amendments which were sought to be pushed through by virtue of Finance Bill 2013 and which sought to insert a provision in Section 90 intending to proclaim that while a TRC would be necessary to avail of treaty benefits, it would not constitute a sufficient basis for claiming benefits. As noticed hereinbefore, the said amendment was ultimately withdrawn as a consequence of a huge furore and the resounding negative clamour and opposition which came to be voiced in connection therewith.

193. More importantly we find that the position of the Union Government does not appear to have been opposed to what the Supreme Court ultimately held in *Azadi Bachao Andolan* and *Vodafone*. The Union as well as the Revenue appear to have accepted the legal position as enunciated in those two decisions and which had acknowledged the invocation of the substance over form principles to the confined and extremely narrow contingencies where the Revenue may be recognised as being justified in questioning the motives of an investment transaction." In that case, the Hon'ble Delhi High Court observed that it could not be held that the Petitioner lacked economic substance and had not undertaken any economic activity or was domiciled in Mauritius solely for the purpose of treaty abuse. The pertinent observations of the Hon'ble Court are extracted hereunder for ready reference :

"210. Quite apart from the above, we find ourselves unable to sustain the view taken by the AAR in light of the following undisputed facts which exist on the record. Undisputedly the petitioners came to be incorporated in Mauritius in 2011. They hold a Category 1 GBL granted under the Financial Services Act, 2007 and are regulated by the Financial Services Commission of Mauritius. They are stated to have aggregated funds from more than 500 investors domiciled across 30 jurisdictions worldwide. It was their consistent stand that they had been incorporated to act as pooling vehicles for funds received from various investors. The details of their principal shareholders have already been noted in the preceding parts of this decision. TGM LLC was the investment manager/management company a crucial fact which has been lost sight of by the respondents and who had proceeded on the incorrect premise that it was the holding or the parent company. The assertion of the petitioner that TGM LLC neither held shares nor had it made any investments in them has gone un rebutted. Both the respondents as well as the AAR appear to have proceeded on the incorrect premise that the petitioner had admitted to TGM LLC being the holding company despite the pleadings and the material which existed on the record and which clearly asserted to the contrary.

211. The initial shares which the petitioners acquired in Flipkart Singapore were issued against a capital contribution of USD 109,020.10. As the Minutes of the Board

Meeting records, the initial investment was to be preceded by the extension of a Bridge Loan of USD 15 million. The entire stock holding was acquired between October 2011 to April 2015. The introduction of the LOB provisions in the DTAA, the tax implications arising out of sale of shares were facts duly disclosed and acknowledged in its Financial Statement which forms part of our record as Annexure P-12. Flipkart Online had made a slump sale of its India business in December 2011. The petitioners transferred their holding in Flipkart Online to Fit Holdings SARL, a company incorporated under the laws of Luxembourg on 18 August 2018. The petitioner is also stated to have incurred expenditure amounting to USD 1,063,709 roughly translating to MUR 36,436,182 as against the threshold of MUR 1,500,000 as prescribed in Article 27A. From the Financial Statement [P/12] for the period ending 31 December 2017 of Tiger Global II we further find that its total liabilities and shareholders' equity stood at USD 1,764,819,299. The net increase in shareholders equity resulting from operations was pegged at USD 267,633,593. Based on the aforesaid facts and which have remained uncontested or questioned, we find ourselves unable to hold that the petitioners lacked economic substance, had not undertaken any economic activity or were domiciled in Mauritius solely for the purposes of treaty abuse." [Emphasis added] Additionally, the Hon'ble Delhi High Court in the case of Tiger Global (supra) observed that TRC and LOB provisions together should constitute sufficient evidence for residency as well as beneficial ownership and eligibility to treaty benefits except in case of fraud, sham or the transaction being in contravention of the underlying object and purpose of the treaty;

furthermore, the onus is on Revenue to establish that the transaction is sham or a colourable device, in the following words:

"The incorporation of LOB provisions in a taxation convention will result in those provisions being determinative of allegations of treaty abuse and purported illegitimate claims of treaty benefits. Furthermore, the right of the Revenue to cast aspersions on the validity or legitimacy of a transaction would be constrained by the requirements of exacting and compelling standards of proof with the onus placed squarely in the domain of the Revenue to establish that a transaction in question would be disentitled to the benefits of a treaty being a sham, a colourable device and imputed with illegality and giving rise to the conclusion that Contracting States never intended for such transactions being accorded treaty benefits. It is also apparent that the Contracting States did not intend for domestic taxation authorities to deploy their own subjective standards in view of the enactment of LOB provisions which had also adopted ascertainable standards to defenestrate presumptions of treaty abuse. It is the finding of this Court that taking any view to the contrary would amount to privileging domestic legislation over and above the enactments in the treaty provisions adopted by Contracting States and would amount to holding that jurisdiction inheres in taxing authorities to question the validity of transaction on parameters alien to the negotiated terms of the treaty.

