INCOME TAX : Where real control of applicant-Mauritius companies 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 a rose on sale of a Singapore Company's share value of which was derived substantially from assets located in India, such arrangement was for avoidance of tax in India; applications for advance rulings were to be rejected

[2020] 116 taxmann.com 878 (AAR - New Delhi)

AUTHORITY FOR ADVANCE RULINGS, NEW DELHI

Tiger Global International II Holdings, *In re*

G. CHOCKALINGAM, CHAIRMAN
NARENDRA PRASAD SINHA AND RAMAYAN YADAV, MEMBER
APPLICATION NOS. AAR/4, 5 & 7 OF 2019
MARCH 26, 2020

Section 245R of the Income-tax Act, 1961, read with article 13 of the DTAA between India and Mauritius - Advance ruling - Procedure on receipt of application for (Rejection of application) - Whether an applicant is not barred from approaching AAR after matter has been examined in proceeding under section 195 or 197; bar is only in respect of pending proceeding - Held, yes - Whether computation of capital gains is embedded in concept of valuation of shares and merely for this reason, question of capital gains arising in application cannot beheld to be barred by clause (ii) of proviso to Section 245R(2) - Held, yes - Whether there is nothing wrong if funds for making FDI by Mauritius companies/individuals had not originated from Mauritius but had come from investors of third countries and same could not be basis to treat arrangement as tax avoidance - Held, yes - Whether holding structure coupled with its management and control including management and control of applicant-companies would be relevant factors for determining design for avoidance of tax - Held, yes – Applicants are tax resident of Mauritius holding shares of Singapore company Flipkart - Flipkart, in turn, invested in multiple companies in India - Value of shares of Singapore company was derived substantially from assets located in India - Applicants transferred certain shares of Flipkart to a Luxembourg company - Applicants sought for an advance ruling whether gains arising to applicants from sale of shares held by applicants in Flipkart would be chargeable to tax in India - It was found that real management and control of applicants was not with their respective Board of Directorsin Mauritius but with one US based person, who was beneficial owner of entire group structure and applicant companies were only a 'see-through entity' to avail benefits of India-Mauritius DTAA - Though tax residency was stated to be established to take benefit of Mauritius tax treaty network with various countries and not just India, applicants had not made any other investment other than in shares of Flipkart; thus, real intention of applicants was to avail benefit of India-Mauritius treaty - Whether since capital gains had not been derived by alienation of shares of any Indian company, rather capital gains arose on sale of shares of Singapore Company and entire arrangement was nothing but an arrangement for avoidance of tax in India, instant applications were to be rejected - Held, yes [Paras 16, 20, 36 and 48] [In favour of revenue]

Circulars and Notifications: Circular No.682, dated 30-3-1994

CASE REVIEW

CIT v. *Sakarlal Balabhai* [1986] 69 ITR 186 (Guj.) (Para 43), Moody's Analytics Inc. USA15(Para 44), *Golden Bella Holdings Ltd.* v. *Dy. CIT* [2019] 109 taxmann.com 83 (Mum.)(Para 44), Star *Television Entertainment Ltd.*, In re [2010] 188 Taxman 206 (AAR - New Delhi)(Para 44) and *Serco BPO (P.) Ltd.* v. *Authority for Advance Rulings* [2015] 60 taxmann.com 433 (Punj.& Har.)(Para 45) distinguished.

Rajesh Simhan, **Nishith Desai Asso**, **Anandu Unnikrishnan** and **Ms. Varsha Bhattacharya**, Advs. *for the Applicant.* **Ramesh Chander**, **Manoj Kumar Mahar**, **S. Anbuselvam**, **Raju B. Kuhikar**, **D. Tisso** and **Abhishek Tripathy** *for the Respondent.*

ORDER U/S 245R(2) OF THE ACT

Tiger Global International II Holdings, Tiger Global International III Holdings and Tiger Global International IV Holdings (hereinafter referred to as "the applicants"), are private company 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 under section 72(6) of the Financial Services Act, 2007 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 (for short "Singapore. Co"). 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	23rd June 2014
3.	Tiger Global International IV Holdings, Mauritius	105,928	24th April, 2012

2. The applicants have submitted that Singapore Co, in turn, had invested in multiple companies in India and the value of the shares of Singapore Co was derived substantially from assets located in India. On 18-8-2018 all the three applicants transferred certain shares of Singapore Co. 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	USD8,435,171.44 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. by Walmart Inc., a company incorporated in the United States of America, from several shareholders, including the applicants.

3. It is stated by the applicants that they had approached the Indian tax authorities under section 197 of the

Act on 2-8-2018 seeking a certification of nil withholding prior to consummation of the transfer. The tax authorities had informed vide communication dated 17 August, 2018 that the applicants were not eligible to avail benefit under the Indo-Mauritius Tax Treaty as the applicants were not independent in their decision making and the control over the decision making of the purchase and sale of the shares did not lie with them. The tax authorities had passed an order under section 197 of the Act on 17-8-2018 prescribing a withholding rate in respect of sale of shares by the applicants as under:

Tiger Global International II Holdings, Mauritius	Certificate dated 17.08.2018 mentioning the rate of income tax @ 6.05%
Tiger Global International III Holdings, Mauritius	Certificate dated 17.08.2018 mentioning the rate of income tax @ 6.92%
Tiger Global International IV Holdings, Mauritius	Certificate dated 17.08.2018 mentioning the rate of income tax @ 8.47%

4. The applicants, thereafter, filed the present application on 19-2-2019 for an advance ruling under section 245Q(1) of the Act on the following common question:

1. Whether, on the facts and in the circumstances of the case, gains arising to the Applicants (a private company incorporated in Mauritius) from the sale of shares held by the Applicants in Flipkart Private Limited (a private company incorporated in Singapore) to Fit Holdings S.A.RL. (a company incorporated in Luxembourg) would be chargeable to tax in India under the Income-tax Act, 1961 read with the Double Taxation Avoidance Agreement between India and Mauritius?

As the question raised by the three applicants is common and issue as well as the facts of the case is identical, the matter is being decided by common order. The applicants have also requested for clubbing the applications as they had common set of facts relating to identical transaction.

