N. A. SHAH
BULLETIN

N. A. SHAH ASSOCIATES LLP
Chartered Accountants

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EXECUTIVE SUMMARY

- The Authority of Advance Rulings (AAR) has rejected an application filed by Tiger Global International Holdings, Mauritius for determination of tax on sale of shares held in Flipkart Private Ltd (Singapore) which in turn held shares in Flipkart India, on the ground that transaction is designed prima facie for the avoidance of tax.

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Tiger Global International Holdings, Mauritius (AAR)

Application Nos. AAR/04,05,07/2019

Facts:

1. The Tiger Global International II Holdings and 3 other companies limited by shares ("applicant/applicants")are Mauritius based companies which held shares in a Singapore company. The Singapore company had direct stake in Flipkart India and therefore, it derived its value substantially from assets located in India.

2. They were set up with the primary objective of undertaking investment activities with the intention of earning long term capital appreciation and investment income.

3. The applicant was a part of a giant private equity fund head-quartered in the USA. As a part of multi-billion dollar transaction, the applicant offloaded its stake in the Singapore company to a Luxembourg based co. for over Rs. 14,500 crores.

4. The applicant had filed an application u/s. 197 of the Act for NIL withholding from the transaction of sale of shares contending it was eligible for beneficial provisions of India – Mauritius DTAA as per which the transfer was taxable in Mauritius only.

5. The application u/s. 197 of the Act was rejected by the department stating the beneficial owners were not resident in Mauritius and granted lower tax deduction certificates instead of NIL rate requested by the applicant.

6. The transaction was concluded by deduction of taxes as per the lower deduction certificates obtained from the department.

7. Subsequently, the applicant filed an application before Authority of Advance Ruling ("AAR") to obtain ruling "whether the said transaction would be chargeable in India under the Income-tax Act, 1961 read with the India – Mauritius DTAA".

Contentions of the Revenue:

Revenue contended that application is not maintainable before AAR on the following basis

1. The lower tax deduction certificates were valid at the time of filing the application although transaction was concluded and therefore, it can be considered as a proceeding which is pending under the Act.

2. The working of capital gains involves determination of fair market value of shares which should be acceptable to both parties and therefore, the application cannot be admissible.

3. The transaction is prima facie designed for the avoidance capital gain tax due to following reasons.

   - The applicant companies were not acting independently but only as a conduit through complex corporate structures for the benefit of real beneficial owners based in USA.

   - From the 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 dated 6.6.2011, applicant companies were set up for making investment in India and that the funds for making investment were provided by the promoter.

   - Based on minutes of Board meeting, non-resident USA director attended all the board meeting in which crucial decision were taken and Mauritius were in effect mere spectators or took advice from USA director.

   - The applicant's decision making was fully subordinate to its USA parent and one of the representatives of the USA entity were always present to advise the Board of the Mauritius Company.

   - The authority to operate the bank account transactions above USD 250,000 was with one USA representative who although not being on the Board of the company, assumed the maximum authority in controlling the funds of the company.

   - The India - Mauritius DTAA and India - USA DTAA treaty have captioned "prevention of tax avoidance" as one of the purpose of DTAA and accordingly, the good faith application of these treaties require the element of tax avoidance and treaty abuse to be examined by the tax administration while invoking treaty provisions.

- Decisions were not taken independently by the applicant companies situated in Mauritius but by the people located with TGM USA.

- As per the documents submitted by applicant with Mauritius Financial services commission for the purpose of obtaining Category 1 Global Business License, applicants itself has clearly specified that beneficial owner of the company is Mr. X who is founder and partner of Tiger Global Management LLC, USA,

- The beneficial ownership of shares was with Mr. X ("USA Resident") and had he 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 India - US DTAA. The Revenue relied upon the judgment of Hon'ble Supreme Court in the case of Vodafone International Holding BV (341 ITR 1)

Contentions of the Applicants:

1. The proceedings u/s. 197 of the Act is completed once the certificate has been issued and TDS has been deducted as per the said certificate. Such proceedings cannot have the effect of determination of tax liability which can be done only through scrutiny assessment proceedings.

2. The applicant is with respect to only chargeability of capital gain and not with valuation of shares.

3. The transaction involved was of shares simpliciter between two unrelated persons which cannot be considered as being designed for the avoidance of tax.

4. 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.

5. The requirement under law is 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" which is not proved by the department.

6. The holding structure cannot be determinative of whether a transaction has been designed for the purpose of avoidance of tax and it is the transaction which has to be proven as designed for tax avoidance. It was also not the case of department that the applicant were a sham or conduit company.

Held:

AAR rejected argument no 1 & 2 of the department. For 3rd argument (whether application relates to a transaction or issue which is prima facie for avoidance of income-tax), held as under:

1. On perusal of the principle objective of the company (as per the notes to accounts) and its ownership structure, it is an inescapable conclusion that the company was set up for making investment in order to derive benefit under the DTAA between India and Mauritius.

2. 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.

3. Based on the minutes of the Board Meetings, it can be observed that the key decisions were made by Non-resident director based in the US and explained that "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".

4. Mr. X (USA Resident) was the beneficial owner as disclosed by the applicants in the application form filed with Mauritius Financial Services Commission.

5. The US based director had the authority to operate the principal bank account of the company and he was also the authorized signatory for the immediate parent company. Since the primary bank account was situated 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

6. Funds of the applicants were ultimately controlled by Mr. X (USA Resident) 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. X. only

7. The real management and control of the applicants was not with their respective Board of Directors but with Mr. X (USA Resident), 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.

8. On perusal of financial statements, it can be observed that the applicants had not made any other investment other than in the shares of Flipkart and thus, the real intention of the applicants was to avail the benefit of India-Mauritius treaty.

9. The objective of India-Mauritius DTAA is 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 which is not resident in India, although deriving substantial value from India, was never intended by the legislator.

10. In view of the above observations, the AAR treated the transaction as 'prima facie for the avoidance of income-tax' and rejected the application filed without deciding on merits of the application.

We will be glad to provide any information, elaboration and elucidation you may need in this regard.

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