In view of the aforesaid we find that LOB provisions and the TRC comprehensively and adequately addresses concerns in relation to potential treaty abuse and it would be impermissible for the Revenue to manufacture additional roadblocks or standards that parties would be required to meet in order to avail of DTAA benefits, subject to caveats of illegality, fraud and the transaction being in contravention of the underlying object and purpose of the treaty." [Emphasis added] Applying the ratio of the decision in Tiger Global (supra) to the facts of the Appellant's case, it would be apparent that the Appellant was not incorporated in Luxembourg with one of the principal purpose being to obtain benefit of the DTAA. Furthermore, the assessing officer has not brought on record any evidence to establish sham, fraud or existence of a colourable transaction. In that view of the matter, the Appellant should be held entitled to the benefit of DTAA.

The specific grounds of appeal raised are dealt with hereunder:

Re : Ground of appeal No. 3 - Business income from JMFARC Metallics Securitization Trust During the year appellant held investments in pass through certificates issued by JMFARC-Metallics Trust which is a securitisation trust. Income accruing/ arising/ received from securitisation trusts is exempt in the hands of securitization trust and taxable in the hands of investors in accordance with the provisions of Section 115TCA of the Act, which reads as under: "115TCA. (1) Notwithstanding anything contained in this Act, any income accruing or arising to, or received by, a person, being an investor of a securitisation trust, out of investments made in the securitisation trust, shall be chargeable to income-tax in the same manner as if it were the income accruing or arising to, or received by, such person, had the investments by the securitisation trust been made directly by him.

(2) The income paid or credited by the securitisation trust shall be deemed to be of the same nature and in the same proportion in the hands of the person referred to in sub-section (1), as if it had been received by, or had accrued or arisen to, the securitisation trust during the previous year.

....." [Emphasis Added] The Appellant had submitted Form 64F received from JMFARC Metallics Trusts (Refer page 93 to 96 of Paper Book) wherein JMFARC has indicated nature of income paid/ credited to the appellant as 'business income' (refer point 7 of the attached Form 64F). The Appellant claimed the business income to be not taxable in India in absence of a permanent establishment in India under Article 7 of the DTAA.

The assessing officer has taxed interest income denying benefit of the DTAA.

Once it is held that the appellant is a tax resident of Luxembourg entitled to benefit of the DTAA, business income received from investment in pass through certificates of JMFARC Metallics Trusts amounting to INR 2,37,57,762 should be held not to be taxable in India as per Article 7 of the DTAA.

Re : Ground of appeal No. 4: Capital gains from sale of investment in securities During the year under consideration, appellant has sold debentures of Indiabulls Housing Finance Ltd and security receipts of Edelweiss Asset Reconstruction Company Ltd on which appellant has earned short term capital gains of INR 37,46,96,834/-. Appellant has submitted capital gain workings at pages 97 to 98 of paper book.

Sale of debentures and securities receipts would be "any other property"

other than those referred in paragraphs 1, 2, 3, 4 and 5 and shall not be taxable in India as per Article 13(6) of the DTAA reproduced here under:

"ARTICLE 13(1) Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State. (2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

(3) Gains from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

(4) Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.

(5) Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

(6) Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable only in the Contracting State of which the alienator is a resident."

The assessing officer has taxed the said income under section 115AD @ 30% + surcharge + cess denying the DTAA benefit.

Once it is held that the Appellant is a tax resident of Luxembourg capital gains on sale of debentures and securities receipts would not be liable to tax in India.

Re : Ground of appeal Nos. 5 & 7: Interest income from investment fund Appellant has made investment in Touchstone Trust Scheme II, an Alternate Investment Fund ("AIF") with Securities and Exchange Board of India, from which interest income of INR 33,839,127/- was earned. The Appellant had submitted Form 64C received from the AIF (Refer page 101 of paper book) This income received from the investment fund is chargeable to tax in accordance with the provisions of Section 115UB of the Act.