Revenue's objections on pendency

5. The Revenue has raised objections on the admissibility of the application in all the three cases in respect of all the three conditions as stipulated in provisos to section 245R(2) of the Income-tax Act, 1961 ("the Act"). The first condition of the said proviso is regarding pendency of proceeding before any Income-tax Authority or the Appellate Tribunal. In the report dated 3-1-2020, the Commissioner of Income-tax(IT)-4, Mumbai has admitted that as on date of application no proceeding was pending against any of the three applicants. However, it has been pointed that the issue of chargeability of capital gains on the sale proceeds of shares held by the applicants in Flipkart Private Limited, Singapore to Fit Holdings, S.A.R.L. Luxembourg was examined by the Department in detail in the course of proceeding under section 197 of the Act. The applicants had filed an application on 2-8-2018 for certificate of 'nil' withholding in connection with the sale transaction and after due consideration of their submission a certificate under section 197 of the Act was issued on 17-8-2018 prescribing certain withholding rate provisionally on the total sale consideration. The Revenue has accordingly contended that long term capital gains arising to the applicants on the sale of shares was held as taxable and the benefit available under the India-Mauritius Double Taxation Avoidance Agreement (DTAA) was denied to the applicants.

6. According to the Revenue, the taxability of the capital gains in the hands of the applicants was already decided by analyzing the facts of the case and piercing the corporate veil to identify the beneficial owner of the shares sold. Accordingly, a request was made to reject the application since the issue raised in the present application already stood decided. It was further pointed out that the applicants had filed their return of income for Assessment Year 2019-20 and the case may be selected under Computer Assisted Scrutiny Selection (CASS) and the department shall determine the chargeability of capital gains once again. The Department has also placed strong reliance on the order dated 22-1-2020 of Mumbai Bench of this Authority in the case of Areva NP SAS, France wherein it was held that conclusion of proceedings

under section 197 of the Act was a reasonable ground for rejecting the application. According to Revenue the applicants had a choice to either go for revision before the Commissioner of Income-tax or file a writ application before the High Court and that the AAR was not an appellate forum, as held in the case of Areva and, therefore, was precluded from filing the present application.

7. As an alternative argument the Department has contended that the certificate issued under section 197 of the Act was valid for the financial year 2018-19 and, therefore, there was a pending proceeding on the date when the present applications were filed on 19th February, 2019.

8. The applicants, on the other hand, have submitted that the bar under clause (*i*) of the proviso to section 245R(2) of the Act was attracted only if the question raised in the application was already pending before any Income-tax Authority or the Appellate Tribunal. It was submitted that the CIT himself had conceded in his report that "as on date there was no proceeding pending against the assessee" and, therefore, there was no legal basis to attract the bar under this clause. The applicants have drawn our attention to Circular No. 774 dated 17-3-1999 issued by the CBDT which clarified that no certificate under section 197(1) of the Act should be issued after the amounts subject to tax deduction at source stand credited or paid, whichever is earlier. It was clarified that the amount subject to TDS was credited / paid prior to the filing of the present applications and, therefore, the proceeding under section 197(1) of the Act stood concluded and there was no pending proceeding on the date of present applications. The applicants relied upon the decision of Hon'ble Supreme Court in *Asgarali Nazarali Singaporawalla* v. *State of Bombay* AIR 1957 SC 503 and the decision of Delhi High Court in the case of *Hyosung Corporation* v. *AAR* 382 ITR 371, wherein the term "already pending" was explained. The applicants have also placed reliance on the following decisions in support:

I. Burmah Castrol Plc [2008] 174 Taxman 95 (AAR)
II. SEPCO III Electric Power Construction Corporation [2012] 340 ITR 225 AAR
III. CTCI Overseas Corporation Ltd. [2013] 350 ITR 174 (AAR)

9. It was further submitted that the certificate under section 197(1) of the Act does not decide the final tax liability of the recipient and, therefore, the applicants were not precluded from approaching this Authority after conclusion of 197(1) proceeding. Reliance in this regard was placed on the decision of Gujarat High Court in the case of *OPJ Trading Private Ltd.* v. *ITO* 259 Taxman 36and on the decision of Bombay High Court in the case of *CIT* v. *Elbee Services Pvt. Ltd*. 247 ITR 109

10. We have carefully considered the facts of the case, the objection raised by the Revenue and the submissions of the applicants. Clause(*i*) of proviso to section 245R(2) of the Act stipulates that the Authority shall not allow the application where the question raised in the application is already pending before any Income-tax Authority or the Appellate Tribunal. It is evident from the report of the Commissioner that no proceeding in respect of the question raised in the present applications was pending on the date on which the applications were filed before this Authority. Therefore, the bar as stipulated in sub-clause(*i*) of proviso to section 245R(2) of the Act is not found attracted. It has been held by the Hon'ble Supreme Court in the case of *Asgarali Nazarali* (*supra*) that a legal proceeding is pending as soon as commenced and until it is concluded. In this case the proceedings under section 197 of the Act were already concluded on 17-8-2018, when the certificates were issued by the TDS Officer. As clarified by the applicants the amount subject to TDS was credited / paid on 17-8-2018 which was prior to the filing of the present applications. The revenue's contention is that the certificate u/s 197 was effective for the period from 2-8-2018 to 31-3-2019 and, therefore, the said proceeding was pending as the certificate could have been modified or varied. Even if the certificate u/s 197 was modified or varied by the TDS officer, it could not have been given effect after the transaction was closed on 17-8-2018 and such variation would have no impact. Therefore, the proceeding u/s 197 of the Act had for all practical purpose concluded on 17-8-2018 when the transaction was closed. The contention of the Revenue that the proceeding under section 197 of

the Act was pending on the date of filing of the present application in February, 2019 is, therefore, not correct and can't be accepted. Once the transaction was closed there could be no pending proceeding under section 197 of the Act as clarified vide CBDT's circular no. 774 dated 17-3-1990.