"115UB (1) Notwithstanding anything contained in any other provisions of this Act and subject to the provisions of this Chapter, any income accruing or arising to, or received by, a person, being a unit holder of an investment fund, out of investments made in the investment fund, shall be chargeable to income-tax in the same manner as if it were the income accruing or arising to, or received by, such person had the investments made by the investment fund been made directly by him."

Thus, income from AIF is chargeable to tax in the hands of the unit holders (i.e., the appellant) as if such investment was directly made by the unit holder (i.e., the appellant). Accordingly, interest income is chargeable to tax @ 21.84% in accordance with the provisions of Section 115AD(1)(i) of the Act.

The Appellant offered such income to tax @ 10% as per beneficial provisions of Article 11(2) of the DTAA.

The assessing officer taxed the interest income from investment in units of investment fund amounting to INR 3,38,39,127/- @ 40% plus surcharge plus cess, as per section 115UB of the Act denying benefit of reduced rate of tax.

Article 11(2) of the DTAA provides that interest earned from investments in India will be taxable @ 10% provided beneficial owner of interest income is resident of Luxembourg. The said Article is reproduced as under:

"ARTICLE 11(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. (2) However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest."

The assessing officer has ignored the detailed submissions made by the Appellant that it is legal as well as beneficial owner of investments made in India and income earned from such investments. The income earned in subject assessment year was not repatriated to Caymans entity as no dividend was declared by the Appellant.

The Hon'ble Delhi High Court in case of Tiger Global (supra) had analysed concept of beneficial ownership observing as under:

"235. In the series on Tax Treaty Entitlement, the subject has been examined by Florian Navisotschnigg and where the learned author explains the principles of forwarding approach in the following terms:-

"4.2.3. The forwarding approach Since its update in 2014, the OECD Model Commentary now states when someone cannot be regarded as the beneficial owner, namely when the "recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person".

However, prior to this addition to the Model Commentary (2014), various courts had already applied this forwarding approach. Nevertheless, the manner in which such an obligation may arise so that beneficial ownership is denied was not answered uniformly. In general, there are two different lines of reasoning; First, the legal approach that asks whether there is a legal obligation to forward the received payment. Second, the economic approach according to which a factual obligation to forward the income is also harmful to beneficial ownership.

For example, in the Canadian *Prévost* case, the court followed the legal approach. It found that a Netherlands holding company, which had no employees and no assets other than the shares of a Canadian subsidiary (*Prévost*) could be regarded as the beneficial owner of the received dividends since there was "no predetermined or automatic flow" of these dividends to its shareholders (i.e. it was under no legal obligation to pass on the payment). Also, a shareholders' agreement between the two shareholders of the Netherlands holding company that stipulated that 80% of the profits of the Netherlands holding company were to be distributed to them was not considered to impose any legal obligation on the Netherlands holding company, because the company itself was not a party to the agreement.

Conversely, in the British *Indofood* case, the economic approach was applied. The court ruled that an (hypothetical) interposed company in the Netherlands between a Mauritian subsidiary and its Indonesian parent company would not be the beneficial owner of the interest it received, although the company would not have been under a legal obligation to pass on the payment (back-to-back loan structures). Rather, the court found that the term "beneficial ownership" was not to be limited by a legal approach but regard was to be had to the substance of the matter. Hence, the court concluded that, in practical terms, the Netherlands company would be bound to forward the interest it received and that it was impossible to conceive of any circumstances in which it could derive any benefit from the received interest other than to fund its liability (i.e. the factual obligation upon it to forward the payment). Consequently, the potentially interposed Netherlands company did not have the 'full privilege' needed to qualify as the beneficial owner, but rather its position equates to that of an "administrator of the income".

The current OECD Model Commentary (2017) leaves leeway for both approaches when it states that "[s]uch an obligation will normally derive from relevant legal documents but may also be found to exist the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person". Some authors argue that an obligation to forward

a payment can never be "factual", but is always a legal obligation. Only in the absence of legal documents can the facts and circumstances help establish the existence of a legal obligation that the recipient has to forward the payment. However, "it is not possible to prove that a person generally should not be considered beneficial owner of a particular income payment on the basis of facts and circumstances". Jiménez (2011) also notes that "one of the major problems of host of the decisions studied (with the exception of Prúvost) is their tendency to resort to 'economic interpretation', when all that was needed in the cases they considered was probably no more than 'legal interpretation'"

236. Proceeding further to explain beneficial ownership on a more fundamental plane, the learned author makes the following pertinent observations:-

"4.5 Beneficial ownership as a basic principle As stated by Arnold (2011), "the concept of beneficial ownership is a basic principle of income taxation: the beneficial owner of income is the person who should be taxed on the income. Accordingly, this basic principle of taxation on the basis of beneficial ownership is implicit in all of the distributive articles of the tax treaty and, to that extent, the explicit reference to 'beneficial owner' in Arts. 10, 11, and 12 of the OECD Model does not add anything". Accordingly, the term "beneficial owner" has no normative meaning on its own.