11. It has been held by the Delhi High Court in the case of *Hyosung Corporation* (*supra*) that the word "already pending" in section 245R should be interpreted to mean "already pending" as on the date of application and not with reference to any future date. It was further held in this case that a notice under section 143(2) merely asking for certain information from the assessee issued prior to filing application before AAR will not constitute bar in terms of clause (*i*) to proviso to section 245R(2), on AAR for entertaining and allowing the application. As clarified in the report of the Commissioner there was no such pending proceeding in this case on the date of filing of the present applications.

12. The Revenue's other contention is that the question as raised in the present applications was already decided by the Department in the course of proceeding under section 197 of the Act and, therefore, the present applications should be rejected. Reliance has been placed on the decision of Mumbai Bench of this *Authority in Areva* (*supra*) in this respect. It is found that in the case of *Areva* (*supra*) the applicant had filed an application before the AAR on 16-10-2015 and, thereafter, an application under section 197 of the Act was filed with the Department on 20-10-2015, which was decided on 23-11-2015. The fact that an application was already filed with the AAR was not disclosed by the applicant to the TDS officer while filing the application under section 197 of the Act. The applicant also did not disclose the factum of having filed the subsequent application u/s 197 to the AAR, till 23.11.2015. It was under the sepeculiar circumstances that the AAR had held that the applicant was resorting to forum shopping as it might have withdrawn the application filed before the AAR in case the TDS Officer had accepted the applicant's contention for nil deduction. The Authority had held in that case that it had every power to reject the application on genuine and reasonable grounds and the application was rejected in view of the conclusion of the subsequent 197 proceeding. Thus the prime reason for rejection of application in that case was filing of application u/s 197 of the Act after having filed the application before the AAR and non-disclosure of the material facts both before the TDS officer and before the Authority. The facts of the present case are, however, found to be totally different. In this case the applicants had filed an application under section 197 of the Act which was already decided, before filing the present applications before the AAR. There is no co-relation of facts of the present case with the facts of *Areva* (*supra*) as there is no concurrent proceeding pending in this case. Therefore, the ratio of the decision of the *Areva* (*supra*) cannot be applied to the facts of the present case.

13. The Department has contended that it had already decided the chargeability of capital gains on the sale of shares in the proceedings under section 197 of the Act and that the present applications should be rejected. The Hon'ble Gujarat High Court has held in the case of *OPJ Trading Pvt. Ltd.* (*supra*) that the deduction of tax at source and depositing it with the Government revenue by the payee does not decide the final tax liability of the recipient of income which would be subject matter of assessment of return. An identical view was taken by Hon'ble Madras High Court in the case of *Anasaldo Energia SPA* v. *ITO* 261 ITR 476 and by the Kerala High Court in the case of *Infoparks* v. *DCIT* 339 ITR 404 wherein it was held that the assessee's tax liability cannot be decided in the proceeding under section 197 of the Act but can only be subject matter of assessment proceeding.

14. This issue was also examined by this Authority in the case of *Burmah Castrol* (*supra*) wherein it was held that an order passed under section 197 of the Act does not fetter the jurisdiction of the AAR to proceed with the application. The relevant portion of said ruling is reproduced below:

> "....The application filed under section 197 has already been disposed of and the order passed therein worked itself out by reason of expiry of the validity period. Moreover, the proceeding initiated before the assessing authority was in connection with tax deduction at source. Deduction and withholding of

tax at source by the payer, it is well settled, is in the nature of tentative determination as pointed out by the Supreme Court in the case of Transmission Corporation of A.P. Ltd. vs. CIT, [1999] 239ITR 587. The final view has to be taken in the course of regular assessment. If before such assessment proceeding is initiated, this Authority gives a ruling in exercise of jurisdiction conferred by the Act, that ruling is binding on the assessing authority and it has to be followed. The order passed under section 197 as a tentative measure does not in any way fetter the jurisdiction of this Authority to proceed with the application. In fact, the rejection of this application at the admission stage under section 245R(2) would amount to failure to exercise the jurisdiction vested in this Authority."

It was further held in that case that there was no abuse of process of law or dubious ingenuity on the part of the applicant to circumvent any provision of law, if it had approached the AAR after passing of order under section 197 of the Act.

15. This Authority in the case of *SEPCO III* (*supra*) had held that mere pendency of the proceedings under section 195 or section 197 of the Act or even a final order thereon does not stand in the way of an application of advance rulings being entertained. The finding that the order under section 195 of section 197 of the Act does not stand in the way of Authority for entertaining the application for advance ruling was reaffirmed by this Authority in the case of *CTCI* (*supra*)as well.

16. The provisions of the Act do not provide a bar that an applicant can't approach this Authority after the matter has been examined in the proceeding u/s 195 or u/s 197 of the Act. The bar is only in respect of pending proceeding and as already discussed earlier there was no pending proceeding on the date of filing of present applications.

17. In view of the above facts and the judicial precedence's, we don't find any merit in the objection of the Revenue to reject the applications under clause(*i*) of proviso to section 245R(2) of the Act and the objection raised is found to be unsustainable.

Whether determination of Fair Market Value (*FMV*) *involved?*

18. The Revenue has submitted that the transfer of shares necessarily involves valuation of shares mutually acceptable to both the parties. The working of the capital gains involved correct working of total sales consideration which in turn depended on the value assigned to each share of Flipkart. According to the Revenue, the question raised by the applicants involved determination of Fair Market Value of the shares held by the applicants in Flipkart and, therefore, the bar under clause(*ii*) of proviso to section 245R(2) of the Act was applicable and that the application was not admissible for this reason.

19. On the other hand, the applicants have submitted that the question raised in the application was only concerned with the chargeability of tax i.e. whether or not transfer would be taxable in India under the Act read with Indo- Mauritius treaty. The question does not require this Authority to undertake a valuation exercise in relation to the shares or compute the capital gains arising to the applicants from the transfer. The applicants have placed reliance on the ruling of this Authority in the case of Worldwide Wickets 303 CTR 107 (AAR) in this regard.