Similarly, Lang (2008) also takes the view that the term has no normative meaning, but is merely an "indication that one has to apply an economic - and not a formal - approach in interpreting tax treaties". The reason why beneficial ownership is only expressly mentioned in articles 10-12 is that these articles deal with the types of income that are the most susceptible to abuse. However, "the usage of the term 'beneficial ownership' makes it clear for all tax treaty provisions as well that tax treaty terms have to be interpreted applying an economic approach".

237. The author proceeded to formulate the following conclusion:-

"4.6. Conclusion The meaning of beneficial ownership is still highly contentious. At this point, it may be questioned whether a uniform meaning of the term can still be achieved, as courts in different jurisdictions have already established a line of jurisprudence on the term and probably may not deviate from it without profound reason, that is, only a further amendment of the OECD Commentary.

This is especially daunting when considering that the historical analysis of the beneficial ownership concept indicates that the term was not meant to add anything of substance to a treaty but was only a clarification of a self-evident principle. However, amendments to the OECD Commentary and "[t]he temptation for desperate tax authorities to use (misuse) any weapon at their disposal to combat tax avoidance" resulted in a meaning for the term that it was probably never intended to have from a historical point of view. Furthermore, a major problem is that the concept was enhanced via amendments only to the OECD Model Commentary but not to the OECD Model itself. Moreover, different OECD publications are often

inconsistent regarding the content of the beneficial ownership test and are thereby creating further confusion.

The historical analysis also suggests that the concept of beneficial ownership was - as a basic principle - equally applicable to all distributive articles of a tax treaty. However, as soon as any normative meaning is ascribed to the term albeit only via the OECD Model Commentary - it seems likely that only the articles in which the beneficial ownership test is explicitly enshrined contain this requirement.

The latest update of the OECD Model Commentary in 2014 regarding the beneficial ownership test may help to clarify a few contentious issues but certainly also leaves some questions unanswered. Nevertheless, the tendency to view beneficial ownership as a broad anti-abuse rule similar to a GAAR will probably be halted, especially due to the recent introduction of the PPT into the OECD Model (2017). Indeed, it will be interesting to observe how courts will assess the relationship between these two provisions. Maybe the PPT will be regarded as the sole means of tackling conduit company situations, which will eventually render the discussion on the meaning of beneficial ownership insignificant."

238. Angelika Meindl Ringler, in her work titled "Beneficial Ownership in International Tax Law" offers the following insights. Referring firstly to Klaus Vogel's work on double taxation conventions, Meindl Ringler observes:-

"1. KLAUS VOGEL Klaus Vogel in his book on Double Taxation Conventions states that the reason for the inclusion of beneficial ownership in the OECD Model was to prevent treaty shopping by the use of intermediaries. Beneficial ownership should not be interpreted with reference to domestic law, as precise definitions cannot be found in the domestic tax systems in question. Rather, beneficial ownership should be interpreted taking into account the context of the treaty and the purpose of the limitation of tax, since here the context requires otherwise according to Art. 3(2) OECD Model. In Vogel's opinion, treaty benefits should not depend on mere formal title but rather on "real" title, which means that substance should prevail over form. According to Vogel, the substantive right to receive income depends on the right to decide on the use of the assets (and therefore, whether income should be realised) or/and the right to decide on the use of the income. If a person is restricted legally or factually in regard to both, only formal ownership exists. "Hence, the 'beneficial owner' is he who is free to decide (1) whether or not the capital or other assets should be used or made available for use by others or (2) on how the yields therefrom should be used or (3) both." As long as one of the requirements is fulfilled, even a trustee can be the beneficial owner. In the case of a joint stock company, Vogel mentions that the company can be the beneficial owner of income even if the company has to distribute all of its profits to its shareholders. However, the situation might - depending on the facts of the individual case - be different where the decision-making power rests with a controlling shareholder and the management must comply with this shareholder's

will.

Vogel focuses on the power to decide on the use of assets or income as the main attribute of ownership relevant in determining beneficial ownership. Ownership attributes are the attributes that, at least in a common law context, are necessary to achieve a position of ownership. Commonly cited ownership attributes are possession, use, control and risk. Sometimes it can be difficult to strictly distinguish between these attributes, as there can be a certain overlap. For example, in the Canadian Velcro decision, the Tax Court in determining the existence of different attributes of ownership stated that "[many] of the comments referred to in the interpretation of the phrases 'possession', 'use' and 'risk', equally apply to 'control'". Vogel's focus on the power to decide on the use of assets or income mainly concerns control over the income and assets. Under Vogel's approach, not only the power to decide on the use of the income but also of the assets or capital can be decisive in determining the beneficial owner of the income. However, Vogel links the power to decide on the use of the asset to the income in question because the decision to use the asset for generating income is a necessary prerequisite for the income flow. Vogel's approach has a strong substance-over-form focus, which becomes even clearer when he talks about the factual and legal restrictions of control over the assets or income."

239. Noticing the explanation of the precept of beneficial ownership as explained by Philip Baker, the learned author observes as under:-

"According to Philip Baker, the OECD uses beneficial ownership to exclude agents, nominees and "any other conduit who ... has very narrow powers over the income which render the conduit a mere fiduciary or administrator of the income on behalf of the beneficial owner" from claiming treaty benefits. Simply being a conduit is, thus, not sufficient to be excluded under the beneficial ownership test. Even a trustee can qualify as the beneficial owner of income as long as he is not an agent, nominee or conduit with very narrow powers. Baker finds the OECD's approach focusing on a binding obligation to forward the income to another person appropriate. Also, beneficial ownership is intended to counter only one specific type of treaty shopping since otherwise, the anti-avoidance rules mentioned in the Commentary and used by contracting states (e.g., LoB clauses) would be superfluous. In Baker's opinion, beneficial ownership should have an international fiscal meaning, since the context requires otherwise under Art. 3(2) OECD Model. This is supported by the fact that beneficial ownership was introduced into international tax law by the OECD and that the meaning of the concept must be consistent with equivalent terms used in treaties in other languages, e.g., "bénéficiaire effectif" in French. Also, some countries that use beneficial ownership in their treaties know the concept in domestic law, whereas others do not.

Baker raises the question whether, for instance, a company controlled by another company would be treated as the beneficial owner of dividends if the company was likely but not legally bound to pay the income to its ultimate owners. To determine whose income a payment constitutes in reality, he proposes the following test:

[What] would happen if the recipient went bankrupt before paying over the income to the intended, ultimate recipient? If the ultimate recipient could claim the funds as its own, then the funds are properly regarded as already belonging to the ultimate recipient. It, however, the ultimate recipient would simply be one of the creditors of the actual recipient (if even that), then the funds properly belong to the actual recipient."

....

242. As is manifest from the aforesaid passages and the views expressed by leading authorities on international tax planning, emphasis is essentially laid on the facet of ownership attributes. The views so expressed thus bid us to discern a legal obligation which binds the recipient to forward the income to another person. The views expressed commends the question to be posed being whether the intermediary could claim the income for its own account and benefit. It thus proposes that if it were found that the conduit was able to avail the income itself, and was not contractually obligated to forward that income to another person, it would clearly be incorrect to impute the principles of beneficial ownership in such a contextual setting. The core of the aforesaid precepts would appear to be aspects of ownership and control over the income, a right of disposal or a contractual obligation to pass on the same to another.

243. Both Vogel and Baker thus bid us to ascertain and discern the true controller of the income, the entity which decides the use of the asset and the income, and which could also include an administrator or trustee. Tested on the basic rule of substance over form, the concept of beneficial owner would get attracted to cases where the recipient of income or the holder of the asset is found to be merely the ostensible depository and which may hold the income either in the capacity of an administrator or even as a trustee. For this charge to be accepted, it would have to be established that the recipient or holder of income has no right or control over the income and merely holds the same to be deployed on the instruction of another. While the obligation to forward the income or gain may be either legal or contractual dependent upon the position of parties, it would certainly require a finding on fact that the income is held at the behest of another, is controlled and regulated by a third party entity and the ostensible owner having no real or substantive control over the same.