20. We have carefully considered the objection of the Revenue and the submission of the applicants. The question raised by the applicants in the present application is whether the gain arising from the sale of shares of Flipkart is chargeable to tax in India under the Income-tax Act read with DTAA between India and Mauritius. The issue of valuation of shares of Singapore Company or computation of capital gains arising on transfer of the shares is not at all involved in the question raised by the applicants. The exercise of valuation of shares (if at all necessary) and the computation of capital gains has to be undertaken by the assessing officer only when the issue of taxability of capital gain on sale of shares is decided in the favour of the revenue. We do not find any involvement of determination of Fair Market Value of any property

(shares) in the question raised in the application. In the case of *Worldwide Wickets* (*supra*) Mumbai Bench of this Authority has held that the computation of capital gains is embedded in the concept of valuation of shares and merely for this reason the question of capital gains arising in application cannot be held to be barred by clause (*ii*) of the proviso to section 245 R (2) of the Act. Considering the precise question raised by the applicants on the taxability of capital gains and the decision of the Authority on the issue, the objection raised by the revenue on the issue of involvement of determination of fair market value of the property is rejected.

Whether transaction / issue designed prima facie for avoidance of tax?

21. On behalf of the Revenue it was submitted that in the course of proceeding under section 197 of the Act, the facts of the case were examined in detail and it was found that the entire scheme was designed to avoid payment of tax on capital gains. The applicants had transferred shares of Singapore Company which owned a company based in India and, therefore, the Singapore based company 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. However, the applicants, which are tax resident of Mauritius, have claimed benefit of beneficial provision of DTAA between India and Mauritius. The Revenue submitted that the following facts discovered during the course of 197 proceedings indicated that the scheme was designed prima facie for avoidance of tax.

22. (*a*) Ownership Structure& Control: The applicant's companies were set up in Mauritius ostensibly for making investment in India and other markets. According to Revenue, they were not acting independently but only as a conduit for the real beneficial owners based out of USA. The Revenue has submitted that as per Notes to the Financial Statement of the year ending 31.12.2011, the applicants were held by the Tiger Global Management LLC ,a USA based investment entity that invests in public and private markets across the world through a web of entities based out of low tax jurisdictions in Cayman Islands and Mauritius, which indicated that the real control of the Company does not lie within Mauritius. The structure of the shareholding arrangements of the applicants are depicted in the following chart:

Organizational structure of Tiger Global International II Holdings

image

Organizational structure of Tiger Global International III Holdings

image

Organizational structure of Tiger Global International IV Holdings

image

22.1 The specific comments of the Department vide letter dated 13-2-2020 on the ownership structure is as under:

> On perusal of the material on record, it prima facie appears that the said Limited Partnership, legally Exempted Limited Partnerships, are by default flow through entity for the purposes of taxation and all profits directly flow to the partners in the ratio of their capital contribution or as defined in partnership deed. The limited partners, however, are not involved in the day to day business of the LP and it's the General Partner(*s*) who manages the business of the LP.
>
> The General Partner of TG Private Investment Partners V LP is TG PIP Performance V and its General Partner is TG PIP Management V Ltd which is in turn controlled by Mr. Charles P. Coleman. Also, the management company for TG Private Investment Partners V LP and TG Private Investment Partners VI LP is TGM LLC, USA whose founder member and partner is Mr. Charles P. Coleman.

The same is duly reflected in the filings made by the company with Securities Exchange Commission, USA...

The Revenue submitted that from the date of inception the applicants were part of Tiger Global Management LLC USA and its affiliates through the web of entities based out of Cayman Islands and Mauritius. As per the business plan of the applicants dated 6-6-2011, the applicants were set up for making investment in India and that the funds for making investment were provided by the promoter.

23. (*b*) Decision Making: On the basis of the Minutes of the Meeting furnished by the applicants, the Revenue submitted that 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 summary of the meetings where crucial decisions were taken was provided by the Revenue as under:

Date of meeting	*Particulars*	*Present*	*In attendance*	*Reference (Paper book)*
21.05.2014	Investment in Flipkart Series E Preference Shares	Mr. Steven Boyd (By telephone)	Justin Horan (By telephone) Representing Tiger Global Management LLC	Annexure C Page 18
30.07.2014	Tiger Global Management LLC appointed as Investment Manager of the assessee	Mr. Steven Boyd (By telephone)		Annexure D Page 21
03.11.2014	Update Authorised Bank Signatories	Mr. Justin Horan, Alternating for Mr. Steven Boyd		Annexure G page 31
10.10.2017	Discussion accepting Flipkart's proposal to buyback shares	Mr. Steven Boyd (By telephone)		Annexure U Page 82
04.05.2018	Disposal of shares of Series E Preference Shares held in Flipkart Limited	Mr. Steven Boyd (By telephone)	Ms. BenaazMohun representing Tiger Global Mauritius Group	Annexure W Page 88

23.1 The Revenue submitted that Mr. Steven Boyd or one of the representatives of TGM, USA was always present to advise the Board of the applicants. The other Directors based in Mauritius were mere puppets and not independent. According to Revenue, the applicant's decision making was fully subordinate and reliance in this regard is placed on the decision of the Supreme Court in the case of Vodafone International Holding BV 341 ITR 1.

24. (*c*) Financial Control: On financial control, the submissions of the department were as under:

. . . . . the authority to operate the bank accounts for transactions above USD 250000 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 applicants company and his presence is NOT noted on any of the Minutes of meeting where apparently crucial decisions regarding investments were taken.

Without being on board of directors, he yields maximum authority in controlling the funds of the applicants company. The other signatories are Mr. Steven Boyd, Mr. Michael Germino and Mr. Anthony Armenia with either of two categories of signatories countersigned by one of the Mauritius based directors. The non-Mauritius based signatories are again senior management personnel of TGM, USA as noted in para 7.6 of the 245R(2) report. It is also noted that only Mr. Steven Boyd is on Board of Directors of the applicants company as a non-resident based out of USA.