244. Tested on the aforesaid precepts, it becomes manifest that the allegation of the revenue earned from the transfer of shares being beneficially held by the petitioner, TG III and TG IV is thoroughly misconceived and untenable. This since the respondents do not rest or found this allegation on any material or evidence which may be read as even remotely suggestive of the petitioners being under a contractual or legal obligation to transmit the revenues to TGM LLC. The respondents also do not base these submissions on any material which may have tended to indicate that the revenue obtained from the transfer of shareholding was an action undertaken by the writ petitioners acting

for and on behalf of TGM LLC. In fact and as was noted by us in the preceding parts of this decision, the allegation of beneficial ownership itself rested on straws with the respondents still seeking to discover the ultimate beneficiaries of the revenue earned from the transfer of shares."

The assessing officer has not been able to demonstrate any material or evidence which would suggest that the Appellant was under a contractual or legal obligation to transmit the interest income to the shareholder / ultimate shareholder, coupled with the fact that no dividend was declared by the Appellant in the subject assessment year. Applying the dictum of law laid down by the Hon'ble Delhi High Court in the said decision, the Appellant ought to have been entitled to the reduced rate of tax of 10% on the interest income as per the beneficial provision of Article 11(2) of the DTAA.

Re : Ground of Appeal No. 6 : Interest income from India RE 2019 Trust The Appellant had received interest income amounting to Rs.4,85,09,059 received from India RE 2019 Trust which was offered to tax @20% as per section 115AD of the Act. The Appellant had submitted Form 64F received from the said trust [Refer : pg 101 of the paperbook] which discloses the income as 'other source' which reflects the distribution made by India RE 2019 Trust is from interest earned by the said trust from the borrower company.

The assessing officer without appreciating the fact that interest income received from the securitization trust is chargeable to tax @20% under section 115AD(i) of the Act brought the same to tax @40% + surcharge + cess under section 115TCA of the Act.

It is respectfully submitted that income arising to the investors out of investments in securitization trusts is chargeable to tax in the same manner as if it were the income accruing or arising to, or received by, such person, had the investments by the securitisation trust been made directly by him. Accordingly, such nature of income cannot be recharacterized by the assessing officer. In that view of the matter, the interest income received by the appellant ought to have been taxed @ 20% only in terms of section 115AD(1)(i) of the Act."

11. On the other hand, Ld. DR for the Revenue submitted that this assessment year under consideration being a first year of MLI, in this regard, he brought to our notice page 205 of the paper book, the MLI with Luxembourg. He submitted that above MLI with Luxembourg came into force is 1st October 2019 in India and 1st August 2019 for Luxembourg. Therefore, it is effective from current AY. He submitted that Article 6 of the MLI is included in the preamble of the Agreement and he also brought to our notice relevant amendments made in Article 6. He submitted that as per Article 1, the MLI is applicable to resident of one or both of the contracting state only. Further he brought to our notice page 220 of the paper book, brought to our notice Article 29. He submitted that as per paragraph 2 & 3 of Article 29, it clearly states the fact that if the main purpose or one of the main purposes of the creation of such enterprise was to obtain the benefits under this Agreement that would not otherwise be available, he submitted that paragraph 3 of Article 29 states clearly that the case of local entities not having bonafide business activities shall be covered by the provisions of this article. Therefore, he submitted that the company established in Luxembourg is with the purpose of getting the tax benefit out of the DTAA since the company is established in

Luxembourg by the Cayman Islands Holding Company. Further he brought to our notice page 12 of the assessment order and brought to our notice organization chart referred by the AO as per which parent companies are from Cayman Islands holding 100% shares in the assessee company. He also brought to our notice findings of the AO that there is no treaty with the Cayman Islands and only treaty exists to exchange the information, therefore, there is no DTAA in existence with the Cayman Islands. Further he submitted that the offshore companies from Cayman Islands has no physical presence in Luxembourg.

12. Further he brought to our notice page 76 of the paper book which is the financial statements for the period 01.02.2020 to 31.12.2020 and submitted that assessee has not claimed any expenditure of operations. He wondered how the company is established in Luxembourg without incurring any expenditure. Based on the MLI entered with the Luxembourg, the assessee is not eligible to claim DTAA benefits considering the fact that assessee is only a conduit and he relied on the detailed findings in the assessment order. With regard to the Hon'ble Delhi High Court decision relied by the Id. AR for the assessee in the case of Tiger Global International IH Holdings (supra), he submitted that the issue involved in that case is relating to Mauritius treaty. Therefore, the facts are distinguishable and the relevant case is not applicable to the facts in the present case. Further by relying on the assessment order, he submitted that there is no commercial rationale to assessee to exist in Luxembourg. Finally he submitted that the MLI provision has to be applied particularly when the assessee company is established in Luxembourg with the object to avail the tax benefits. Therefore, he supported the findings of the AO for denying the treaty benefit to the assessee. With regard to other grounds of appeal, he relied on the findings of the lower authorities.

13. In the rejoinder, Id. AR for the assessee submitted that the AO has not brought on record what is actual tax evasion made by the assessee and he prayed that the submissions made by him may be considered. With regard to additional grounds, he submitted that no doubt the interest charged u/s 234 is consequential still the provisions of section 234B may be remitted back to the AO to determine the actual liability in accordance with the law.

14. Considered the rival submissions and material placed on record. We observe from the record, during the assessment proceedings, the AO observed that the assessee is a limited liability Company incorporated in Luxembourg and it is 100% subsidiary of SC Lowy Primary Investments Limited based in Cayman Islands and the Holding company also 100% subsidiary of SC Lowy Offshore Fund based in Cayman Islands. After analyzing the financial statements of the assessee company and various documents on record, he came to the conclusion that a) the scheme of arrangements employed in this case is tax avoidance through treaty shopping, b) it is just a conduit and the real owner is Holding Company based in Cayman Island, with whom there is no DTAA exists, c) TRC is not sufficient to establish the tax residency d) it is not a beneficial owner of income as control is not with them and e) no commercial rationale of establishment of company in Luxembourg as the commercial outcome would be identical irrespective of location of funds. Accordingly, he denied the treaty benefits claimed by the assessee during this year. The issue raised before us is a) whether the existence of TRC issued by the Luxembourg authorities is valid for availing DTAA benefits and corresponding existence of LOB in the respective DTAA/MLI, compliance to the Art.29 is sufficient. And b) Whether the revenue could go beyond to raise several other conditions to grant DTAA

benefits.

15. We observe that the above questions were considered by the Hon'ble High Court of Delhi in the case of Tiger Global International III Holdings (supra) wherein they held that i. A validity and sanctity of TRC issued by competent authority must be considered to be sacrosanct and due weightage must be accorded to the same as it constitutes the relevant entity being a bona fide entity having beneficial ownership domiciled in the contracting state to pursue a legitimate business purpose in the contracting state. Unless there is evidence of Fraud, sham transactions where the entity has no vestige of economic substance or the transaction is alleged to be aimed at camouflaging an illegality with cogent material at the disposal of the revenue authorities.

ii. Based on the Circular No,789 of 2000 issued by the CBDT clearly held out that a TRC issued by authorities would constitute sufficient evidence for determining fiscal residence and beneficial ownership. (In our view, even though above circular was issued in relation to the transactions with Mauritius, still the substance of above direction of CBDT hold good for other treaties as well.) iii. The issuance of TRC constitutes a mechanism adopted by the contracting states themselves so as to dispel any speculation with respect to the fiscal residence of an entity.

iv. The revenue has to base an allegation on cogent and convincing evidence as opposed to a mere conjecture, doubt or a perceived need to investigate and enquire. Such an allegation has to be established at the outset itself before they discard the presumption of validity when the entity produces TRC and the LOB conditions are shown to be fulfilled.

v. The circumstances under which the Revenue could pierce the corporate veil of a TRC holding entity is restricted to extremely narrow circumstances of tax fraud, sham transactions, camouflaging of illegal activities and the complete absence of economic substance and the establishment of those charges would have to meet stringent and onerous standards of proof and required to base such conclusions on cogent and convincing evidence and not merely suspicion alone.

16. From the above, it is clear that the revenue has to accept the TRC issued by the competent authority and if the facts on record satisfies the conditions specified in the Article 29 on Limitation of Benefits, it cannot stretch beyond the above mandates unless they bring on record the cogent and convincing evidences to prove the existence of assessee being acted as conduit. On careful consideration of MLI with Luxembourg, we observe that the article 29 was modified and replaced the sub clause 2 and 3 of the Article by paragraph 1 of Art.7 of MLI, as per which benefit under the agreement shall not be granted in respect of income or capital if it is reasonable to conclude leading to relevant facts and circumstances, obtaining the benefit is one of the principal purposes of any arrangements or transaction that resulted directly or indirectly in that benefit. It is to be established that obtaining benefit is one of the principle purpose and bring on record the relevant facts and circumstances to prove that purpose of arrangements and transactions only for the purpose of taking treaty benefit.