Vide Minutes of meetings dated 3-11-2014 (attached as Annexure-2), the authorised bank signatories were updated as noted below:

Group A	Group B	Group C
Charles P. Coleman III	Richard Shi	Resident Directors.
Anil Castro	Jeremy Geller	
Steven Boyd	Jie Jennifer Zhang	

However, Mr. Charleas P. Coleman continued to be authorised signatory along with Mr. Anil Castro, both of whom are not on Board of Directors of the applicants company and are infact key personnel of Tiget Global Management, LLC (Mr. Anil Castro being Chief Operating Officer of Tiger Global Management LLC). Any transactions above USD 250000 required either 2 signatories from Group A or one each from Group A and Group B. That is to say, the person listed in Group A had the ultimate control over the funds of the applicants company. There were no changes to Group A signatories subsequently till transfer of shares of Flipkart by the applicants company. The above facts establish beyond doubt that the control of fund lies outside Mauritius in the hands of Tiger Global personnel based out of USA.

On perusal of the minutes of the meetings, it is also found that Mr. Charles P. Coleman is also the authorised signatory for the immediate parent companies of the applicants being Tiger Global Five Parent Holdings (Annexure-3) and Tiger Global Six Parent Holdings, Mauritius (Annexure-4). He was also the sole director of ultimate holding company being Tiger Global PIP Management V Ltd. and Tiger Global PIP Management VI Ltd. till July 2019 (Annexure-5). Hence, the funds were controlled by Mr. Charles P. Coleman and under his overall control by other senior Tiger Global Management personnel for the entire claim of ownership structure.

25. (*d*) Beneficial ownership: On beneficial ownership, following submissions were made:

" On bare perusal of the documents submitted by Tiger Global International III Holdings with Mauritius Financial services commission for the purpose of obtaining Category 1 Global Business License, it is found that the applicants itself has clearly specified the BENEFICIAL OWNER OF THE COMPANY AS 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....".

26. The Revenue submitted that the element of good faith needs to be retained for applicability of the treaties. Both India-Mauritius treaty and India- USA treaty have captioned "prevention of tax avoidance" as one of the purpose of DTAA. Therefore, the good faith application of these treaties requires the element of tax avoidance and treaty abuse to be examined by the tax administration while invoking treaty provisions.

27. The Revenue further submitted that on the basis of material on record, it was evident that the decisions of the applicants were not taken independently by the companies situated in Mauritius but by the people located with TGM USA. The beneficial owner of the shares of the Flipkart was with Mr. Charles P. Coleman of TGM USA. 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. The Revenue relied upon the judgment of Hon'ble Supreme Court in the case of *Vodafone International Holding BV* (*supra*) and requested that considering the peculiar facts and circumstances of the case, the Revenue is entitled to disregard form of the arrangement and re-characterize the equity transfer according to its economic substance and impose tax on the actual controlling non-resident enterprise. It was submitted that the applicant companies were "see-through entity" which was designed prima facie for avoidance of tax and, therefore, the clause (*iii*) of the proviso to section 245R(2) of the Act was squarely applicable.

Applicant's submissions:

28. The learned counsel for the applicant sargued that the allegation of the Revenue that the transaction was prima facie for avoidance of tax was grossly erroneous, lacked substance and was wholly unsubstantiated. It was submitted that the transaction involved in the present application was sale of shares simpliciter undertaken between two unrelated independent parties which cannot be considered as being designed for the avoidance of tax. The applicants emphasized that the argument of the Revenue that the entity undertaking the transaction should not be entitled to treaty benefits was different from saying that the transaction was entered into with a view to avoid income-tax. The submission of the application is this regard is reproduced below:

> "The requirement under law is therefore to prove that transaction is "designed prima facie for the avoidance of income-tax " and not that there is a "prima facie case of the transaction being designed for the avoidance of income-tax The CIT has arrived at a prima facie finding that there is a design for the avoidance of tax, which is not the requirement under law since the law prescribes establishment of a design after consideration of all facts and materials that suggests the prima facie avoidance of tax. Therefore, it is submitted that the CIT's conclusion is bad in law since the conditions and tests prescribed under clause (*iii*) of the proviso to section 245R(2) have been incorrectly applied."

29. The applicants relied on the judgment of the Hon'ble Supreme Court in the case of *Vodafone* (*supra*) to emphasize that the onus was on the tax authority to demonstrate how such a design existed in each case. It was also submitted that this Authority has held in the case of Star Television Entertainment Ltd. [2010] 321 ITR 1 (AAR) that a transaction cannot be designed for the prima facie avoidance of tax if there is business rationale surrounding the transaction.

30. The applicants have given specific comments to the report of the CIT vide letter dated 19-2-2020, the relevant portions of which are reproduced below:

> " (*iv*) At paragraphs 4.2,4.3,9.7 and 9.11(*b*) of the Revenue WS, the CIT has alleged that the applicants had established tax residency in Mauritius only to take advantage of the India-Mauritius DTAA and that the purpose of such residence was only to avoid paying taxes on returns earned by the applicants from its investments.
>
> It is submitted that the above allegation is baseless and factually incorrect. The Board minute extract relied on by the CIT specifically notes that Mauritius's comprehensive tax treaty network with various countries (and not just India) facilitated efficient asset management and achieved a competitive return for the Applicant's investors. The mere fact that the applicants applied for a TRC in order to avail of treaty benefits does not mean that a colourable device for tax avoidance was resorted to....
>
> It is also submitted that a mere claim for treaty eligibility does not in any manner tantamount to "tax avoidance " for the purposes of the Act.
>
> (*viii*) At paragraphs 6.4, 6.5, 8 and 9.9 of the Revenue WS, the CIT has alleged that certain facts "establish beyond doubt that the control of funds lies outside Mauritius in the hands of Tiger Global personnel based out of USA.
>
> It is submitted that the CIT has failed to adduce even a single fact or lead any evidence whatsoever in support of this allegation. The mere fact that the Board of Directors of the Applicants have given a limited authorization to certain persons to operate the Applicant's bank account does not ipso facto mean that the Applicants did not have control over its funds. Indeed, not a single fact has been adduced by the CIT to disprove the applicants 's submission that the funds invested by the applicants as well as the sale proceeds received by the applicants from the transaction were legally and

beneficially owned by the applicants in its sole, independent and exclusive capacity.

(*ix*). At paragraph 7 of the Revenue WS, the CIT, relying on certain corporate disclosures made in Mauritius, has alleged that the 'beneficial owner ' of the applicants is Mr. Charles P. Coleman.

It is submitted that the CIT has failed to adduce even a single fact or lead any evidence whatsoever in support of this allegation. The mere fact that certain disclosures were made and maintained for Mauritius corporate law purposes does not ipso facto mean that the legal owner does not enjoy the benefits of the shares in his independent capacity for income tax purposes, unless clear facts are brought on record to demonstrate otherwise. No such facts have been brought on record in the present case. In fact, applying the logic adopted by the Revenue would result in an absurd and legally unintended situation whereby no Indian company with foreign shareholders would ever be able to claim treaty benefits in India. Moreover, the allegation also goes against the Revenue's own argument that the applicants have multiple owners or limited partners.

31. It was further submitted by the applicants that the holding structure of the applicants was of no relevance and the transaction was not prima facie found to be designed for avoidance of tax. The applicants contended that the CIT has deemed the holding structure of the applicants to be ipso facto determinative of whether the transaction was designed for the avoidance of tax which was not the standard to be applied to invoke clause(*iii*) of the proviso to section 245R(2) of the Act. It must be proven that the transaction itself and not the structure of the entity undertaking the transaction was designed for the avoidance of income-tax in order to invoke clause (*iii*) and that the Revenue had failed to discharge its burden of proof. The applicants submitted that it was managed and controlled of its Board of Directors in Mauritius in accordance with its constitution. The decision to invest into and ultimately sell the shares of Singapore Company was taken by the Directors of the applicants in Mauritius after proper discussions and deliberations. The applicants had beneficially held shares of Singapore Company and were not accountable to any third party. The applicants we reneither sham entity nor a conduit company and that the treaty benefit being claimed by the applicants cannot be considered as a measure of tax avoidance.

Findings& Decision:

32. We have carefully considered the objections of the Revenue and the submissions made by the applicants. As per clause (*iii*) of proviso to section 245R(2) of the Act, the Authority shall not allow the application where the question raised in the application relates to a transaction or issue which is prima facie for avoidance of income-tax. At the outset it has to be kept into consideration that the tax avoidance itself is not illegal perse. In the scheme of tax avoidance, the taxpayer discloses all the relevant facts to tax authorities and claims benefit as provided under the law. The tax avoidance may be considered as legal as the transactions are so planned that relief is obtained; even though it was not as per the intent of the lawmakers. We have to, therefore, examine as to whether the transaction or the issue raised by the applicants in the present application was designed prima facie for availing the benefit which may appear to be correct but was not intended by the lawmakers.

33. It has to be further kept into consideration that at the stage of admission the requirement is not to conclusively establish that there was tax avoidance rather it has to be demonstrated that prime facie the transaction or the issue was designed for avoidance of tax. Therefore, the probability of avoidance of tax has to be decided on the basis of evidences and materials brought on record before us and by drawing inferences therefrom. The issue of tax avoidance was dealt by the Hon'ble Calcutta High Court in the case of *Hela Holdings Pvt. Ltd.* v. *Commissioner of Income-tax and Another* 263 ITR 124 and the Hon'ble Court had summarized on the issue as under:

(1) The distinction between tax evasion and tax avoidance is still prevalent.

(2) Generally speaking tax evasion is the result of such things as illegality, suppression, misrepresentation and fraud.

(3) Tax avoidance is the result of actions taken by the assessee, none of which is illegal or forbidden by the law in itself and no combination of which is similarly forbidden or prohibited.

(4) The permissibility of a tax avoidance, will fall to be decided, when and only when, on the basis of the facts and transactions truly and correctly disclosed by the assessee, a point of law arises, whether, on a certain reasonable construction of one part of the taxing statute, as applied to the assessee's case, tax which would otherwise to be payable by the assessee, becomes not payable in the case in hand.

(5) When the court is faced with a task of construction in the above manner, the court is not bound to make the construction in favour of the assessee, merely on proof by the assessee, that it has entered into no illegality and made no prohibited transaction.

(6) The court would have to assess, in the facts and circumstances of each case, upon general principles of conscience and justice, whether the arrangement of affairs by the assessee, so as to cause the possibility of a reduction of tax incidence, can fairly be permitted to the assessee, as a genuine and legal means of tax reduction, employed by it in a commercially fair sense, or whether, allowing the assessee to earn the reduction, in the facts and circumstances of the particular case, is opposed to the public policy of not encouraging citizens, to engage themselves in dealings and transactions, designed primarily for the purpose of non-payment of tax only.

34. The applicants have contended that the transaction involved in the present application was sale of shares simpliciter undertaken between two unrelated independent parties which cannot be considered as being designed for avoidance of tax. The contention of the applicants is too simplistic to be accepted. The precise question raised in the application is chargeability of capital gains on sale of shares under the Act read with DTAA between India and Mauritius. The capital gain is not dependent on mere sale of shares. As per the mechanism of computation of capital gains, the cost of acquisition of shares is to be reduced from the sale price of shares. Therefore, in the mechanism of capital gains computations what is relevant is not only the sale of shares but also the purchase of shares. We have to, therefore, look at the entire transaction of acquisition as well as sale of shares as a whole and we cannot adopt only a dissecting approach by examining the sale of shares as suggested by the applicants.

35. The design for avoidance of tax may be a long drawn process. It is found from the Notes to Financial Statement that the principal objective of the applicant companies was to act as an investment holding company for a portfolio investment domiciled outside Mauritius. The investment made by the applicants in the Singapore Company, with Indian subsidiary, was with a prime objective to obtain benefits under the double taxation treaty between Mauritius and India and between Mauritius and Singapore. The organization structure of the applicants, as described in the Notes to Financial Statement, has been depicted by the Revenue in the form of chart reproduced earlier, which is not denied by the applicants. The applicants 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-subsidiary 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 the applicants were set up for making investment in order to derive benefit under the DTAA between Mauritius and India is an inescapable conclusion.

36. The Revenue has pointed out, by citing evidences from the Minutes of the Meeting of Board of Directors of the applicants, that the key decisions were taken by Mr. Steven Boyd, the non-resident Director, who was also General Counsel of Tiger Global Management LLC and that the other Directors were not independent but mere puppets. It is found that Mr. Steven Boyd was the non-resident Director of the applicant companies. Under the circumstance no adverse inference can be drawn if he was privy to the crucial decisions taken in the Board meetings. Further, the Supreme Court has held in the case of *Vodafone* (*supra*) that there was nothing wrong if the funds for making FDI by Mauritius companies/individuals had not originated from Mauritius but had come from investors of third countries. In view of this judgement, the Revenue's submission that funds had come not from the applicants but from the promoters in USA, so as to treat the arrangement as tax avoidance, has to be rejected.

37. What is relevant to consider here is the control and management of the applicant companies. Though the applicants have submitted that their control and management was with the Board of Directors in Mauritius, what is material is not the routine control of the affairs of the applicants but their overall control. The control and management of applicants does not mean the day-to-day affairs of their business but would mean the head and brain of the Companies. Therefore, it will be relevant to examine whether the head and brain of the applicants was in Mauritius.

38. The fact that the authority to operate the bank accounts for transaction above US$ 2,50,000 was with Mr. Charles P. Coleman, countersigned by one of the Mauritius based Directors, has not been disputed by the applicants. As per clause 31 of the Constitution document of the applicant companies, the principal bank account of the companies had to be maintained in Mauritius. Further clause 30.2 of the said document stipulated that all cheques or orders for payment shall be signed by any two directors or by such other person or persons as the directors may from time to time appoint. Thus, the cheques were required to be signed by two directors or such other persons as appointed by the Board of Directors. The applicants have submitted that there was nothing wrong with Mr. Charles P. Coleman being appointed by the Board of Directors as signatory of cheques above a particular limit. Apparently, the argument of the applicants may seem logical. However, as the principal bank account of the applicants was maintained in Mauritius, it would have made sense if a local person based in Mauritius was appointed to sign the cheques on behalf of the Directors. The applicants have not explained as to why Mr. Charles P. Coleman, who was not based in Mauritius was appointed to sign the cheques of Mauritius bank account. In this regard it is relevant to consider that Mr. Charles P. Coleman was the beneficial owner as disclosed by the applicants in the application form for Category "I" Global Business Licence filed with Mauritius Financial Services Commission. Mr. Coleman was also the authorized signatory for the immediate parent company of the applicants viz. Tiger Global Five Percent Holdings and Tiger Global Six Percent Holdings and was also the sole Director of ultimate holding company Tiger Global PIP Management V Limited and Tiger Global PIP Management VI Limited. In view of these facts the appointment of Mr. Charles P. Coleman as authorized signatory of bank cheques above a limit can't be considered as a mere coincidence.

39. The applicants have contended that authorization to certain person to operate its bank account doesn't ipso facto mean that the applicants had no control over its funds. It must be considered that authorization given by the applicants to operate its bank account was not to certain person but to Mr. Charles P. Coleman, whose influence over the group has been described in the preceding para. Mr. Charles P. Coleman and another authorized signatory Mr. Anil Castro, though being not on the Board of Directors of the applicants, were the key personnel of the Group and were managing and controlling the affairs of the entire organization structure. From the evidences brought on record by the Revenue, it is evident that the funds of the applicants were ultimately controlled by Mr. Charles P. Coleman and the applicants had only a limited control over their fund. Apparently, the decision for investment or sale was taken by the Board of Directors of the applicants but the real control over the decision of any transaction over USD 2,50,000 was exercised by Mr. Charles P. Coleman only. Obviously, he was controlling the decision of the Board of

Directors of the applicants through the non-resident Director Mr. Steven Boyd who was accountable to him. We have, therefore, no hesitation to conclude that the head and brain of the companies and consequently their control and management was situated not in Mauritius but outside in USA.

40. The applicants have contended that the holding structure of the applicants has no relevance to determine whether the transaction was prima facie designed for avoidance of tax. In our opinion it is not the holding structure only that would be relevant. The holding structure coupled with prima facie management and control of the holding structure, including the management and control of the applicants, would be relevant factors for determining the design for avoidance of tax. As discussed earlier, the real management and control of the applicants was not with their respective Board of Directors but with Mr. Charles P. Coleman, the beneficial owner of the entire group structure. The applicant companies were only a "see-through entity" to avail the benefits of India-Mauritius DTAA.

41. The applicants have submitted that a claim for treaty eligibility does not tantamount to tax avoidance. The applicants' claim for exemption of capital gains was in accordance with the provisions of Article-13 of India-Mauritius treaty. It was contended that under the circumstances, it cannot be said that the question raised in the application related to a transaction or issue designed prima facie for avoidance of income-tax. It is a settled principle that a treaty is to be interpreted in good faith. The context and purpose of the treaty must be determined on the basis of preamble and annexure including agreement, subsequent agreement regarding interpretation of terms of the treaties, relevant international rules applicable to the agreement etc. The Circular No. 682 dated 30-3-1994 issued by the CBDT had clarified that any resident of Mauritius deriving income from alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per the Mauritius tax law and will not have any capital gains tax liability in India. It was imperative from this Circular that what was exempted for a resident of Mauritius was the capital gains derived on alienation of shares of Indian company. In the present case capital gains has not been derived by alienation of shares of any Indian company rather the applicants have come before us in respect to capital gains arising on sale of shares of Singapore Company. The Protocol for Amendment of Convention for Avoidance of Double Taxation between India and Mauritius was signed on 10-5-2016 which provided that taxation of capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India will be taxed on source basis with effect from financial year 2017-18. At the same time investment made before 1st April, 2017 was grandfathered and not subject to capital gains tax in India. Thus as per the amended DTAA between India & Mauritius as well, what was not taxable was capital gains arising on sale of shares of a company resident in India. It is thus crystal clear that exemption from capital gains tax on sale of shares of company not resident in India was never intended under the original or the amended DTAA between India and Mauritius. In view of this clear stipulation in the India-Mauritius DTAA, the applicants were not entitled to claim benefit of exemption of capital gains on the sale of shares of Singapore Company. Thus, the applicants have no case on merits and fail on the ground of treaty eligibility as well.

42. The applicants have disputed the contention of the Revenue that the tax residency in Mauritius was established only to take advantage of India- Mauritius DTAA. The applicants submitted that Mauritius comprehensive tax treaty network with various countries (and not just India) facilitated efficient asset management and achieved a competitive return for their investors. According to the applicants, the mere fact of obtaining a TRC to avail the treaty benefits does not make it a colourable device for tax avoidance. It had been held by the Hon'ble Supreme Court in the case of *Vodafone* (*supra*) that DTAA and Circular No. 789 dated 13-4-2000 would not preclude the Income Tax Department from denying the tax treaty benefits in suitable cases. It was further held that the Department is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company was interposed as a device, it was open to the Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. It is relevant to consider here that though the tax

residency is stated to be established to take benefit of Mauritius tax treaty network with various countries and not just India, in effect the entire investment made by the applicants was with Singapore company only, in respect of which the benefit of India-Mauritius DTAA is being claimed. As is evident from their financial statements filed with the application, all the three applicants had not made any other investment other than in the shares of Flipkart. Thus, the real intention of the applicants was to avail the benefit of India-Mauritius treaty, whatever be the stated objective.

43. The applicants have relied upon the decision of the High Court of Gujarat in the case of *Commissioner of Income-tax* v. *Sakarlal Balabhai* [1986] 69 ITR 186 (Guj) wherein it was held that avoidance postulates that the assessee is in receipt of amount which was in reality and truth his income liable to tax on which it avoids payment of tax by some artifice or device. It was submitted that there was no artifice or device employed and, therefore, there was no question of any tax avoidance. It is found that this observation of the Hon'ble Court was in the context of gift of shares which was held bona fide and not a case of tax avoidance. The facts of that case are distinctly different from the present one, as already discussed earlier, and the ratio of this decision is not applicable to the facts of this case.

44. The applicants have also relied upon the ruling of this Authority in the case of Moody's Analytics Inc. USA [2012] 24 taxmann.com 41. It is found that the issue involved in that case was capital gains arising to Mauritius company on transfer of its shares in Indian company to a foreign company, which was held as not chargeable to tax in India. As the issue involved there was capital gain on transfer of shares of Indian company, the facts are found to be distinct as the applicant has not transferred the shares of Indian Company but that of a Singapore company. In the case of Golden Bella Holdings Ltd. [2019] 109 taxmann.com 83,also relied by the applicants, the facts were different as the investment was made in CCDs of an Indian Private Limited company and the interest income derived therefrom was held as not taxable under the beneficial provision of DTAA between India and Cyprus. The facts of the case of *STAR Television Entertainment Limited* (*supra*) are also found to be different as the issue involved therein was capital gain arising on amalgamation. The other judicial pronouncements relied upon by the applicants are also found to be different and distinct on facts and the ratio of those decisions can't be imported to the facts of the present case.

45. The applicants have relied upon the decision of Punjab & Haryana High Court in the case of SERCO BPO P Ltd. 379 ITR 256 ,wherein the issue of transaction designed for avoidance of tax was considered by the Hon'ble Court. It was held by the Court that there was not a single finding of fact in relation to the prima facie finding that transaction was designed for avoidance of tax in India. In the present case, however, we have discussed the facts and findings which establish that the transaction was not only designed for avoidance of tax but the benefit of India-Mauritius DTAA as being claimed by the applicants was never intended by the legislator. Therefore, the applicants cannot derive any strength from this judgment.

46. Both, Revenue as well as the applicants have relied upon the decision of the Hon'ble Supreme Court in the case of *Vodafone* (*supra*) by selectively quoting from the said judgement. The Court had held in that case that the Revenue should apply 'look at' test to ascertain its true legal nature in order to distinguish between pre-ordained transaction created for tax avoidance and a transaction which evidenced investment participation in India. The relevant observation of the Court is reproduced below:

> 73. ...There is a conceptual difference between preordained transaction which is created for tax avoidance purposes, on the one hand, and a transaction which evidences investment to participate in India. In order to find out whether a given transaction evidences a preordained transaction in the sense indicated above or investment to participate, one has to take into account the factors enumerated hereinabove, namely, duration of time during which the holding structure existed, the period of business operations in India, generation of taxable revenue in India during the period of business

operations in India, the timing of the exit, the continuity of business on such exit, etc...

47. The applicants fail miserably if we apply the yardsticks as laid down by the Hon'ble Supreme Court in the case of *Vodafone* (*supra*). There was no foreign direct investment made by the applicant companies in India and, therefore, there cannot be any question of participation in investment. The applicants had made investment in shares of Flipkart which was a Singapore company and thus the immediate investment destination was in Singapore and not in India. In view of this fact the applicants also fail on other yardsticks viz. the period of business operation in India, the generation of tax revenue in India, timing of exit and continuity of business on such exit. In the absence of any strategic foreign direct investment in India there was neither any business operation in India nor they ever generated any taxable revenue in India. In the absence of any direct investment in India one can only conclude that the arrangement was a pre-ordained transaction which was created for tax avoidance purpose.

48. In view of the foregoing, we are of the considered opinion that the issue involved in the question raised in the present applications was designed prima facie for avoidance of tax. The applicants have contended that shares of the Singapore Company derived their value substantially from assets located in India and, therefore, it was eligible to take benefit of Article 13 (4) of India - Mauritius Treaty. Even if the Singapore Company derived its value from the assets located in India, the fact remains that what the applicants had transferred was shares of Singapore Company and not that of an Indian company. The objective of India-Mauritius DTAA was to allow exemption of capital gains on transfer of shares of Indian company only and any such exemption on transfer of shares of the company not resident in India, was never intended by the legislator. Further, as discussed earlier the actual control and management of the applicants was not in Mauritius but in USA with Mr. Charles P. Coleman, the beneficial owner of the entire group structure. Therefore, we have no hesitation to conclude that the entire arrangement made by the applicants was with an intention to claim benefit under India - Mauritius DTAA, which was not intended by the lawmakers, and such an arrangement was nothing but an arrangement for avoidance of tax in India. Therefore, the bar under clause (*iii*) to proviso to section 245R(2) of the Act is found to be squarely applicable to the present cases. Accordingly, the applications are rejected.

■■

In favour of revenue