17. Coming to issue under consideration, we observe that the assessee has submitted the valid TRC and the revenue has not raised any flag on the validity of the TRC.

Further we observe that it was incorporated in Luxembourg in the year 2015 and incorporated in Luxembourg as an investment holding company and invested mainly in distressed assets. It also made investments in Italy in its step down subsidiary for making further investments. It is a step-down subsidiary of SC Lowy Offshore Fund incorporated in Cayman Islands as a special purpose vehicle for pooling of funds from various investors. It also registered with SEBI as Category II - Foreign Portfolio Investor and has made investment in India only in financial year 2018-19 in securitization trust / securities issued by companies in India. Ld AR also submitted the geographical concentration of investments made by the assessee, for the sake of clarity, it is reproduced below:

Geographical location	Percentage	Region
India	13.95%	Asia
Indonesia	14.84%	Asia
Korea	9.03%	Asia
China	8.91%	Asia
Bahrain	8.42%	Middle East
Singapore	5.86%	Asia
Hong Kong	5.84%	Asia
Mongolia	5.14%	Asia
United Kingdom	4.85%	Europe
United Arab Emirates	4.53%	Middle East
Australia & New Zealand	3.92%	Australia
Germany	2.64%	Europe
Luxembourg	2.39%	Europe
Sweden	2.31%	Europe
Spain	1.94%	Europe
Saudi Arabia	1.32%	Middle East
Vietnam	1.25%	Asia
Turkey	0.86%	Middle East
Netherlands	0.47%	Europe
Norway	0.42%	Europe
US	0.38%	Other
Kuwait	0.33%	Middle East
Philippines	0.31%	Asia
Italy	0.22%	Europe
Brazil	0.07%	Other
Europe	0.05%	Europe
Morocco	0.05%	Other
Virgin Islands (British)	0.03%	Other
Denmark	0.02%	Europe
Ukraine	0.02%	Europe
Iceland	0.01%	Europe
Malaysia	0.01%	Asia
Grand Total	100.00%	

18. From the above, it shows that the activities of the assessee is beyond Indian jurisdiction and it also filed tax returns and paid tax in Luxembourg on its worldwide income, i.e., income earned from investments made in India as also income from other investments in different jurisdictions. It was

submitted and brought to our notice that the assessee has incurred substantial operational expenditure relating to investments in Luxembourg in the nature of consulting fees, legal and litigation fees, other professional fees apart from other administrative expenses such as rent paid for office premises, bank account charges, accounting fees, etc.

19. Finally, it was submitted that the assessee continues to exist till date in Luxembourg and continues to hold substantial investments. It clearly shows that the assessee controls the assets as well as income on its own and cannot be termed as conduit. Further we observe that the AO has not brought any cogent material on record to indicate that the assessee in substance a conduit except expressing his views and presumptions. In our considered view, as per the directions of Hon'ble Delhi High Court in the case of Tiger Global International decision (supra), revenue authorities cannot bring on record other conditions to deny the benefit under the treaty when the assessee submits the relevant TRC and proves its existence from the date of its investment in the source country. In our view, any economic activities which is not substantial in the earlier of its existence will not alter the position and it also proves that its activities are genuine by bringing on record the various activities and also establishes the fact that it is stand alone entity not depends on the conduct of the holding company, it establishes its existence beyond the source country and also without their being any cogent material with the revenue to establish that the assessee is only a conduit, the benefit under the treaty cannot be denied. With the above observations, we are inclined to direct the AO to grant the treaty benefits to the assessee. In the result, the ground no 2 is allowed in favour of the assessee.

20. With regard to other grounds raised by the assessee, which are relating to various benefits claimed by the assessee under the treaty, which was denied by the AO on the basis of non eligibility of the assessee for availing treaty benefit under the DTAA with Luxembourg. Since we already held them to be eligible to claim the benefit under the DTAA, the other grounds of appeal also allowed in favour of the assessee. Accordingly, all the grounds raised by the assessee are allowed.

21. With regard to additional ground raised by the assessee, it was submitted that the interest liability u/s 234B is excessively charged in the case of the assessee and prayed that it may be remitted back to AO to determine the liability as per law.

Accordingly, we set aside the same to the file of AO to determine the liability as per law after considering the adjudication of various grounds raised by the assessee. In the result, the additional ground raised by the assessee is allowed for statistical purpose.

22. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.12.2024.

Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

sd/-
(S.RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Dated : 30.12.2024

TS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI